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CASES REPORTED

Vols. 85–88 P.

	P.	
	Vol.	Page
Abrahamsen; Bouchard v., App.	88	383
Ahlers v. Barrett, App.	87	232
Alcatraz Masonic Hall Ass'n v. United States Fidelity & Guaranty Co., App.	85	156
Alexander's Estate, In re, Sup.	85	308
Allen v. Bryant, App.	88	294
Alper v. Tormey, App.	85	661
Amalgamated Ass'n of Street Railway Employés of America; Dingwall v., App.	88	597
Anaheim Union Water Co. v. Fuller, Sup.	88	978
Anderson v. Anderson, App.	87	558
Anderson v. Bank of Santa Cruz County, App.	88	379
Angiola Water Co.; Lower Tule River Ditch Co. v., Sup.	86	1081
Argabrite; Guiberson v., App.	87	226
Arndt; Kohler v., App.	87	389
Arnold v. Woollacott, App.	88	504
Arroyo Ditch & Water Co. v. Bequette, Sup.	87	10
Austin v. Union Paving & Contracting Co., App.	88	731
Bailey v. Brown, App.	88	518
Baker, Ex parte, App.	86	915
Ball; Pogue v., App.	88	376
Bancroft v. Randall, App.	87	805
Bank of California; Thompson v., App.	88	987
Bank of Santa Cruz County; Anderson v., App.	88	379
Bank of Visalia; Du Brutz v., App.	87	467
Bank of Visalia; Du Brutz v., Sup.	87	469
Bank of Woodland; Bank of Yolo v., App.	86	820
Bank of Yolo v. Bank of Woodland, App.	86	820
Banks v. Stockton, Sup.	87	83
Banzhaf v. Chase, Sup.	88	704
Barling v. Weeks, App.	88	502
Barrett; Ahlers v., App.	87	232
Bartholomew; Fisher v., App.	88	608
Bashore v. Mooney, App.	87	553
Bastady; Bixby v., App.	88	493
Baxter, Ex parte, App.	86	998
Beatty; People v., App.	88	377
Becker; Winchester v., App.	88	296
Beckett v. Morse, App.	87	408
Beckman v. Waters, App.	86	997
Bell v. Superior Court of City and County of San Francisco, Sup.	87	1031
Benedict; Chapman v., App.	86	736
Benedict; Koyer v., App.	87	231
Bequette; Arroyo Ditch & Water Co. v., Sup.	87	10
Berger; Brett v., App.	87	222
Berger v. Justice, App.	88	591
Bergerow v. Parker, App.	87	248
Best Mfg. Co. v. Cohn, App.	86	829

	Vol.	Page
Biescar v. Pratt, App.	87	1101
Billings v. Pearson, App.	86	825
Bird v. Utica Gold Min. Co., App.	86	509
Bixby v. Bastady, App.	88	493
Black v. Black, Sup.	86	505
Board of Trustees of Police Relief & Pension Fund of City & County of San Francisco; Burke v., App.	87	421
Boas; Levison v., Sup.	88	825
Boca & L. R. Co.; Sierra Valleys R. Co. v., App.	86	1134
Boca & L. R. Co. v. Superior Court of Lassen County, Sup.	88	715
Boca & L. R. Co. v. Superior Court of Lassen County, Sup.	88	718
Bone v. Ophir Silver Min. Co., Sup.	86	685
Bouchard v. Abrahamsen, App.	88	383
Bovard; Southern P. R. Co. v., App.	87	203
Brackett v. Martens, App.	87	410
Bree v. Wheeler, App.	87	255
Bresee v. Los Angeles Traction Co., Sup.	85	152
Brett v. Berger, App.	87	222
Bricker; Sierra Land & Cattle Co. v., App.	85	665
Brown; Bailey v., App.	88	518
Brown; Freeman v., App.	87	204
Brown v. Los Angeles Ry. Co., Sup.	88	1135
Brown v. Rea, Sup.	88	713
Brown v. Yarraham Gold Min. Co., App.	86	744
Bruson; Bully Hill Copper Min. & Smelting Co. v., App.	87	237
Bruson; Bully Hill Copper Min. & Smelting Co. v., App.	87	239
Bryant; Allen v., App.	88	294
Bryant; Graham v., App.	87	232
Buckman; Union Collection Co. v., Sup.	88	708
Builders' Supply Depot v. O'Connor, Sup.	88	982
Bully Hill Copper Min. & Smelting Co. v. Bruson, App.	87	237
Bully Hill Copper Min. & Smelting Co. v. Bruson, App.	87	239
Bundy v. Sierra Lumber Co., Sup.	87	622
Burch; Cooper v., App.	86	719
Burke v. Board of Trustees of Police Relief & Pension Fund of City & County of San Francisco, App.	87	421
Burnett v. Piercy, three cases, Sup.	86	603
Burns v. Hiatt, Sup.	87	196
Burr v. Cross, App.	86	824
Butler; Darlington v., App.	85	931
Butler; Darlington v., App.	86	194
Butler; Syvertson v., App.	85	164
Calegaris v. Calegaris, App.	87	561
California Shipping Co. v. City & County of San Francisco, Sup.	88	704
Calkins v. Sorosis Fruit Co., Sup.	88	1094
Campbell v. Campbell, Sup.	87	573
Campbell; State v., App.	86	840
Campbell; Vasey v., App.	88	509
Campbell's Estate, In re, Sup.	87	573
Canavan; Mattern v., App.	86	618
Cannobio; Vatuone v., App.	88	374
Cannon v. McKenzie, App.	85	130
Carey; Gregg v., App.	88	282
Castile; People v., App.	86	745
Castile; People v., App.	86	746
Cederburg v. Dutra, App.	86	838
Center; Johnson v., App.	88	727

	P.	
	Vol.	Page
Central Trust Co. v. Stoddard, App.	88	806
Cerf; Dawson v., App.	87	559
Chadwick; People v., App.	87	384
Chadwick; People v., Sup.	87	389
Chapman v. Benedict, App.	86	736
Chapman v. Hughes, two cases, App.	86	908
Chapman v. Woodward, App.	86	908
Chappellet; National Parafine Oil Co. v., App.	88	506
Chase; Banzhaf v., Sup.	88	704
Churchill v. More, App.	88	290
City of Los Angeles v. Davidson, Sup.	88	42
City of Los Angeles v. Glassell, App.	87	241
City of Los Angeles; Goytino v., Sup.	88	1091
City of Los Angeles; Spires v., Sup.	87	1026
City of Visalia; Western Union Tel. Co. v., Sup.	87	1023
City Store v. San Jose-Los Gatos Interurban Ry. Co., Sup.	88	977
City & County of San Francisco; California Shipping Co. v., Sup.	88	704
City & County of San Francisco; Meyer v., Sup.	88	722
City & County of San Francisco; Warren v., Sup.	88	712
Clark; Dennie v., App.	87	59
Clary, Ex parte, Sup.	87	580
Clint v. Eureka Crude Oil Co., App.	86	817
Cohen v. Cohen, Sup.	88	267
Cohn; Best Mfg. Co. v., App.	86	829
Colgan; Honeycutt v., App.	85	165
Collins; Collins Hotel Co. v., App.	88	292
Collins v. Gray, App.	86	983
Collins; People v., Sup.	86	895
Collins Hotel Co. v. Collins, App.	88	292
Conde v. Dreisam Gold Min. & Mill Co., App.	86	825
Conklin; Folsom v., App.	86	724
Conness; People v., Sup.	88	821
Cook v. Southern Pac. R. Co., App.	88	1100
Cooper v. Burch, App.	86	719
Copriviza v. Rilovich, App.	87	398
Corona City Water Co.; McConnell v., Sup.	85	929
Correll; Fish v., App.	88	489
Corson v. McDonald, App.	85	861
Coules; Wright v., App.	87	809
Craig v. Dowie, App.	87	250
Crane; People v., App.	87	239
Cresta; Luty v., App.	88	642
Crisman v. Lanterman, Sup.	87	89
Crocker v. Garland, App.	87	209
Crocker v. Scott, Sup.	87	102
Crocker Estate Co.; Knowles v., Sup.	86	715
Cross; Burr v., App.	86	824
Cross; Dillon v., Sup.	87	379
Crowell v. Ewing, App.	88	285
Crystalline Min. Co.; Olender v., Sup.	86	1082
Cummings v. Strobridge Land Syndicate, Sup.	88	901
Curtin v. Krohn, App.	87	243
Daggett v. Yreka Min. & Mill. Co., Sup.	86	968
Daniels v. Daniels, App.	85	134
Darbee & Immel Oyster & Land Co. v. Pacific Oyster Co., Sup.	88	1090
Darlington v. Butler, App.	85	931
Darlington v. Butler, App.	86	194

	Vol.	Page
Davidson; City of Los Angeles v., Sup.	88	42
Davis; People v., App.	88	1101
Davis v. Trachsler, App.	86	610
Davis' Estate, In re, Sup.	86	183
Davis' Estate, In re, Sup.	87	17
Dawson v. Cerf, App.	87	559
Dean's Estate, In re, Sup.	87	13
Deardorff; Jones v., App.	87	213
Deering; Jacks v., Sup.	88	909
Del Ponte; Higuera v., App.	88	808
Dennie v. Clark, App.	87	59
De Yoe; Ostrom v., App.	87	811
Dickie v. Steiger, App.	88	814
Dierssen; Leist v., App.	88	812
Diggins; Pacific Paving Co. v., App.	87	415
Dillon v. Cross, Sup.	87	379
Dillon's Estate, In re, Sup.	87	379
Dingwall v. Amalgamated Ass'n of Street Railway Employés of America, App.	88	597
Dinnigan v. Peterson, App.	87	218
Dodge v. Kings County, Sup.	88	266
Dolbeer's Estate, In re, Sup.	86	695
Dollenmayer v. Pryor, Sup.	87	616
Dominici's Estate, In re, App.	87	389
Dondero v. O'Hara, App.	86	985
Donnellan v. Wood, Curtis & Co., App.	87	235
Donovan; Miller v., App.	85	159
Dorris v. McManus, App.	86	909
Dorris v. McMannus, App.	87	287
Dowie; Craig v., App.	87	250
Doyle; Sweeney v., App.	86	819
Dreisam Gold Min. & Mill. Co.; Conde v., App.	86	825
Druffel; People v., App.	86	907
Du Brutz v. Bank of Visalia, App.	87	467
Du Brutz v. Bank of Visalia, Sup.	87	469
Dugan; King v., Sup.	88	925
Dutra; Cederburg v., App.	86	838
Earle v. Sunnyside Land Co., Sup.	88	920
Eastwood; Ward v., App.	86	742
Eddy; Oatman v., App.	87	210
Edwards v. Lechleiter, Sup.	87	194
Egressy v. Stansbury, Sup.	87	280
Eldridge; People v., App.	86	832
Elizalde v. Murphy, App.	87	245
Elliott v. Pardee, Sup.	86	1087
Emerson; Worth v., App.	85	664
Emerson v. Yosemite Gold Min. & Mill. Co., Sup.	85	122
Ephraim v. Pacific Bank, Sup.	86	507
E. P. Vandercook Co. v. Wilmans Co., App.	87	1116
Erwin; People v., App.	88	371
Estudillo v. Security Loan & Trust Co., Sup.	87	19
Eureka Crude Oil Co.; Clint v., App.	86	817
Evarts v. Santa Barbara Consol. Ry. Co., App.	86	830
Evening Exp. Co.; Redpath v., App.	88	287
Ewing; Crowell v., App.	88	285
Facemire v. Redlands Heights Water Co., App.	86	989
Fallon; People v., Sup.	86	689

	P.	
	Vol.	Page
Farmers' Union & Milling Co.; Grange Co. v., App.	86	615
F. A. Robbins Press Works; Shepard v., Sup.	85	307
Feld; People v., Sup.	86	1100
Fernandez; People v., App.	86	899
Fernandez; People v., App.	87	1112
Fink; Pease v., App.	85	657
Fireman's Fund Ins. Co. v. Palatine Ins. Co., Sup.	88	907
Fish v. Correll, App.	88	489
Fisher v. Bartholomew, App.	88	608
Fitts v. Southern Pac. Co., Sup.	86	710
Flanigan; Sierra County v., Sup.	87	801
Flanigan; Sierra County v., Sup.	87	913
Fleming v. Howard, Sup.	87	908
Flinn v. Strauss, App.	87	414
Folsom v. Conklin, App.	86	724
Ford; Gear v., App.	88	600
Forsythe v. Los Angeles Ry. Co., Sup.	87	24
Foster; Kauffman v., App.	86	1108
Fowden v. Pacific Coast S. S. Co., Sup.	86	178
Fox v. Townsend, Sup.	87	82
Freeman v. Brown, App.	87	204
Freeman; Placer County v., Sup.	87	628
French v. Superior Court of San Diego County, App.	85	133
Freyberg v. Los Angeles Brewing Co., App.	88	378
Fuller; Anaheim Union Water Co. v., Sup.	88	978
Gallanar; People v., App.	86	814
Gardner; Hesparia Land & Water Co. v., App.	88	286
Garel v. Page, App.	88	591
Garland; Crocker v., App.	87	209
Gas Consumers' Ass'n; Riordan v., App.	88	809
Gates v. Quong, App.	85	662
Gear v. Ford, App.	88	600
German American Ins. Co.; Johnson v., Sup.	88	985
German Savings & Loan Society; Givens v., App.	86	993
German Savings & Loan Society; Youd v., App.	86	991
Givens v. German Savings & Loan Society, App.	86	993
Glass v. Glass, App.	88	734
Glassell v. Hansen, Sup.	87	200
Glassell; City of Los Angeles v., App.	87	241
Goldberg, Bowen & Co. v. Stablemen's Union, Local No. 8,760, Sup.	86	806
Goldman, Ex parte, App.	88	819
Goldstein v. Hensley, App.	88	507
Goodwin; Nixon v., App.	85	169
Gormley; Whittier v., App.	86	726
Goytino v. City of Los Angeles, Sup.	88	1091
Goytino v. McAleer, App.	88	991
Graham v. Bryant, App.	87	232
Graham v. Light, App.	88	373
Graham v. Redlands Heights Water Co., App.	86	989
Grange Co. v. Farmers' Union & Milling Co., App.	86	615
Grant Bros.; Schreiner v., App.	86	912
Gray; Collins v., App.	86	983
Gray; Schander v., Sup.	86	695
Green; Schindler v., Sup.	87	626
Greene v. Osceola Gold Mines Co., App.	86	733
Gregg v. Carey, App.	88	282
Gregg; Hatton v., App.	88	592

	Vol.	Page
Gregg; Hatton v., App.	88	594
Gregory; Sterling v., Sup.	85	305
Griffith; Miller v., App.	88	285
Grill; People v., App.	86	613
Guiberson v. Argabrite, App.	87	226
Gunn; Jones v., Sup.	87	577
Guthrie v. Supreme Tent Knights of Maccabees of World, App.	87	405
Hampshire; Smith v., App.	87	224
Hansen; Glassell v., Sup.	87	200
Harris v. Harris, App.	88	384
Harron, Rickard & McCone v. Wilson, Lyon & Co., App.	88	512
Hart; Hoyt v., Sup.	87	569
Hatch v. McCloud River Lumber Co., Sup.	88	355
Hatton v. Gregg, App.	88	592
Hatton v. Gregg, App.	88	594
Hay; Norris v., Sup.	87	380
Hayden's Estate, In re, Sup.	87	275
Heeney's Estate, In re, App.	86	842
Hemple; People v., App.	87	227
Hensley; Goldstein v., App.	88	507
Hersberger v. Pacific Lumber Co., App.	88	587
Hersberger v. Pacific Lumber Co., Sup.	88	591
Hesperia Land & Water Co. v. Gardner, App.	88	286
Hiatt; Burns v., Sup.	87	196
Hibernia Savings & Loan Soc. v. Hinz, App.	88	730
Hibernia Savings & Loan Soc. v. Robinson, Sup.	88	720
Higuera v. Del Ponte, App.	88	808
Hinz; Hibernia Savings & Loan Soc. v., App.	88	730
Hodges v. Southern Pac. Co., two cases, App.	86	620
Honeycutt v. Colgan, App.	85	165
Howard; Fleming v., Sup.	87	908
Hoyt v. Hart, Sup.	87	569
Hoyt v. Zumwalt, Sup.	86	600
Hughes; Chapman v., App.	86	908
Humburg v. Lotz, App.	88	510
Hunt v. Jones, Sup.	86	686
Hunt Bros. Co. v. San Lorenzo Water Co., Sup.	87	1093
Hutchason v. Spinks, App.	85	132
Jacks v. Deering, Sup.	88	909
Jenison v. Redfield, Sup.	87	62
Jersey Island Dredging Co. v. Whitney, App.	86	509
Jersey Island Dredging Co. v. Whitney, Sup.	86	691
Johnson v. Center, App.	88	727
Johnson v. German American Ins. Co., Sup.	88	985
Johnson v. Levy, App.	86	810
Johnson v. Taylor, Sup.	88	903
Johnston v. Mulcahy, App.	88	491
Johnston v. Superior Court of Sacramento County, App.	87	211
Jones v. Deardorff, App.	87	213
Jones v. Gunn, Sup.	87	577
Jones; Hunt v., Sup.	86	686
Jones v. Waterman, App.	87	469
Justice; Berger v., App.	88	591
Kauffman v. Foster, App.	86	1108
Kendall; Sheppard v., Sup.	85	312
Kennedy; Prince v., App.	85	859
Kennedy; Prince v., App.	86	609

P.

	Vol.	Page
Kerrigan; Title & Document Restoration Co. v., Sup.	88	356
Kevane v. Miller, App.	88	643
Kimball v. McKee, Sup.	86	1089
King v. Dugan, Sup.	88	925
King; People v., App.	87	400
Kings County; Dodge v., Sup.	88	266
Knowles v. Crocker Estate Co., Sup.	86	715
Koch; Welsh v., App.	88	604
Kohler v. Arndt, App.	87	389
Koyer v. Benedict, App.	87	231
Kramm v. Stockton Electric R. Co., App.	86	738
Kramm v. Stockton Electric R. Co., App.	86	903
Krohn; Curtin v., App.	87	243
Ladd v. Myers, App.	87	1110
La Fortuna Gold & Silver Mining Co.; Ludington Exploration Co. v., App.	88	290
Lake View Town Co.; San Gabriel Valley Bank v., App.	86	727
Lanterman; Crisman v., Sup.	87	89
Larson; Stebbins v., App.	88	505
Learned; Noble v., App.	87	402
Lechleiter; Edwards v., Sup.	87	194
Leist v. Dierssen, App.	88	812
Levison v. Boas, Sup.	88	825
Levy; Johnson v., App.	86	810
Lewis, Ex parte, App.	86	996
Lewis v. Lewis, App.	86	994
Lewis v. Ogram, Sup.	87	60
Light; Graham v., App.	88	373
Light; Loehr v., App.	87	1112
Llewellyn Iron Works Co.; Murray v., App.	87	202
Loehr v. Light, App.	87	1112
Logan v. McMullen, App.	87	285
Los Angeles Brewing Co.; Freyberg v., App.	88	378
Los Angeles County; Title Guarantee & Trust Co. v., App.	86	844
Los Angeles Ry. Co.; Brown v., Sup.	88	1135
Los Angeles Ry. Co.; Forsythe v., Sup.	87	24
Los Angeles Traction Co.; Bresee v., Sup.	85	152
Los Angeles & R. R. Co. v. New Liverpool Salt Co., Sup.	87	1029
Lotz; Humburg v., App.	88	510
Lowe v. Ozmun, App.	86	729
Lower Tule River Ditch Co. v. Angiola Water Co., Sup.	86	1081
Lowrie; People v., App.	87	253
Ludington Exploration Co. v. La Fortuna Gold & Silver Mining Co., App.	88	290
Luty v. Cresta, App.	88	642
Lux's Estate, In re, Sup.	85	147
Lynch v. Superior Court of City and County of San Francisco, Sup.	88	708
McAleer; Goytino v., App.	88	991
McAneny v. Superior Court of Santa Clara County, Sup.	87	1020
McAulay v. Tahoe Ice Co., App.	86	912
McCarty; Mutchmor v., Sup.	87	85
McClellan v. Weaver, App.	88	646
McCleverty; Weber v., Sup.	86	706
McCloud River Lumber Co.; Hatch v., Sup.	88	355
McConnell v. Corona City Water Co., two cases, Sup.	85	929
McCue; People v., Sup.	88	899
McDonald; Corson v., App.	85	861
McFarland; Merritt v., App.	88	369
McGehee v. Schiffman, App.	87	290

	P.	
	Vol.	Page
McIntosh v. Robb, App.	88	517
McKee; Kimball v., Sup.	86	1089
McKenzie; Cannon v., App.	85	130
McMahill; People v., App.	87	404
McMannus; Dorris v., App.	87	287
McManus; Dorris v., App.	86	909
McMullen; Logan v., App.	87	285
McPherson; People v., App.	86	907
McQueen v. Phelan, App.	88	1099
Madera Ry. Co. v. Raymond Granite Co., App.	87	27
Martens; Brackett v., App.	87	410
Martin v. Molera, App.	87	1104
Martin; Moneta Canning & Preserving Co. v., App.	88	369
Martin v. Southern Pac. Co., Sup.	88	701
Marysville Gas & Electric Co.; Sneed v., Sup.	87	376
Mascarel v. Mascarel's Ex'rs, App.	86	617
Mascarel's Ex'rs; Mascarel v., App.	86	617
Mattern v. Canavan, App.	86	618
Maughs; People v., Sup.	86	187
Mayhew's Estate, In re, App.	87	417
Mebius & Drescher Co. v. Mills, Sup.	88	917
Meeker v. Shuster, App.	87	1102
Melandrez; People v., App.	88	372
Merritt v. McFarland, App.	88	369
Meyer v. City & County of San Francisco, Sup.	88	722
Meyer v. O'Rourke, Sup.	88	706
Michael; Shanks & March v., App.	88	596
Miller v. Donovan, App.	85	159
Miller v. Griffith, App.	88	285
Miller; Kevane v., App.	88	643
Miller; San Francisco Commercial Agency v., App.	87	630
Miller; State v., Sup.	85	609
Mills; Mebius & Drescher Co. v., Sup.	88	917
Modesto Irrigation Co.; Western Union Tel. Co. v., Sup.	87	190
Molera; Martin v., App.	87	1104
Moneta Canning & Preserving Co. v. Martin, App.	88	369
Moody v. Peirano, App.	88	380
Mooney; Bashore v., App.	87	553
More; Churchill v., App.	88	290
Morgan v. San Diego County, App.	86	720
Morrow; Neal v., App.	88	815
Morse; Beckett v., App.	87	408
Morse v. Steele, Sup.	86	693
Mulberry v. O'Dea, App.	88	367
Mulcahy; Johnston v., App.	88	491
Mundell, Ex parte, App.	86	833
Murphy; Elizalde v., App.	87	245
Murray v. Llewellyn Iron Works Co., App.	87	202
Mutchmor v. McCarty, Sup.	87	85
Myers; Ladd v., App.	87	1110
Napa State Hospital v. Solano County, App.	88	501
National Bank of Commerce v. Schirm, App.	86	981
National Parafine Oil Co. v. Chappellet, App.	88	506
Neal v. Morrow, App.	88	815
Neiman; Pepper v., App.	87	286
Nesbitt; Nicholson v., App.	88	725
Nevin; Sumner v., App.	87	1105

	Vol.	Page
New Liverpool Salt Co.; Los Angeles & R. R. Co. v., Sup.	87	1029
Newport v. Temescal Water Co., Sup.	87	372
Newton v. United Electric, Gas & Power Co., App.	86	901
Nicholdson v. Nesbitt, App.	88	725
Nigro's Estate, In re, Sup.	87	384
Nixon v. Goodwin, App.	85	169
Noble v. Learned, App.	87	402
Norris v. Hay, Sup.	87	380
Null v. Superior Court of Shasta County, App.	87	392
Oatman v. Eddy, App.	87	210
O'Connor; Builders' Supply Depot v., Sup.	88	982
O'Dea; Mulberry v., App.	88	367
O'Donnell; Southern California Ry. Co. v., App.	85	932
Ogram; Lewis v., Sup.	87	60
O'Hara; Dondero v., App.	86	985
Oldham v. Ramsner, Sup.	87	18
Olender v. Crystalline Min. Co., Sup.	86	1082
Ophir Silver Min. Co.; Bone v., Sup.	86	685
Orack v. Powleson, App.	85	129
O'Rourke; Meyer v., Sup.	88	706
Osceola Gold Mines Co.; Greene v., App.	86	733
Ostrom v. De Yoe, App.	87	811
Overacker; Rogers v., App.	87	1107
Owens; People v., App.	86	980
Ozmun; Lowe v., App.	86	729
Pacific Bank; Ephraim v., Sup.	86	507
Pacific Coast S. S. Co.; Fowden v., Sup.	86	178
Pacific Lumber Co.; Hersberger v., App.	88	587
Pacific Lumber Co.; Hersberger v., Sup.	88	591
Pacific Oyster Co.; Darbee & Immel Oyster & Land Co. v., Sup.	88	1090
Pacific Paving Co. v. Diggins, App.	87	415
Pacific Portland Cement Co.; Plyler v., App.	87	395
Page, Ex parte, App.	86	1134
Page; Garel v., App.	88	591
Palatine Ins. Co.; Fireman's Fund Ins. Co. v., Sup.	88	907
Pardee; Elliott v., Sup.	86	1087
Pardee v. Schanzlin, App.	86	812
Parker; Bergerow v., App.	87	248
Pavkovich v. Southern Pac. R. Co., Sup.	87	1097
Paxton; Santa Rosa Bank v., Sup.	86	193
Pearson; Billings v., App.	86	825
Pease v. Fink, App.	85	657
Pease's Estate, In re, Sup.	85	149
Pedersen v. Superior Court of City & County of San Francisco, Sup.	86	712
Peirano; Moody v., App.	88	380
People v. Beatty, App.	88	377
People v. Castile, App.	86	745
People v. Castile, App.	86	746
People v. Chadwick, App.	87	384
People v. Chadwick, Sup.	87	389
People v. Collins, Sup.	86	895
People v. Conness, Sup.	88	821
People v. Crane, App.	87	239
People v. Davis, App.	88	1101
People v. Druffel, App.	86	907
People v. Eldridge, App.	86	832
People v. Erwin, App.	88	371

P.

	Vol.	Page
People v. Fallon, Sup.	86	689
People v. Feld, Sup.	86	1100
People v. Fernandez, App.	86	899
People v. Fernandez, App.	87	1112
People v. Gallanar, App.	86	814
People v. Grill, App.	86	613
People v. Hemple, App.	87	227
People v. King, App.	87	400
People v. Lowrie, App.	87	253
People v. McCue, Sup.	88	899
People v. McMahill, App.	87	404
People v. McPherson, App.	86	907
People v. Maughs, Sup.	86	187
People v. Melandrez, App.	88	372
People v. Owens, App.	86	980
People v. Soeder, Sup.	87	1016
People v. Staples, Sup.	86	886
People v. Stofer, App.	86	734
People v. Sullivan, App.	86	834
People v. Taylor, App.	87	215
People v. Thornburgh, App.	87	234
People v. Trebilcox, Sup.	86	684
People v. Weber, Sup.	88	671
People's Home Sav. Bank v. Stadtmuller, Sup.	88	280
Pepper v. Neiman, App.	87	286
Perrine v. San Jacinto Valley Water Co., App.	88	293
Peters; Southern California Lumber Co. v., App.	86	816
Peterson; Dinnigan v., App.	87	218
Peterson v. Plunkett, App.	88	283
Peverill; Tabler v., App.	88	994
Pfahler, In re, Sup.	88	270
Phelan; McQueen v., App.	88	1099
Phelps; Wadleigh v., Sup.	87	93
Piercy; Burnett v., Sup.	86	603
Piercy v. Piercy, Sup.	86	507
Pinney v. Wilson, App.	87	1111
Pipher v. Superior Court of California, in Amador County, App.	86	904
Placer County v. Freeman, Sup.	87	628
Plumas County; Wheeler v., Sup.	87	802
Plumas County v. Wheeler, Sup.	87	909
Plunkett; Peterson v., App.	88	283
Plyler v. Pacific Portland Cement Co., App.	87	395
Pogue v. Ball, App.	88	376
Pollitz v. Wickersham, Sup.	88	911
Pool; Waters v., Sup.	87	617
Porter; Star Mill & Lumber Co. v., App.	88	497
Powleson; Orack v., App.	85	129
Pratt; Biescar v., App.	87	1101
Prince v. Kennedy, App.	85	859
Prince v. Kennedy, App.	86	609
Pryor; Dollenmayer v., Sup.	87	616
Quong; Gates v., App.	85	662
Ramsner; Oldham v., Sup.	87	18
Randall; Bancroft v., App.	87	805
Ratto's Estate, In re, Sup.	86	1107
Raymond Granite Co.; Madera Ry. Co. v., App.	87	27
Rea; Brown v., Sup.	88	713

	Vol.	Page
Redfield; Jenison v., Sup.	87	62
Redland Heights Water Co.; Graham v., App.	86	989
Redland Heights Water Co.; Facemire v., App.	86	989
Redpath v. Evening Exp. Co., App.	88	287
Reed's Estate, In re, App.	85	155
Rice, Ex parte, App.	88	599
Rilovich; Copriviza v., App.	87	398
Riordan v. Gas Consumers' Ass'n, App.	88	809
Ripperdan v. Weldy, Sup.	87	276
Riverside County v. Yawman & Erbe Mfg. Co., App.	86	900
Rixford v. Zeigler, Sup.	88	1092
Roach; Sefton v., App.	87	252
Robb; McIntosh v., App.	88	517
Robbins Press Works; Shepard v., Sup.	85	307
Robinson; Hibernia Savings & Loan Soc. v., Sup.	88	720
Rodrigue v. Rogers, App.	87	563
Rogers v. Overacker, App.	87	1107
Rogers; Rodrigue v., App.	87	563
Rowe v. Southern California R. Co., App.	87	220
Rowland v. Watson, App.	88	495
Saddlemire; Stockton Savings & Loan Society v., App.	86	723
Sage; White v., Sup.	87	193
San Diego County; Morgan v., App.	86	720
San Francisco Commercial Agency v. Miller, App.	87	630
San Gabriel Valley Bank v. Lake View Town Co., App.	86	727
San Jacinto Valley Water Co.; Perrine v., App.	88	293
San Joaquin Valley Bank; Yardley v., App.	86	978
San Jose-Los Gatos Interurban Ry. Co.; City Store v., Sup.	88	977
San Lorenzo Water Co.; Hunt Bros. Co. v., Sup.	87	1093
San Pedro Lumber Co. v. West, App.	86	993
Santa Barbara Consol. Ry. Co.; Evarts v., App.	86	830
Santa Clara Valley Mill & Lumber Co.; Steen v., App.	88	499
Santa Rosa Bank v. Paxton, Sup.	86	193
Schander v. Gray, Sup.	86	695
Schanzlin; Pardee v., App.	86	812
Schiffman; McGehee v., App.	87	290
Schindler v. Green, Sup.	87	626
Schirm; National Bank of Commerce v., App.	86	981
Schreiner v. Grant Bros., App.	86	912
Scott; Crocker v., Sup.	87	102
Scott; Security Savings Bank v., App.	86	903
Security Loan & Trust Co.; Estudillo v., Sup.	87	19
Security Savings Bank v. Scott, App.	86	903
Sefton v. Roach, App.	87	252
Shafer v. Sloan, App.	85	162
Shanks & March v. Michael, App.	88	596
Shepard v. F. A. Robbins Press Works, Sup.	85	307
Sheppard v. Kendall, Sup.	85	312
Sheppard's Estate, In re, Sup.	85	312
Shipman v. Unangst, Sup.	88	1090
Showers v. Zanone, App.	85	857
Shuster; Meeker v., App.	87	1102
Sierra County v. Flanigan, Sup.	87	801
Sierra County v. Flanigan, Sup.	87	913
Sierra Land & Cattle Co. v. Bricker, App.	85	665
Sierra Lumber Co.; Bundy v., Sup.	87	622
Sierra Valleys Ry. Co. v. Boca & L. R. Co., App.	86	1134

P.

	Vol.	Page
Sloan; Shafer v., App.	85	162
Smith v. Hampshire, App.	87	224
Smith v. Vandepeer, App.	85	136
Sneed v. Marysville Gas & Electric Co., Sup.	87	376
Soeder; People v., Sup.	87	1016
Solano County; Napa State Hospital v., App.	88	501
Sorosis Fruit Co.; Calkins v., Sup.	88	1094
Soule v. Soule, App.	87	205
Southern California Lumber Co. v. Peters, App.	86	816
Southern California Ry. Co. v. O'Donnell, App.	85	932
Southern California R. Co.; Rowe v., App.	87	220
Southern Pac. Co.; Fitts v., Sup.	86	710
Southern Pac. Co.; Hodges v., App.	86	620
Southern Pac. Co.; Martin v., Sup.	88	701
Southern Pac. Co.; Wyckoff v., App.	87	203
Southern Pac. R. Co. v. Bovard, App.	87	203
Southern Pac. R. Co.; Cook v., App.	88	1100
Southern Pac. R. Co.; Pavkovich v., Sup.	87	1097
Spencer, Ex parte, Sup.	86	896
Spinks; Hutchason v., App.	85	132
Spires v. City of Los Angeles, Sup.	87	1026
Stablemen's Union, Local No. 8,760; Goldberg, Bowen & Co. v., Sup.	86	806
Stadtmuller; People's Home Sav. Bank v., Sup.	88	280
Stansbury; Egressy v., Sup.	87	280
Staples; People v., Sup.	86	886
Star Mill & Lumber Co. v. Porter, App.	88	497
State v. Campbell, App.	86	840
State v. Miller, Sup.	85	609
State; Trippet v., Sup.	86	1084
Stebbins v. Larson, App.	88	505
Steele; Morse v., Sup.	86	693
Steen v. Santa Clara Valley Mill & Lumber Co., App.	88	499
Steiger; Dickie v., App.	88	814
Sterling v. Gregory, Sup.	85	305
Stevenson v. Woodward, App.	86	990
Stockton; Banks v., Sup.	87	83
Stockton Electric R. Co.; Kramm v., App.	86	738
Stockton Electric R. Co.; Kramm v., App.	86	903
Stockton Savings & Loan Society v. Saddlemire, App.	86	723
Stoddard; Central Trust Co. v., App.	88	806
Stofer; People v., App.	86	734
Strauss; Flinn v., App.	87	414
Strobridge Land Syndicate; Cummings v., Sup.	88	901
Sullivan; People v., App.	86	834
Sumner v. Nevin, App.	87	1105
Sunnyside Land Co.; Earle v., Sup.	88	920
Superior Court of California, in Amador County; Pipher v., App.	86	904
Superior Court of City and County of San Francisco; Bell v., Sup.	87	1031
Superior Court of City and County of San Francisco; Lynch v., Sup.	88	708
Superior Court of City & County of San Francisco; Pedersen v., Sup.	86	712
Superior Court of City & County of San Francisco; Union Collection Co. v., Sup.	87	1035
Superior Court of City and County of San Francisco; Voorman v., Sup.	86	694
Superior Court of Lassen County; Boca & L. R. Co. v., Sup.	88	715
Superior Court of Lassen County; Boca & L. R. Co. v., Sup.	88	718
Superior Court of Sacramento County; Johnston v., App.	87	211
Superior Court of San Diego County; French v., App.	85	133

	Vol.	Page
Superior Court of Santa Clara County; McAneny v., Sup.	87	1020
Superior Court of Shasta County; Null v., App.	87	392
Superior Court of Siskiyou County; Wetzel v., App.	85	858
Supreme Tent Knights of Maccabees of World; Guthrie v., App.	87	405
Sweeney v. Doyle, App.	86	819
Syvertson v. Butler, App.	85	164
Tabler v. Peverill, App.	88	994
Tahoe Ice Co.; McAulay v., App.	86	912
Taylor; Johnson v., Sup.	88	903
Taylor; People v., App.	87	215
Temescal Water Co.; Newport v., Sup.	87	372
Thompson v. Bank of California, App.	88	987
Thompson v. Wheeler, App.	87	1149
Thornburgh; People v., App.	87	234
Title Guarantee & Trust Co. v. Los Angeles County, App.	86	844
Title & Document Restoration Co. v. Kerrigan, Sup.	88	356
Tormey; Alper v., App.	85	661
Townsend; Fox v., Sup.	87	82
Trachsler; Davis v., App.	86	610
Trebilcox; People v., Sup.	86	684
Trippet v. State, Sup.	86	1084
Unangst; Shipman v., Sup.	88	1090
Union Collection Co. v. Buckman, Sup.	88	708
Union Collection Co. v. Superior Court of City & County of San Francisco, Sup.	87	1035
Union Paving & Contracting Co.; Austin v., App.	88	731
Union Sav. Bank of San Jose v. Willard, App.	88	1098
United Electric Gas & Power Co.; Newton v., App.	86	901
United States Fidelity & Guaranty Co.; Alcatraz Masonic Hall Ass'n v., App.	85	156
Utica Gold Mining Co.; Bird v., App.	86	509
Vandepeer; Smith v., App.	85	136
Vandercook Co. v. Wilmans Co., App.	87	1116
Vandiveer, Ex parte, App.	88	993
Van Leuven v. Van Leuven, App.	85	860
Vasey v. Campbell, App.	88	509
Vatuone v. Cannobio, App.	88	374
Voorman v. Superior Court of City & County of San Francisco, Sup.	86	694
Wadleigh v. Phelps, Sup.	87	93
Wagner v. Wedell, App.	85	126
Walker, In re, Sup.	85	310
Ward v. Eastwood, App.	86	742
Warren v. City & County of San Francisco, Sup.	88	712
Waterman; Jones v., App.	87	469
Waters; Beckman v., App.	86	997
Waters v. Pool, Sup.	87	617
Watson; Rowland v., App.	88	495
Weaver; McClellan v., App.	88	646
Weber, Ex parte, Sup.	86	809
Weber v. McCleverty, Sup.	86	706
Weber; People v., Sup.	86	671
Wedell; Wagner v., App.	85	126
Weeks; Barling v., App.	88	502
Weldy; Ripperdan v., Sup.	87	276
Welsh v. Koch, App.	88	604
Wemple v. Yosemite Gold Min. Co., App.	87	280
West; San Pedro Lumber Co. v., App.	86	993

P.

	Vol.	Page
Western Union Tel. Co. v. City of Visalia, Sup.	87	1023
Western Union Tel. Co. v. Modesto Irrigation Co., Sup.	87	190
Wetzel v. Superior Court of Siskiyou County, App.	85	858
Wheeler; Bree v., App.	87	255
Wheeler v. Plumas County, Sup.	87	802
Wheeler; Plumas County v., Sup.	87	909
Wheeler; Thompson v., App.	87	1149
White v. Sage, Sup.	87	193
Whitney; Jersey Island Dredging Co. v., App.	86	509
Whitney; Jersey Island Dredging Co. v., Sup.	86	691
Whittier v. Gormley, App.	86	726
Wickersham; Pollitz v., Sup.	88	911
Wilbur; Womble v., App.	86	916
Wilbur; Womble v., App.	86	921
Willard; Union Savings Bank of San Jose v., App.	88	1098
Williams, Ex parte, App.	87	565
Williams, Ex parte, Sup.	87	568
Wilmans Co.; E. P. Vandercook Co. v., App.	87	1116
Wilson; Pinney v., App.	87	1111
Wilson, Lyon & Co.; Harron, Rickard & McCone v., App.	88	512
Winchester v. Becker, App.	88	296
Womble v. Wilbur, App.	86	916
Womble v. Wilbur, App.	86	921
Wood, Curtis & Co.; Donnellan v., App.	87	235
Woodward; Chapman v., App.	86	908
Woodward; Stevenson v., App.	86	990
Woollcott; Arnold v., App.	88	504
Worth v. Emerson, App.	85	664
Wright v. Coules, App.	87	809
Wyckoff v. Southern Pac. Co., App.	87	203
Yardley v. San Joaquin Valley Bank, App.	86	978
Yarraham Gold Min. Co.; Brown v., App.	86	744
Yawman & Erbe Mfg. Co.; Riverside County v., App.	86	900
Yosemite Gold Min. Co.; Wemple v., App.	87	280
Yosemite Gold Min. & Mill. Co.; Emerson v., Sup.	85	122
Youd v. German Savings & Loan Society, App.	86	991
Young's Estate, In re, Sup.	85	145
Yreka Min. & Mill. Co.; Daggett v., Sup.	86	968
Zanone; Showers v., App.	85	857
Zeigler; Rixford v., Sup.	88	1092
Zumwalt; Hoyt v., Sup.	86	600

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EMERSON et al. v. YOSEMITE GOLD MIN. & MILL. CO. et al. (Sac. No. 1,142.)

(Supreme Court of California. March 27, 1906. Rehearing Denied May 21, 1906.)

JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

Code Civ. Proc. § 1908, subd. 2, provides that the effect of a judgment is conclusive as to matters directly adjudged, and by section 1911, that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged. *Held*, that where, in an action to quiet title to a mining claim, plaintiffs claimed a certain interest by forfeiture from co-owners, and defendants claimed under a conveyance from such co-owners, a former judgment in a suit brought by plaintiffs against defendants to obtain a judgment permitting plaintiffs to redeem the property from mortgage sale did not show forfeiture; the complaint in that action having merely alleged that plaintiffs were "the successors in interest" of the co-owners and it not appearing that the question of succession by forfeiture was directly involved and adjudicated.

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by E. L. Emerson and others against the Yosemite Gold Mining & Milling Company and others. From a judgment in favor of plaintiffs, the Milling Company appeals. Modified.

F. W. Street, W. C. Kennedy, and Will M. Beggs, for appellant. Crittenden Hampton and J. P. O'Brien, for respondents.

ANGELLOTTI, J. This is an action to quiet title to a mining claim in Tuolumne county, called the Slap Jack mine. Judgment went for the plaintiffs, and defendant Yosemite Gold Mining & Milling Company appeals from the judgment and an order denying its motion for a new trial. This is the second appeal in this cause. See Emerson et al. v. McWhirter et al., 133 Cal. 510, 65 Pac. 1036. Upon the first trial, judgment was given in favor of defendant McWhirter, and on the appeal therefrom, this judgment and an order denying plaintiffs' motion for a new trial were reversed. Upon the going down of the remittitur, the Yosemite Gold Mining & Milling Company, claiming to be the successor in interest of defendant Mc-

Whirter and defendants Argall, was substituted for "R. S. McWhirter et al," as a defendant. Plaintiffs base their claim upon a location made by one Coyle in January, 1896. The claim of defendants Argall, which embraced an undivided nine-twentieths of the property, was based on the same location, and by deed dated May 31, 1899, said Argalls purported to grant to appellant's immediate predecessor all their interest in said property. The claim of defendant McWhirter, succeeded to by appellant corporation, was based upon an attempted location by McWhirter on January 1, 1899, a few minutes after midnight, made by him upon the theory that plaintiffs had failed to perform the assessment work for the year 1898.

It is first contended by appellant that Coyle never made a valid location, because he posted but one notice of location on the claim, while the local regulation of the miners of Tuolumne county required two such notices to be posted. The same contention was made upon the former appeal, was there fully discussed and decided adversely to appellant's claim. What was there said in this matter is now the law of this case.

The second and third points made by appellant relate to the question of the sufficiency of the evidence to support the findings of the court as to the doing by the plaintiffs of the assessment work for the year 1898. The court found "that during the year 1898, the plaintiffs performed $84.80 worth of labor upon said mine and mining claim; that on the 31st day of December, 1898, the plaintiffs resumed work upon said mine and mining claim, and prosecuted said work diligently thereafter until more than $100 worth of labor and improvements were performed and made thereon, in addition to the labor performed during the year 1898, as aforesaid." Upon the former trial, the court found that the assessment work for 1898 had not been performed, and that the land was, therefore, on January 1, 1899, public mineral land, open to location, and McWhirter's attempted location on that day consequently valid. The judgment then given was reversed upon the ground that, conceding that the requisite $100 worth of labor had not been done during the year 1898, the evidence showed that some work had been done in good faith during that year, and that on December 31, 1898, prior to McWhirter's attempted location, work was resumed thereon in good faith by plaintiffs, and continuously carried on thereafter, to some time late in January, 1899, until more than $100 worth of work, in addition to that done during 1898, had been done. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], providing that on a failure to comply with the conditions as to doing the requisite work, the mine "shall be open to relocation in the same manner as if no location of the same had ever been made, provided, the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location," it was held by this court thereunder that the resumption of work on December 31, 1898, and the continuance thereof to the requisite amount, prevented a forfeiture, and that McWhirter's attempted location at a time during which plaintiffs were in possession, engaged in the continuance of such work, was unavailing. It cannot be seriously contended that the evidence given upon the second trial was substantially different from that given on the first trial as to the character of the work done, and the amount thereof. Under the views expressed on the former appeal, which must here be accepted as the law of the case, the only point upon which there may be a question at all, so far as the finding of the court is concerned, is as to whether plaintiffs resumed work on December 31, 1898, or not until January 2, 1899. Upon this point, however, there can be no real question here, for there was a clear conflict in the evidence. There was added to the testimony given on the former trial, that of two new witnesses, who testified positively that Boynton, who commenced the work, did not arrive at the mine until late in the afternoon of December 31st, and that he did no work at all that day. On the other hand, Boynton testified positively that he arrived at the mine on December 30th, and commenced his work the next day. As to the time of his arrival, he was corroborated by another witness, who accompanied him there, and who was positive as to the date. The evidence of the other witnesses for appellant upon this subject was not materially different from that given by them upon the former trial, where it was held not to be sufficient to even raise a substantial conflict. There was, as shown above, a substantial conflict in the evidence upon this matter on the second trial, but that is the most that can be said for appellant. It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal. These are the only points made in relation to the McWhirter interest, and it thus appears that so far as appellant claims under McWhirter, the judgment in favor of plaintiffs was correct.

The remaining points relate to the Argall nine-twentieths interest. This action was commenced February 10, 1899, and it was alleged in the original complaint that the Argalls were, with plaintiffs and one other defendant, the owners of all the property here involved. and that they were made defendants because they would not join as plaintiffs. The Argalls filed their answer on February 27, 1899, admitting all the allegations of the complaint. Judgment was given for McWhirter, and against plaintiffs and the Argalls, May 4, 1899. Upon the reversal of this judgment by this court, and the substitution of appellant as the successor of McWhirter and the Argalls, the plaintiffs, on February 4, 1902, filed a supplemental complaint, alleging that at the time of the commencement of the action the Argalls and the plaintiffs were the owners of this property, and that since the filing thereof one of the then plaintiffs had transferred his interest to another plaintiff, and that the Argalls had forfeited to the plaintiffs, their co-owners, all their interest, for failure to contribute their proportion of the cost ofthe as-ssessment work for the year 1898, after proper notice given them on December 20, 1899, the allegations in this behalf being apparently sufficient to bring the case within the provisions of section 2324, U. S. Rev. St., relative to forfeiture to co-owners. It was also alleged that the alleged subsequent grants to the immediate predecessor of appellant and appellant itself were taken by the grantees with full notice of such forfeiture. It was further alleged that the plaintiffs were the owners and entitled to the possession of all the property, that the appellant claimed some interest therein adverse to plaintiffs, which claim was without any right whatever, and this was followed by the ordinary prayer in complaints to quiet title. The appellant answered, denying the allegations of the supplemental complaint, setting up its claim based on the McWhirter location, and alleging the transfer by the Argalls to have been made on May 31, 1899, prior to the giving of the notice to contribute. The case was tried upon the issues thus made. The court found in accord with the allegations of the supplemental complaint as to the doing of the required work for the year 1898, the failure of the Argalls to do any of the same, and their failure to contribute their proportion after notice personally served on them, but it further found that such notice was not given until "after they had executed and delivered" their conveyance to the Yosemite Company, and had ceased to be co-owners with plaintiffs, and upon this ground, concluded that there had been no forfeiture. It made no finding at all upon the allegation that the Yosemite Company and appellant had notice of the facts upon which the claim of forfeiture is based. It, however, further found facts, not specifically alleged in the complaint or answer, upon which it based the conclusion that as between plaintiffs and appellant, the plaintiffs are the successors in interest of the Argalls in their nine-twentieths of said claim. These findings were based upon the judgment roll in an action brought by said plaintiffs in March, 1901, against certain parties, including this appellant, to obtain a judgment permitting them to redeem the property from a sale of an undivided nineteen-twentieths of the land, made under a decree of foreclosure of mortgage. It was alleged in the complaint therein that these plaintiffs are the owners of an undivided nineteen-twentieths of said property, and "are the successors in interest of the judgment debtors in said action," among whom were the Argalls, who were, with others, personally liable for the debt, and whose interest in the land was subject to the mortgage. The appellant was the assignee of the certificate of purchase issued by the commissioner at such sale, and it and the commissioner refused to receive from plaintiff the money necessary to effect a redemption. The defendants in that action filed their answer, denying specifically that plaintiffs were the successors in interest of the judgment debtors. They then offered to allow judgment permitting plaintiffs to redeem the property upon payment of $2,440, less their costs, and plaintiffs accepted the offer, and judgment was entered accordingly, plaintiffs waiving their further claim for damages. The court did not make findings of fact, findings having been waived, and the judgment entered recited the offer and acceptance, and, the money having been paid, decreed a redemption, and further expressly adjudged "that the plaintiffs herein redeemed the premises and property hereinafter described from said foreclosure sale, as the successors in interest of the judgment debtors in the action aforesaid." This judgment had become final prior to the trial of this cause.

Plaintiffs claim, and the trial court held, that the effect of these proceedings was to estop appellant from here disputing that plaintiffs succeeded to the Argall interest. The judgment roll in that proceeding was offered by plaintiff in rebuttal, appellant's testimony having been to the effect that the notice to contribute was not given to the Argalls, until after they had ceased to be co-owners in the property. It was objected to upon the grounds, among others, that it was not put in issue by the pleadings, and was irrelevant, incompetent, and immaterial. It was received in evidence, subject to a motion to strike out, and such motion was made at the conclusion of the trial, upon substantially similar grounds, and denied. The exceptions to these rulings sufficiently present the points made by appellant in regard to the effect of the proceedings in the redemption suit, so far as this appeal is concerned. We are satisfied that this judgment roll should not have been received in evidence. It is urged that it was proper evidence in rebuttal of appellant's evidence tending to show that there was no forfeiture. There is, however, nothing in the judgment roll to indicate that the precise question of the alleged Argall forfeiture was involved in the redemption suit. Taking the allegation of succession in the complaint therein as material in its full scope, it was simply that the plaintiffs therein "are the successors in interest of the judgment debtors in said action." By what means they succeeded to those interests was not alleged. The allegation was broad enough to include any of the numerous methods by which realty may be acquired. That plaintiffs were the successors in interest of the Argalls by forfeiture, or, indeed, that they were their successors in interest at all, is not essential to the validity of the judgment therein, for admittedly they had succeeded to the other interests, and, as successors in any mode of one or more of the co-tenants, were entitled to redeem the whole property. Code Civ. Proc. § 701, subd. 1. As successors in part, they could not redeem at all, except by redeeming the whole. Eldridge v. Wright, 55 Cal. 531–534. Where it is sought to show that a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated. Beronio v. Ventura Co. L. Co., 129 Cal. 232–236, 61 Pac. 958, 79 Am. St. Rep. 118. The judgment roll here not showing affirmatively that the question of forfeiture of the Argall interest was involved in that action, it was not admissible in rebuttal of appellant's evidence showing that there was, in fact, no forfeiture.

We are also of the opinion that the judgment in the redemption suit cannot be held to raise an estoppel upon the question as to the succession to the Argall interest. In Beronio v. Ventura County Lumber Co., supra, it was said: "In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by intrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. Citing authorities. 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' Coke on Littleton, 352b. 'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' * * * By section 1908, subd. 2, of the Code of Civil Procedure, 'the effect of a judgment is conclusive in respect to the matters directly adjudged,' and by section 1911, 'that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.' " See also Freeman on Judgments, § 256. This is simply a statement of elementary principles relative to estoppel by judgment. The thing adjudged in the redemption action was simply that the plaintiffs, as successors in interest, had the right to redeem the whole of this property from the foreclosure sale. That they should have this right, it was essential that they should be successors in interest of one or more of the judgment debtors in some portion of the property, but it was not essential to this right, and, therefore, not essential to the judgment, that they should be the successors in interest of all the judgment debtors. Code Civ. Proc. § 701, subd. 1. Their allegation that they were the successors of all the judgment debtors was material in the sense that it was necessary for them to prove that they had succeeded to the interest of some judgment debtor in some part of the property, and the judgment is necessarily conclusive upon that point. Does it appear that anything further was determined by the judgment? We certainly cannot say that the offer to allow judgment permitting plaintiffs to redeem admitted anything more than was essential to such right of redemption. The judgment upon its face shows that there was no trial of any of the issues, and that the judgment was purely a consent judgment, based entirely on the offer and acceptance. It cannot be said, with any degree of certainty whatever, from the face of this record that the question of the succession as to the Argall interest was litigated and determined in that proceeding. Indeed, the contrary affirmatively appears, and we are satisfied that the judgment is conclusive only of that which is essential to support it, viz.: that plaintiffs had succeeded to such an interest in the property as entitled them to redeem. We think the somewhat peculiar adjudication of the decree as to the character in which the plaintiffs redeemed the premises, adds nothing to the effect of the record. Some point is made as to the acceptance on redemption of all the redemption money, including that portion due on the Argall interest, but we do not see how this can affect the question here discussed.

It is contended by appellant that, as the plaintiffs have chosen to set forth in their supplemental complaint the particular facts upon which their alleged title to the Argall interest rests, the allegation of ownership, in connection therewith, was a mere conclusion, that they could, therefore, recover only by showing title by forfeiture from the Argalls, and that the judgment roll in the redemption suit was inadmissible under the issues made to show title in them. See Castro v. Richardson, 18 Cal. 478; Lick v. Diaz, 30 Cal. 65, 75; Haven v. Seeley, 59 Cal. 494; Turner v. White, 73 Cal. 299, 14 Pac. 794; Levins v. Rovegno, 71 Cal. 275, 12 Pac. 161; Hesser v. Miller, 77 Cal. 192, 19 Pac. 375; Gruwell v. Seybolt, 82 Cal. 9, 22 Pac. 938; Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 538, 39 Pac. 922. There is much force in this contention, but as we here uphold objections made by appellant to this judgment roll, which go to the merits, it will be unnecessary to discuss an objection of this nature, which could be obviated by amendment of the pleadings. No point is made on this appeal as to the findings of fact relating to the question of forfeiture. It may be material to that question to determine whether at the time of the service of the notice to contribute, the plaintiffs had been notified, actually or constructively, of the transfer by the Argalls. As this question has not been discussed, we do not decide the same. It appears unnecessary to require the parties to again litigate the question of title as to the remaining eleven-twentieths of the property. As to that portion the judgment was clearly correct.

To the extent that the judgment decrees that plaintiff F. F. Britton is the owner of an undivided one-fourth of the property, that plaintiff Annie L. Emerson is the owner of an undivided one-fourth thereof, and that plaintiff Jacob Miller is the owner of an undivided one-twentieth thereof, the judgment and order denying a new trial are affirmed.

As to the remaining undivided nine-twentieths, constituting what is known as the Argall interest, the judgment and order are reversed, and the cause remanded for a new trial, with the right to the parties to amend their pleadings as they may be advised.

We concur: SHAW, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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3 Cal. App. 274

WAGNER v. WEDELL.

(Court of Appeal, First District, California. March 19, 1906.)

1. Chattel Mortgages — Assignment — Rights of Parties—Foreclosure.

Where, after plaintiff assigned a second chattel mortgage on property to defendant, a prior mortgagee, with the understanding that both mortgages were to be foreclosed at the same time, the amount due plaintiff to be paid out of the proceeds of sale, and the assignment appointing defendant plaintiff's attorney to take all lawful means for the recovery of the amount due, defendant, who had acquired title to the property, satisfied both mortgages of record, he was liable to plaintiff for the amount due on the latter's mortgage; plaintiff having the right to rely on a judicial sale before he could be deprived of his security without payment of the amount due him.

2. Same—Estoppel.

Where defendant, a prior mortgagee, took an assignment from plaintiff of the latter's second mortgage, under an assignment appointing him plaintiff's agent to collect the indebtedness, and thereafter acquired title to the property, satisfied the mortgages of record, sold the property, and took notes and mortgages for part of the purchase price, he was responsible to plaintiff for money had and received, was thereafter estopped as to plaintiff from saying that such notes and mortgages were not money.

3. Money Recieved—Grounds of Action.

Where, after taking an assignment of plaintiff's second chattel mortgage for the purposes of foreclosure only, defendant, a prior mortgagee, who had acquired title to the property, satisfied the mortgages of record and sold the property, he was responsible to plaintiff for money had and received under the common counts, and plaintiff's remedy was not limited to pursuit of the mortgages taken by defendant for the purchase price.

4. Same—Complaint—Sufficiency.

A complaint charging defendant, as agent of plaintiff, with having sold plaintiff's note and mortgage for a certain sum for and on account of plaintiff, and that, although demand had been made, defendant had not paid plaintiff the said sum, nor any part thereof, stated facts sufficient to constitute a cause of action.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Received, §§ 55, 56.]

5. Trial—Motion for Nonsuit—Evidence.

A plaintiff's evidence must be regarded as true for the purposes of a defendant's motion for nonsuit.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 373, 374.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by David Wagner against Theodore Wedell. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

Reed & Hankins, for appellant. Edgar D. Peixotto, for respondent.

COOPER, J. Upon the close of plaintiff's testimony the court granted defendant's motion for a nonsuit, and judgment was accordingly entered. Plaintiff appeals from the judgment, and order denying his motion for a new trial.

The evidence shows substantially the following facts: On July 22, 1903, Lucien Blum and Peter Verdon executed to defendant a chattel mortgage on the furniture, household goods, and kitchen and dining-room wares, contained in a building known as 41 and 45 Stockton street, to secure the payment of a promissory note for $1,500 and interest to accrue thereon. On the same day the same mortgagors executed and delivered to plaintiff a second chattel mortgage on the same property to secure a promissory note for $1,000, besides interest. Both mortgages were properly recorded. Afterwards, the mortgagors being in default in the payment of interest, the defendant went to the plaintiff and asked him to assign his mortgage to defendant for convenience, so that defendant could foreclose both mortgages in the one action. It was finally agreed that the plaintiff should assign his mortgage to the defendant, and that the defendant should immediately commence foreclosure proceedings, and pay plaintiff out of the proceeds of the sale under foreclosure. The plaintiff told defendant at the time of the assignment that he would bid in the property for enough to cover both mortgages. The assignment was in writing, and contained the following clause: "And hereby appoint the said Theodore Wedell my true and lawful attorney irrevocable, in my name or otherwise, to have, use, and take all lawful means for the recovery of said note, money and interest." It was duly acknowledged, and was afterwards placed upon record at the request of the defendant. At the time of making the assignment the defendant gave to plaintiff the following writing: "San Francisco, Oct. 8th, 1903. One day after date I, Theodore Wedell, promise to pay to David Wagner, the sum up to one thousand dollars in gold coin, out of the sale of the rooming house known as 41 and 45 Stockton street, San Francisco, Cal., after gaining possession of the same. Theodore Wedell. Witness: George Pattison." Plaintiff asked the defendant about the words of the writing "up to one thousand dollars." Defendant replied: "Well, that is only a matter of form. That is all right. You will get your money as soon as the foreclosure is made." Plaintiff replied that he would bid in the property to the amount of both mortgages. On the 12th day of October, 1903, the defendant, being the owner of the first mortgage, and the owner of record of the second mortgage, had both said mortgages satisfied of record. Although the evidence does not show it, the defendant evidently had procured the title from the mortgagors at the time he had the mortgages satisfied, for he afterwards sold the property and dealt with it as his own. Defendant sold the property afterwards, the date not being shown, to George P. Beck and wife, and received therefor $1,000 in money, and a note for $1,500, in his own favor, secured by a mortgage upon the same property, and also a note for $1,350, executed in favor of A. C. Blum, secured by a second mortgage upon the same property. The defendant, in satisfying the former mortgages of record, in selling the property to Beck and wife, and in taking the second set of mortgages from Beck and wife, acted without the consent or knowledge of the plaintiff. In fact, after plaintiff had heard of the sale from other sources and asked defendant about it, defendant did not state the facts, but said to plaintiff, "There is a sale on, but it had not been consummated." Afterwards in a conversation with plaintiff as to the mortgage to Blum, defendant said: "There has been a good deal of crooked business done up in the real estate office, and that second mortgage I know nothing about, anything more than it is put there. It is a fictitious name that was put there as a bluff." When plaintiff asked the defendant as to the money coming to him defendant said: "Everybody in this country has got to look out for himself and do the best he can." Plaintiff has not been paid.

We are of the opinion that the defendant is liable to the plaintiff for the $1,000, and the interest that was due thereon at the time the property was sold by defendant, less the $10 paid plaintiff when he assigned his mortgage to defendant, and legal interest on such sum since the said sale. The defendant was the agent of plaintiff "to take all lawful means for the recovery of said note, money, and interest." As such agent it was his duty to act in the utmost good faith for the interests of his principal. He had taken the assignment for the purpose of foreclosing both mortgages, and under an express statement by plaintiff that at foreclosure sale he would bid in the property for an amount sufficient to cover both mortgages. He had been made the plaintiff's agent to foreclose the plaintiff's mortgage, and to recover the money and interest due thereon. Plaintiff had the right to rely upon defendant, and it was the duty of the defendant to act within the scope of his agency for the interest of his principal, and not adversely to him. If defendant had proceeded to foreclose the mortgages, he would have had the right to a decree that his own mortgage and costs be first paid, and then the balance to be applied to plaintiff's second mortgage. If defendant had so foreclosed, and the property had only sold for enough at judicial sale to pay the amount due to defendant, he would not have been responsible to plaintiff; but plaintiff had the right to rely upon a judicial sale before he could be deprived of his security without payment of the amount due him. Defendant satisfied and canceled the mortgage held by plaintiff without plaintiff's consent. He did this to clear his own title to the property. He then sold the property, without consulting the plaintiff, and apparently for a sum more than sufficient to pay both himself and the plaintiff; and, even if he did not, he had no right to satisfy and cancel the mortgage of the plaintiff without becoming liable to plaintiff for the amount due him. When defendant sold the property, and took notes and mortgages for part of the purchase price, he was thereafter estopped as to plaintiff from saying that such notes and mortgages were not money. He sold the property and was paid for it. Whether it was all in money or that which, as to plaintiff, ought to have been money, makes no difference. He is responsible to plaintiff for money had and received, for the reason that he is estopped from saying that he did not sell for money. Defendant's main argument is to the effect that plaintiff has mistaken his remedy, and that defendant is not responsible for money had and received under the common counts, but that plaintiff's only remedy is by pursuit of the mortgages taken by defendant. We are not inclined to look with favor upon such contention. It certainly would not be in furtherance of honesty and fair dealing between man and man. In Moses v. McFarlan, 2 Burr. 1005, Lord Mansfield said, in speaking of the action for money had and received: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, ex æquo et bono, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not, in justice, to be kept is very beneficial, and therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation, contrary to the laws made for the protection of persons under these circumstances." The above quotation was referred to with approval by our own court in Minor v. Baldridge, 123 Cal. 190, 55 Pac. 783, where it was said that it is well established in this state that the common counts in assumpsit may be used, and that at common law such counts could be used to recover money obtained by false and fraudulent representations.

In Floyd v. Day, 3 Mass. 403, 3 Am. Dec. 171, it was held that where an agent compromises a demand of his principal, by receiving from the debtor a negotiable note, indorsed specially to the agent, an action for money had and received will lie. In the opinion it is said: "In fact, when the defendant, instead of money, received this note of Pilsbury, and discharged him, the property of the note was in the defendant, and he became immediately answerable to the plaintiff for the amount of the liquidated damages, which made a part of the consideration of the note, as so much money received by him to her use, and an action of assumpsit is her proper remedy. For, although the defendant received no money, yet by this transaction he discharged Pilsbury from the plaintiff's demand on him for money, and he must be considered as having made himself answerable to her for the money he ought to have received from Pilsbury." Floyd v. Day has everywhere been regarded as authority on the proposition that, in such case, an action for money had and received will lie. Under the rule in that case, when the defendant in the present case, instead of foreclosing the mortgages, or instead of receiving the money on the sale, released plaintiff's mortgage and received the $1,000 and the mortgages of Beck and wife, he became immediately chargeable to plaintiff as for so much money received to the use of plaintiff. The same rule was laid down in Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386, where it was held that such action would lie, even though the defendant had received no money, but had wrongfully discharged a debt due his principal in payment of his own debt. It is there said: "The general rule indisputably is, that the action for money had and received cannot be supported unless the defendant has actually received money. It has, however, been held in the English courts that taking negotiable paper is equivalent to the receipt of money. * * * Here the attorney or agent has discharged a debt due to his principal, and applied that debt to the payment and satisfaction of his own debt, for the amount of which he is liable to the plaintiff in this form of action."

In Bullard v. Hascall, 25 Mich. 132, it was held that such action would lie even though defendant did not receive any money. It is there said: "But it is objected, by the counsel for plaintiff in error, that assumpsit for money had and received could not be maintained by the plaintiff, because there was no evidence that the defendant actually received the money for the draft. To this objection there are two sufficient answers: First, as the evidence clearly shows that the draft, which belonged to the plaintiff, came to the defendant's possession, who gave a receipt for it in the name of the firm, and thus discharged the government from liability for the claim, and thereby cut off the plaintiff's remedy against the government, and then, instead of handing it over to the plaintiff, or procuring the money upon it and paying it over to him, that he wrongfully deprived the plaintiff of the opportunity of obtaining the money upon it, and wrongfully enabled another party to obtain it, it does not now lie with him to deny that he had himself received the money, whether he did in fact receive it or not. It was his duty, as between himself and the plaintiff, if he disposed of it at all, to have obtained the money for it, and to have paid it over to the plaintiff; and if he chose to dispose of it without obtaining the money, the disposition being wrongful as against the plaintiff, he is estopped to deny that he received the money." In Thompson v. Babcock, Brayton (Vt.) 24, the plaintiff, having mortgaged a lot of land, executed a deed of the same land to Burbank, and delivered the deed to Babcock to enable him to dispose of the same and pass the title to a purchaser. Babcock, on disposing of the land as plaintiff's agent, took notes of hand against a third person and a quantity of paper instead of money. The court held that defendant was not authorized to sell for anything but money, and having done so he was liable on the common counts for money had and received. In Andrew v. Robinson and Others, 3 Campbell, 199, it was held that where an insurance broker had received credit in account with an underwriter for a loss upon a policy, and had thus deprived his principal of all remedy against the underwriter, the action for money had and received would lie, and Lord Ellensborough held that defendants "were estopped from saying that they had not this sum in their hands for the plaintiff's use."

The complaint states facts sufficient to constitute a cause of action. It charges the defendant, as agent of the plaintiff, with having sold the plaintiff's note and mortgage for $1,000 for and on account of plaintiff; that, although demand has been made, the defendant has not paid the plaintiff the said sum of $1,000 nor any part thereof. If the defendant sold the plaintiff's note and mortgage for $1,000, and did not receive the $1,000, he should have received it. What has been said relates to the ruling on the motion for a nonsuit, and in such case we must regard all the plaintiff's evidence as being true for the purposes of the motion.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

3 Cal. App. 282

ORACK v. POWLESON et al.

(Court of Appeal, First District, California. March 20, 1906.)

1. Quieting Title—Statutory Provisions—Defenses.

Where, in a suit against the city and county of San Francisco to quiet title, it appeared that plaintiff had had such adverse possession as to confer title under Civ. Code, § 1007, the fact that the land involved was within the lands included in Act March 14, 1870 (St. 1869–70, p. 353, c. 249), authorizing the city and county to convey certain lands to persons claiming under those in possession prior to a certain date, was no defense, in the absence of any showing that some person existed for whom, by reason of such possession, the property was held in trust.

2. Same.

The fact that plaintiff himself might have secured a deed from the city and county under the act of 1870 did not defeat the title acquired by him by virtue of his adverse possession.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by E. Orack against Grace M. Powleson, as administratrix, and others. From a judgment in favor of plaintiff, except as against defendant city and county of San Francisco, plaintiff appeals. Reversed.

Tobin & Tobin, for appellant. Percy V. Long, City and County Atty., for respondent.

HARRISON, C. J. Action to quiet title. Judgment was rendered in favor of the plaintiff, quieting his title to the land described in the complaint as against the defendant Powleson, but refusing to quiet it as against the defendant the city and county of San Francisco. The plaintiff has appealed from the judgment, presenting his appeal upon the judgment roll without any bill of exceptions.

The land involved in the action is situate in the city and county of San Francisco on the southerly line of Golden Gate avenue 100 feet easterly from Scott street, and having a frontage of 25 feet with a depth of 100 feet. The court found that the plaintiff deraigns his title by mesne conveyances under a so-called pre-emption claim of one Henry Merritt, made in 1850, which embraces the land described in the complaint; and it also found that "the plaintiff, by himself and his predecessors in interest, has been in open, notorious, exclusive, and adverse possession of said premises and every part thereof, and has paid all taxes levied and assessed thereon for city, county and state purposes for a period of more than 10 years next before the beginning of this action." By virtue of the provisions of section 1007, Civ. Code, the finding that the plaintiff has had an adverse possession of the land in question for more than 10 years prior to the commencement of the action shows that he has acquired a title thereto by prescription sufficient against all. The provisions of the section include the respondent, and in the absence of any further evidence, the plaintiff was entitled to the judgment asked for by him. If there were any ground upon which the respondent would not be subject to the provisions of the section it was an affirmative defense, to be presented upon the record and established by evidence. In its answer to the complaint the respondent alleges that it holds the legal title to the property in trust, to be disposed of and conveyed to the parties entitled thereto and designated in an act of the Legislature of the state of California entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain authorities thereof," approved March 14, 1870; and that the legal title thus held by it in trust is the only interest or claim which it has therein; that by the aforesaid act of March 14, 1870, the Legislature has prescribed the terms and conditions and designated the manner in which the legal title of said premises shall be disposed of and conveyed by it to the party or parties designated in said act as entitled to said conveyance; that said title has never been disposed of or conveyed at all; and that said act provides a plain, speedy, and adequate method by which its title can be conveyed to plaintiff if he has title to it; and that he has never availed himself of said method for the purpose of procuring said legal title. The court made a finding in accordance with these averments, and as a conclusion of law therefrom held that the plaintiff is not entitled to a decree quieting his title as against the city and county.

The lands within the city and county of San Francisco which were formerly held by the pueblo of San Francisco are those which were embraced within the limits of the Van Ness ordinance and those commonly known as "Outside Lands." The former includes those within the charter limits of the city of San Francisco as defined in the act for its incorporation, passed April 15, 1851, and were released to the city by the act of Congress of July 1, 1864; and the latter includes that portion of the pueblo lands confirmed to the city by the decree of the Circuit Court of the United States May 18, 1865, which lie outside of the charter limits of 1851 and were conveyed to the city by the act of Congress of March 8, 1866. The act of March 14, 1870 (St. 1869–70, p. 353, c. 249), covers the land included in both of these descriptions, and authorizes a conveyance to be made by the city and county of land included in each; but in defining the class of persons to whom such conveyances may be made the Legislature has precluded it from making a conveyance to any one who is not within the class so defined. Of the outside lands it is authorized to make a conveyance only to those who, either in person or through persons from whom they claim or derive possession, were in possession on the

8th of March, 1866. Of the lands covered by the Van Ness ordinance the conveyance can be made only to those who, by themselves, their tenants or the persons through whom they claim or derive possession, were in possession on or before January 1, 1855, and remained in such possession until and including June 20, 1855. It is only for such persons that the city and county holds any of said land in trust for conveyance, or to whom it is authorized by said act to make a conveyance; and in the absence of any showing of such possession the provisions of the act of March 14, 1870, are not available as a defense to the plaintiff's complaint. It was therefore incumbent upon the respondent, not only to allege as an affirmative defense to the plaintiff's right of action, but also to show at the trial the existence of some person for whom, by reason of such possession the property is held by it in trust to be conveyed to him. The land involved in the present action is within the limits of the Van Ness ordinance; and the finding of the court that it was not reserved under that ordinance for any public use, or set apart for any municipal purpose, showed that it is not incapable of alienation or of being acquired by adverse possession.

Neither did the fact that it was held under a trust to convey it to persons who might be entitled thereto prevent the plaintiff from acquiring a title by adverse possession. Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005. As the respondent did not allege in its answer any previous possession of the property, and as the court states in its findings that there was no evidence introduced at the trial to show that the plaintiff or his predecessors were or were not in possession of any portion of the property on the 1st day of January, 1855, or on the 20th day of June, 1855, or at any time between those dates, the act of March 14, 1870, was irrelevant to the controversy between the parties. "There is no presumption that any portion of the land covered by the ordinance was or was not in the actual possession of any one during this period; but in any legal proceeding, in which the fact whether a particular parcel of land was or was not then held in actual possession, becomes material it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense." Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18. The finding that the plaintiff might have secured a city deed under the Act of 1870 if he had proved possession of said property by himself or his predecessors in interest on the 1st day of January, 1855, and continuously thereafter until the 20th day of June, 1855, has no legal significance in the absence of a finding that he had such possession or was able to make such proof. Even if such possession could have been established it would not have defeated the title acquired by him by virtue of his 10 years' adverse possession, or justified the court in refusing to give him judgment.

The judgment in favor of the respondent is reversed, and the superior court is directed to enter judgment upon its findings in favor of the plaintiff and against the respondent as prayed for in his complaint.

We concur: COOPER, J; HALL, J.

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3 Cal. App. 286

CANNON v. McKENZIE.

(Court of Appeal, Third District, California. March 20, 1906.)

1. Motions—Surprise—Leave to Renew.

Where, on motion by defendant for a change of the place of trial, he made no claim that he was taken by surprise by plaintiff's affidavit in opposition to his own affidavit and asked no time to offer further proof, a subsequent motion for leave to renew his former motion on the ground of surprise and for the purpose of introducing new evidence to rebut the affidavit of plaintiff was properly denied.

2. Judgment—Conformity to Pleading.

A complaint for board furnished, labor done, and the value of broom brush will not support a judgment for hire of a team, nor for gasoline furnished.

3. Work and Labor—Wages of Son.

Under Civ. Code, § 197, providing that a father is entitled to the services and earnings of his minor son, there may be a recovery for labor of the plaintiff's son under a complaint for labor done.

4. Sales—Action for Price—Time to Sue.

Under a contract whereby defendant purchased broom brush while the broom corn was standing in the field and agreed to cut, harvest, and bale the crop at his own expense, and the plaintiff delivered possession of the crop to him but defendant failed to perform the contract, an action for the price of the broom brush might properly be commenced before the crop was harvested and baled, where the failure to harvest and bale it was due to the fault of the defendant.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Allen Cannon against George F. McKenzie. From a judgment in favor of plaintiff, defendant appeals. Modified.

E. De Los McGee, for appellant. Donohoe & Freeman, for respondent.

CHIPMAN, P. J. This is an action to recover the value of certain 18 tons of broom brush and for board furnished defendant and labor done. The court gave judgment for plaintiff in the sum of $612.33, with interest, and costs and disbursements, amounting to $273.45. The action was commenced in Glenn county, and summons was served in said county on October 3, 1904. Defendant appeared by demurrer, and, at the same time, served his demand in writing and notice of motion that the place of trial be changed to the city and county of San Francisco. The motion was made on the affidavit of defendant, the demand in writing and the papers and records on file in the action. The motion was heard on October 31, 1904, and at the hearing plaintiff's attorney filed an affidavit of plaintiff in reply to defendant's said affidavit. The court denied the motion of defendant, to which exception was duly taken. Thereafter, on November 10, 1904, defendant served and filed his motion to vacate and set aside the order of the court made October 31st, and to grant defendant leave to renew his said motion. This latter motion was made on the alleged grounds: (1) That said order was given and made through inadvertence and mistake. (2) That the court was not fully advised as to defendant's residence. (3) That the affidavit of plaintiff is false and untrue so far as it relates to defendant's residence. (4) That defendant was taken by surprise at the hearing of said motion to change the same and was given no opportunity to reply to plaintiff's said affidavit. (5) That there is no evidence before the court sufficient to justify said order.

With defendant's said motion for leave to renew his former motion, defendant served and filed the affidavit of defendant and also the affidavit of Frank Moody, Esq., his attorney, appearing at the hearing of the first motion. It was stated in the motion that it would be heard upon the affidavits of defendant and said Moody "and upon all the papers on file in this cause, and upon such other evidence as may be introduced at the hearing of this motion." It was admitted that at the hearing of the first motion no objection was made by defendant to the introduction of plaintiff's affidavit, "nor was any time asked by counsel for defendant to reply to said affidavit." The court denied defendant's motion to vacate said order of October 31, 1904, and denied the motion for leave to renew said motion to change the place of trial. "The court, in denying defendant's motion, said that the additional showing of defendant for a change of venue should have been made in the original affidavit of defendant." No exception appears to have been taken to the order or decision of the court denying defendant's motion to set aside the first order, and to permit defendant to serve his motion for a change of the place of trial. Respondent makes the point that the second order is not appealable under section 939, Code of Civil Procedure, and therefore, not having been excepted to, cannot be reviewed. Citing section 647, Code Civ. Proc.; Grazidal v. Bastanchure, 47 Cal. 167. It is not necessary to determine the point. At the hearing of the first motion defendant stated in his affidavit that at "the commencement of the action, and long prior thereto, he was, and ever since has been, a resident of the city and county of San Francisco" and "is not now, and never has been, a resident of Glenn county." The counter affidavit of plaintiff stated that at the time of the commencement of the action, and at the time summons was served, defendant was a resident of Glenn county and that for several months prior to the commencement of this action the said George F. McKenzie has resided in the county of Glenn and many times stated to plaintiff "that he intended to reside and make his home in the county of Glenn, and would vote in said county at the election this fall, and intended to register as a voter as such." The first motion was heard on these two affidavits without objection by defendant, and without asking time to file further affidavits or submit further evidence, and at that hearing defendant made no suggestion of surprise and made no complaint, as he now makes, that plaintiff's affidavit had not been served upon him prior to the hearing. If he was taken by surprise and desired further time to meet plaintiff's affidavit he should have made known his desire then and there. His attorney deposed, in support of the second motion, that if he had been given the opportunity to reply to plaintiff's affidavit he "believes that the utter and entire falsity of plaintiff's affidavit could and would have been shown." We cannot see that he was deprived of this opportunity, for he did not ask that it be accorded to him.

As to the fact of defendant's residence, Attorney Moody made no statement. Defendant in his second affidavit merely reiterates what he stated in his first affidavit, with the additional statements that he had registered as a voter in the city and county of San Francisco, in July, 1904, which is shown by a copy of his certificate of registration; that he had been a resident of San Francisco for over 20 years and that his business had led him to visit Colusa and Sutter counties in August, 1904, for the purpose of buying broom corn, and, being unable to secure all he required, he went to Glenn county for the same purpose and was there for that purpose alone. He denied making the statements deposed to by plaintiff in his affidavit. There is nothing in the record in support of defendant's claim of surprise or excusable neglect. No new facts were before the court except as above stated, which were facts tending to corroborate the facts stated in his first affidavit. Defendant may have registered as a voter in San Francisco in July, 1904, and later have changed his residence to Glenn county. His registration in San Francisco was not conclusive as to his residence when the action was brought. The second motion was made on the papers on file, including plaintiff's affidavit. The question was within the discretion of the court, and we cannot say that there was such abuse of discretion as should compel a reversal of its orders.

The appeal from the judgment is on the judgment roll, and it is claimed that certain findings are not within the issues—namely, the finding that there is due the sum of $37.50 for hire of a team, that there is due the sum of $22.50 for the labor of plaintiff's son, and that there is due the sum of $2.25 for gasoline. The complaint was for "board furnished, labor done, and the value of 18 tons of broom brush." A demurrer to the complaint on the ground of ambiguity and uncertainty was overruled, but defendant does not claim error in this regard. We do not think that plaintiff can have greater relief than he prayed for, or on issues not before the court, and hence there is no basis in the complaint for the items mentioned except the item for services of plaintiff's son. All intendments must be indulged in support of the judgment. The father is entitled to the services and earnings of his minor son. Civ. Code, § 197. The evidence under the claim for labor performed may have shown that the son was a minor, and there is no claim that defendant paid the minor. Civ. Code, § 212; Commissioners v. Barnard, 98 Cal. 199, 32 Pac. 982; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400. We see no reason why the judgment for the other items mentioned in the complaint should not stand.

The court found that defendant purchased the broom brush while the broom corn was standing in the field and "agreed to cut, harvest, and bale the said crop at his own cost and expense," and that the crop was to be harvested and baled and paid for at the agreed price on September 15, 1904, and that plaintiff delivered possession of the crop to defendant on or about August 1, 1904; and the court also found that defendant failed to perform the contract on his part in all these particulars. It is claimed that because the court also found that all the broom corn was not harvested and baled at the commencement of the suit the cause of action had not accrued. But the court found that the failure of defendant to harvest and bale the crop "was due to the fault of the said defendant and not to any act or fault of the said plaintiff"; and "that the plaintiff at the time of the commencement of this action had performed in every respect the terms of his agreement of sale of said crop." There is no merit in the claim that the action was prematurely commenced.

The judgment is modified by deducting therefrom the sum of $39.75, and otherwise it is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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3 Cal. App. 291

HUTCHASON et al. v. SPINKS.

(Court of Appeal, Second District, California. March 23, 1906.)

FRAUD—ELEMENTS—RELIANCE ON REPRESENTATIONS.

In an action for fraud, the plaintiff, in order to recover, must show not only fraudulent representations by the defendant, but also that they relied on the representations, and were thereby induced to enter into the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 1, 3, 17.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. E. Hutchason and others against M. E. Spinks. From an order denying defendant's motion for a new trial, he appeals. Reversed.

Byron Waters and J. W. McKinley, for appellant. Edward L. Hutchison, E. C. Bower, and Bower & Hutchison, for respondents.

SMITH, J. This is an appeal by the defendant from an order denying his motion for a new trial. It is somewhat difficult to determine from the complaint the nature of the action. It appears, however, that the cause of action originated in the lease or contract of date April 13, 1901, set out in the complaint, and in the subsequent conduct of the defendant. This contract purports to be a lease of the "dental office and business" of the defendant in the city of Los Angeles, and there is contained in it, among other provisions, an agreement by the defendant that he "will not, during the term thereof, open or conduct any dental office in the city of Los Angeles, or engage directly or indirectly in the practice of dentistry in said city"; and we construe the contract, also, as being in effect a transfer of the good will of the business. Civ. Code, § 992. It is further alleged that the defendant, as an inducement for plaintiff to enter into the contract, represented to them that he was receiving from the business the sum of $1,800 per month, and that this representation was untrue; the business being worth not to exceed $250 per month; and that the plaintiffs, relying upon these representations, were induced thereby to enter into the contract. Other false representations by the defendant to the plaintiffs are also alleged; but these are, in effect, simply allegations of the promises contained in the contract, and of other promises and of failure upon the part of the defendant to perform them. The suit may, therefore, be regarded as a suit to recover damages for the misrepresentation of fact above specified, and for breach of contract; and as no objection to the joinder of these causes of action was interposed, it must be so regarded. The complaint concludes with the allegation that by reason of said misrepresentations, which will include both causes of action, the plaintiffs were damaged in the sum of $10,000, for which amount they pray judgment. The jury found a general verdict for the plaintiffs in the sum of $2,994; but in the special findings the sources of the several damages suffered by the plaintiffs are distinguished, and it is found that by reason of the misrepresentations of the defendant the plaintiffs suffered damage in the sum of $2,394, and "by reason of the defendant not performing his agreements" they suffered damage in the sum of $600. The points made by the appellant are very numerous, but it will be sufficient to consider the following:

1. The jury were, in effect, instructed that if they believed from the evidence "that as an inducement for plaintiffs to purchase

said business * * * the defendant represented that said business was paying from $1,800 to $2,000 per month, whereas * * * as a matter of fact, said business was not then paying more than $250 a month," they should "find for the plaintiffs." But this omits an element essential to plaintiffs' cause of action, namely, that they relied upon these representations and were thereby induced to enter into the contract. It is clear, therefore, that as to the amount $2,394 the verdict cannot be sustained.

2. As to the $600 damages for breach of contract, the matter is not so clear. According to the theory of appellant the plaintiffs, at some time subsequent to the commencement of the suit, ceased to perform the contract, and he claimed that such being the case the plaintiffs could not recover; but the jury were instructed, in effect, that if the plaintiffs had complied with the terms of the contract up to the time of the commencement of the suit, their subsequent failure of compliance would not prevent them from recovering the amount, if any, to which they were entitled when the suit commenced or while performing the terms of their contract. But the applicability of this instruction to the case depends upon a very intricate question, which we do not deem it necessary to discuss; though on this point some explanation will be necessary. By the terms of the lease set out in the complaint the consideration is stated to be $7,570; but it appears that upon the execution of the lease the plaintiffs paid the defendant in cash the sum of $4,050, making with the amount specified in the lease an aggregate of $11,620, and continued to pay the installments mentioned in the lease until the 15th day of February, 1902, thus paying in the aggregate $8,207.50, or $637.50 in excess of the amount stated in the lease. Accordingly, in the original complaint, filed September 16, 1901, it is alleged, in effect, and in the third amended complaint, filed January 18, 1902, expressly, that the consideration of the contract was the aggregate of the amount paid and the amount specified in the contract—that is to say, the sum of $11,620—which is also the theory of the defendant. But in the present complaint it is claimed by the plaintiffs that the sum mentioned in the contract, $7,570, was the whole consideration agreed upon, and that the cash payment of $4,050 was a payment upon the amount specified in the written contract. On this point the jury found specially in accordance with the theory of the plaintiffs, and one of the points urged by the defendant is that this finding is not supported by the evidence. On the other hand, it is claimed by counsel for the appellant that the matter was not in issue; and in this we agree. But the question was material to the instruction under consideration; for upon the defendant's theory of the case it would have been applicable. Upon the case as presented to us on this appeal, however, it has no application; nor can we assume that on another appeal it will become so. We, therefore, deem it unnecessary to pass upon the correctness of the instruction.

3. There are some other instructions bearing upon the credibility of the testimony of a witness, the correctness of which is at least doubtful. But upon this point and the numerous, or rather innumerable, other points presented in the case, we deem it unnecessary to enter.

For the error first above specified, the order appealed from must be reversed, and the cause remanded for a new trial; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 304

FRENCH et al. v. SUPERIOR COURT OF SAN DIEGO COUNTY et al.

(Court of Appeal, Second District, California. March 24, 1906.)

ADMINISTRATORS—SPECIAL ADMINISTRATORS—ACCOUNTING AND SETTLEMENT.

Code Civ. Proc. §§ 1622–1627, relating to accounting and settlements of executors and administrators, applies to special administrators appointed under the provisions of section 1411 et seq., so that it is the duty of the judge to hear and determine issues made by an account of a special administrator and objections thereto, before the appointment of a regular administrator.

Application by Louise A. French and others for a writ of mandamus to the superior court of San Diego county and N. H. Conklin, judge thereof. Writ granted.

C. H. Rippey, E. W. Britt, and Hunsaker & Britt, for plaintiffs. W. J. Mossholder and Stearns & Sweet, for defendants.

SMITH, J. In this case, one C. W. Buker was, on the 27th day of July, 1903, duly appointed special administrator of the estate of Harriet M. Arnold, deceased, pending the contests of two wills of the decedent of different dates, which still remain undetermined, and has duly qualified as such. May 10, 1904, he rendered and filed in the superior court a report and account or exhibit of the property of the estate received by him and of payments made by him as such administrator. The account or exhibit prayed that a day be appointed for the hearing thereof, and upon the hearing the same be allowed, approved, and settled; and accordingly notice of such hearing was given by the clerk in the usual manner. The matter, however, was not taken up by the court at the time appointed or afterward; but on the 28th day of March, 1905, the plaintiffs, who are heirs of the deceased and beneficiaries under either will, filed in the superior court their objections to the account and contested the allowance and settlement of the same, and thereafter, upon due notice to the court, moved the court to hear and determine the issues thus presented. But the court refused, and has ever since refused, to hear or determine the issues made by said account and objections, or to appoint a time for the hearing thereof; and this proceeding is an application for a writ of mandamus compelling the court to act in the premises.

From the answer of the defendant Conklin it appears that the motion to hear the case was denied by the court on the grounds following: "(5) That there is no law or provision of law in said state of California requiring or authorizing or permitting said special administrator of said estate to make, render or present any account of his administration of said estate prior to the time of the appointment of a regular administrator of said estate, or the appointment of an executor under the last will and testament of said decedent. (6) That there is no law or provision of law in said state authorizing or empowering or directing said superior court, or said respondent N. H. Conklin as the Judge thereof, to settle or refuse to settle, allow or refuse to allow, or approve or disapprove said account and report of said special administrator prior to the appointment of a regular administrator or an executor as aforesaid. (7) That said superior court has not, nor has said respondent N. H. Conklin, any jurisdiction to allow or disallow, approve or disapprove, or settle or refuse to settle said account of said special administrator prior to the appointment of a regular administrator or executor as aforesaid. * * * (12) That should said court settle, allow, and approve said account, the order settling, allowing, and approving the same would not bind any heir of said decedent or any legatee or devisee named in the last will and testament of said decedent, nor any executor or administrator of said estate who might hereafter be appointed. * * * (17) That there is no law or provision of law in said state requiring or authorizing or empowering said special administrator to make any report of his acts as such special administrator prior to the close of his administration as such special administrator."

Upon this showing, we are of the opinion that the court in refusing to hear the case declined to perform functions devolving upon it by the law. A special administrator is, according to the ordinary use of language, merely a kind of administrator; and accordingly the provisions specially referring to him in section 1411 et seq. of the Code of Civil Procedure, form but part of the general chapter entitled "Of Executors and Administrators," etc. We think it clear, therefore, that it was the intention of the Legislature that the provisions of this chapter, so far as applicable, should apply to the case of a special administrator, and hence that sections 1622 to 1627, inclusive, are applicable, and the court should have heard the case. As to the kind of order or judgment that should be entered by the court, or its effect as an estoppel, these are questions that it would not be proper to consider in this proceeding; but we are clearly of the opinion that it is the duty of the court to hear the case and at least to take such action with regard thereto as may be necessary for the preservation of the estate.

It is ordered that a peremptory writ of mandamus be issued to the defendants, requiring the court and the judge thereof to hear and determine the issues raised by the exhibit of the special administrator, and the objection thereto of the plaintiffs heretofore filed, and to render such judgment or order thereon as it may be advised.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal.App. 294

DANIELS v. DANIELS et al.

(Court of Appeal, Third District, California. March 22, 1906.)

1. Pleading—Judgment on Pleadings—Motion—Effect.

Where in an action on a note, the answer merely stated that the cause of action was barred by limitations, a motion for judgment on the pleadings did not admit the truth of the allegation that the cause of action was barred.

2. Limitation of Actions—Action on Note—Accrual.

Civ. Code, § 1642, provides that several contracts relating to the same matter and parts of substantially the same transaction are to be taken together, and by section 1636 effect must be given to every part of the contract. At the time of making a demand note, without interest, and as a part of the same transaction, the parties executed an instrument reciting the execution of the note in payment for shares of stock and providing that the note should be given to a third person and retained by him until the death of one of the makers, provided it occurred within a specified time, and that upon such death or the expiration of such time the third party should deliver the notes to the payees. *Held*, that limitations did not commence to run against the note until the death of the maker mentioned.

3. Contracts—Consideration.

There was a sufficient consideration for the agreement as the consideration for the notes would support the agreement, and the forbearance evidenced by the suspension of the right to sue was a part of the consideration for which the notes were given.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by Walter A. Daniels against Sarah L. Daniels, as executrix, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

C. H. Pond and J. H. & R. L. Thompson, for appellants. W. B. Kollmyer, for respondent.

McLAUGHLIN, J. It appears from the complaint herein that on the 5th day of June, 1897, at Chicago, Ill., Newell Daniels and Sarah L. Daniels made and executed their promissory note for $1,000 without interest, payable to Walter A. Daniels at his office in Chicago upon demand, and at the same time and place made and executed a similar note for a like amount to Adelaide M. and Cora Jean Daniels. That at the time the said notes were so made and executed, and as a part of the same transaction, the payors, who were described as residents of the state of California, as parties of the first part, the payees, as sole heirs at law of Leo H. Daniels, deceased, as parties of the second part, and one James A. Stoddard of Chicago, as party of the third part, entered into an agreement in writing, reciting the execution of the two notes, in renewal of two notes given to secure the payment of 61 shares of stock in the Milwaukee Cranberry Company, representing an interest in 680 acres of land in Wisconsin, and recording their mutual agreement with regard thereto. which was, in substance, as follows: It was mutually covenanted that the two notes be placed in the keeping of the third party to be by him or his legal representatives retained until the death of Newell Daniels provided such death occurred within 9½ years from date thereof; that the payors might pay or renew either or both of the notes at any time within the period mentioned; and that upon the death of Newell Daniels, or at the expiration of 9½ years, if he should live so long, the third party, upon notification, would immediately deliver the notes to the parties of the second part, their heirs, executors, or administrators, to be used by them as they might deem proper "by negotiating them or otherwise." It was further alleged in the complaint that Newell Daniels died on April 16, 1904, that Sarah L. Daniels was the duly appointed, qualified and acting executrix of his will, that claims upon said notes in due form had been presented within the time allowed by law, and rejected, and that plaintiff was the assignee of the payees and claimants Adelaide M. and Cora Jean Daniels. The defendant demurred to the complaint on general grounds, and on the special ground that the causes of action therein stated were barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The demurrer was overruled, and an answer was filed which contained only an affirmative allegation that Newell and Sarah L. Daniels had resided in this state continuously for more than four years prior to the death of the former, and a reiteration of the plea that the causes of action were barred by the statute of limitations. The court granted plaintiff's motion for judgment on the pleadings, and this appeal is from the judgment thereupon entered.

As preliminary to the main inquiry touching the plea of the statute of limitations, it is contended that the motion for judgment on the pleadings admits the truth of the averments that the causes of action are barred by the provisions of section 337 and subdivision 1 of section 339 of the Code of Civil Procedure. This contention cannot be sustained. While the ordinary rule is that such a motion must be treated as an admission that every substantive fact stated in the answer is true, that rule cannot have the conclusive effect claimed for it here. The absence of denials in the answer was an express admission that every fact alleged in the complaint was true. The answer must, therefore, be construed as confessing such facts, and the special plea in bar of the causes of action thereby admitted must be treated as an averment that, though the facts so admitted and affirmatively alleged are true, the bar of the sections of the Code enumerated had intervened when the complaint was filed. In other words, such special plea is a conclusion of law which the law for mere convenience tolerates in a pleading, but the sufficiency of such plea rests on facts admitted or proven. If the facts show that the causes of action are barred, the plea attaches and the plaintiff must be denied relief. If the facts demonstrate the contrary, it would be giving the plea undue force to say that it not only contradicts the other admissions, but conclusively establishes something which is admittedly untrue. We are of the opinion that the causes of action stated in the complaint were not barred by the provisions of law relied upon, when that pleading was filed. It stands admitted that the agreement was executed contemporaneously with the notes, as part of the same transaction, and that the notes were thereupon delivered to and deposited with Stoddard under the terms of the contract. "Several contracts relating to the same matters between the same parties, and made as parts of substantially the same transaction, are to be taken together." Civ. Code, § 1642. Therefore, the notes and auxiliary agreement must be viewed as one contract, and construed as a whole, effect must be given to every part, to the end that the intention of the parties as it existed at the time of contracting may be effectuated. Civ. Code, §§ 1636, 1642. So viewed, it must receive an interpretation that will make it lawful, operative, definite, reasonable, and capable of being carried into effect if this can be done without violating the evident intention of the parties, and if uncertainty exists the language must be interpreted most strongly against the promisors, who are, presumably, the parties who caused the uncertainty to exist. Civ. Code, §§ 1643, 1654, 3541, 3543. The purpose and intention of the parties to the transaction as evidenced by the auxiliary agreement, seems quite evident. The execution and unconditional delivery of the notes would create the relation of debtors and creditors, with the correlative rights pertaining to such relation. If it was not intended that the legal rights which would otherwise result from the delivery of the notes and the relation thereby created, would be changed, modified, or suspended by the agreement, then it could have no possible purpose or object. But that such was the intention is apparent from the context. By the general terms of the agreement the notes were placed in the keeping of Stoddard until death or lapse of time should entitle the payees to the full possession and control thereof. Unless it was intended by such general terms to suspend the legal rights incident to complete delivery and control of the notes, there could be no necessity for the insertion of a clause reserving the right of the debtors to pay or renew either or both of the notes. They would have this right as debtors under ordinary circumstances, and the only purpose the reservation could have would be to guard against a postponement or suspension of the particular rights reserved, which would otherwise result from the general terms and conditions upon which the notes were delivered to and held by Stoddard. If it was not intended that the right of the payees to collect, control, indorse, negotiate, and use the notes would be postponed or suspended, then there could be no object in stipulating that the right to possess, control, use, and negotiate them should only accrue after death or flight of time had rendered their delivery by Stoddard a duty. Indeed there could be no necessity for placing the notes in the hands of a stranger for a stated period unless the design was to deprive the payee of the rights which ordinarily attend the complete delivery, control and possession of negotiable instruments. A fair, unstrained and reasonable construction of the agreement leads to the conclusion that the notes were delivered to Stoddard as escrows to be delivered upon the death of Daniels or the expiration of the prescribed period of time. It was perfectly competent for the parties to enter into such an agreement. Daniels on Negotiable Instruments (5th Ed.) § 68; Witmer Bros. v. Weid, 108 Cal. 574, 41 Pac. 491; Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Ruiz v. Dow, 113 Cal. 496, 45 Pac. 867. And the statute of limitations did not commence to run until the death of Newell Daniels when a cause of action accrued on each of the notes. Smith v. Lawrence, 38 Cal. 29, 99 Am. Dec. 344; State Loan, etc., Co. v. Cochran, 130 Cal. 252, 62 Pac. 466, 600; W. F. Co. v. Enright, 127 Cal. 674, 60 Pac. 439, 49 L. R. A. 647; McDonald v. Huff, 77 Cal. 283, 19 Pac. 499.

If this is not the proper construction of the agreement then but one other is possible, and that is that the payees thereby agreed to suspend their legal rights and forego the pursuit of legal remedies which would otherwise be open to them, during the time the notes were held by Stoddard under the agreement. Under the former construction the time necessary to complete the bar of the statute would not commence to run until the death of Daniels, and under the latter the running of such time was suspended while the impediment created by the agreement of the parties endured. Harrington v. Home L. Ins. Co., 128 Cal. 540, 58 Pac. 180, 61 Pac. 99, and cases cited supra. In either event the causes of action were not barred by the provisions of law relied upon. There was a sufficient consideration for the agreement. Aside from the fact that the notes and agreement were part of the same transaction, and that the consideration for the notes would support the agreement, it was perfectly competent for the parties to agree that the notes should be delivered at a specified time and in a particular manner. In any event, the forbearance evidenced by the suspension of legal right to sue on notes bearing no interest must be considered as being an essential part of the consideration for which the notes were given.

The judgment is affirmed.

We concur: CHIPMAN P. J.; BUCKLES, J.

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3 Cal. App. 300

SMITH v. VANDEPEER et al.

(Court of Appeal, First District, California. March 23, 1906.)

JUDGMENT — RES JUDICATA—DISTRIBUTION OF ESTATE.

Where a residuary legatee was properly brought before the court on the hearing on an application for distribution, and she did not appeal from the judgment, which among other things distributed a certain sum to the executors, she could not thereafter attack the judgment in equity on the ground that the distribution to the executors was violative of the constitutional provision against perpetuities, though the executors held the legacy merely in trust, and though it did not appear upon the record whether the objection was considered on the application for distribution.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Suit by Catherine Smith against J. G. Vandepeer and another. From a decree in favor of defendants, plaintiff appeals. Affirmed.

D. Kinsell, for appellant. J. B. Richardson, for respondents.

HARRISON, P. J. The last will and testament of Fannie Simpson appointed the defendants herein as its executors, and contained among other provisions the following: "Fourth. I desire to be buried beside my husband in the cemetery of San Lorenzo; and I give, devise and bequeath to my executors hereinafter named the sum of two thousand dollars, in trust, however, that they shall invest the same in such way as their good judgment shall dictate so as to produce an annual income, which income shall be applied perpetually to keep in repair, embellish and make attractive our burial lot in said cemetery."

"Tenth. All the remainder of my estate

I give and bequeath to my sister the said Catherine Smith."

The testatrix died December 26, 1891, and on January 11, 1892, her will was admitted to probate by the superior court of Alameda county, and on the same day letters testamentary thereon were issued to the defendants. Thereafter such proceedings were had that on January 16, 1893, the superior court settled the final account of the executors, and made its decree of distribution of said estate, in and by which it distributed to the defendants herein the sum of $2,000 in trust (setting forth the provisions of the trust as stated in the will), and distributed to the plaintiff herein all the remainder of the estate of said decedent, which was described in said decree as "and all the rest of said estate, whether herein described or not." The $2,000 thus distributed to the defendants was received by them February 20, 1893, and, with the exception of so much thereof as has been expended in the care of said burial plot, they still have the same in their possession, together with its accumulations. March 2, 1904, the plaintiff brought the present action against the defendants, alleging that under the Constitution of the state no perpetuity is allowed except for eleemosynary purposes, and that by the above clause in her will the testatrix attempted to create a perpetuity which is not for eleemosynary purposes, that the judgment of the court distributing the legacy to be held by the defendants for the purposes of said trust is void, and that as the residuary legatee of the decedent she is entitled to the same, together with its accumulations, and praying that the defendants be declared to hold the same for her benefit, and that they render an account thereof, and be directed to pay the same to her. A demurrer to this complaint on the part of the defendants was sustained, and from the judgment entered thereon the plaintiff has appealed.

In the cases of William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323, Crew v. Pratt, 119 Cal. 139, 51 Pac. 44, Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561, Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145, Trust of Trescony, 119 Cal. 568, 51 Pac. 951, Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132, and Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, the nature and effect of a decree of distribution of the estate of a decedent, and its conclusiveness upon the rights of heirs, legatees, and devisees, have been so fully discussed and distinctly stated that a mere reference to those cases is sufficient to show that the demurrer to the complaint was properly sustained.

The plaintiff seeks herein, by a suit in equity, to make a collateral attack upon the validity of a judgment of a court that had jurisdiction of the subject-matter, and of all the parties interested therein and which, by reason of lapse of time since its rendition and entry, has become final. The same principles attach to a judgment of a superior court in a matter of probate, as to its judgment in actions at law or suits in equity (Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458), and for any error committed by the court in its decree of distribution, whether in matter of fact or in the application of the law to the facts before it, the party aggrieved must seek his remedy by appeal. Mere error is not a ground for relief in equity. Daley v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

The plaintiff herein was a party interested in the distribution of the estate of the decedent, and was properly brought before the court at the hearing upon the application therefor. Whether she then made the objection to the validity of the provision in the will which she now makes does not appear; but, whether she made it or not, she had the opportunity to do so, and, whether she did or neglected to do so, she is equally bound by the decree. William Hill Co. v. Lawler, supra. Nor does it appear from the record whether this objection was considered by the court; but the omission of the court to place upon the record its ruling upon the objection cannot impair the effect of the judgment which it rendered. It was its duty to consider all of the provisions of the will, and to determine the validity of the above provision before making the decree of distribution (Goldtree v. Allison, supra); and, as it distributed the legacy to the defendants, it must be assumed that it determined that the provision was valid and created a valid trust. Its action in this respect must receive the same consideration as if, upon an objection made by the plaintiff at the hearing, the court had overruled the same, and incorporated into its decree a specific finding that the trust was not created for eleemosynary purposes and did not purport to create a perpetuity. If it should be conceded that the court erred in making such finding, it was competent for the plaintiff to waive the error so far as it affected her rights, and by failing to appeal therefrom, she has waived it.

The conclusiveness of the judgment is not affected by the fact that it involved the construction of a provision of the Constitution instead of a statute. A statute passed by the Legislature within its constitutional power is as authoritative and of as high a sanction as is a provision of the Constitution. Each is an expression of the sovereign will of the people—the one by its direct vote; the other by its duly constituted representatives—and the failure of a court to give a proper construction to either is but an error of law. Neither is the conclusiveness of the judgment impaired by the fact that the defendants hold the legacy distributed to them merely in trust, and have no personal interest therein. The exigencies of this appeal do not require us to determine whether this trust is valid or not; but, conceding the claim of the plaintiff to be correct, the jurisdiction of the court to determine that question was not affected thereby, and not having been reversed remains binding upon all parties to the proceeding. An erroneous judgment that is unreversed is binding upon the parties thereto as an adjudication of their rights, and, when invoked before any other tribunal, is conclusive thereof. Thompson v. McKay, 41 Cal. 221; People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

(149 Cal. 173)

In re YOUNG'S ESTATE.

(Supreme Court of California. April 10, 1906.)

1. EXCEPTIONS, BILL OF—SERVICE—"ADVERSE PARTIES."

On application for partial distribution of the estate of a decedent, persons claiming as devisees under the will left by decedent and appearing in that capacity to contest the petition for partial distribution were "adverse parties," within Code Civ. Proc. § 650, declaring that a draft of the bill of exceptions or a copy thereof must, within 10 days after notice of entry of judgment, be served upon the adverse party.

2. APPEAL—AFFIRMANCE—FAILURE TO SERVE BILL OF EXCEPTIONS.

Where, on petition for partial distribution of the estate of a decedent, devisees in a will left by decedent appeared and moved to strike the petition from the files which was done, the judgment could not be overthrown on appeal without affecting the interests of those devisees, and hence failure to serve upon them a draft of the bill of exceptions, as required by Code Civ. Proc. § 650, necessitated an affirmance of the judgment, so far as points contained only in the bill of exceptions were concerned.

3. SAME—FAILURE TO SHOW ERROR.

Where the record on appeal merely showed the filing by appellants of a petition for the partial distribution of a decedent's estate, and the making and granting of a motion to strike the petition from the files on the ground that a previous similar proceeding had terminated in the final judgment denying the relief sought, no error was shown.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Separate petitions by Pauline Young Hyde and Sarah Young against A. St. Clair and others, as executors, for partial distribution of the estate of M. Young, deceased. From orders striking the petitions from the files, petitioners appeal. Affirmed.

J. J. Scrivner and William M. Aydelotte (Alfred H. Cohen, of counsel), for appellants. Jeter & Makinney, W. P. Netherton, and Hugh R. Osborn, for respondents.

SLOSS, J. M. Young died, leaving a last will, which was admitted to probate in the superior court of Santa Cruz county, and letters testamentary thereon were issued to A. St. Clair and William Armstrong on the 27th of April, 1903. On December 12, 1904, Pauline Young Hyde, one of the appellants, filed a petition for partial distribution, in which she alleged that the decedent had left as his sole heirs four children, of whom she was one, and that said decedent had, by an omission not appearing to be intentional, failed to provide in his will for any of his said children. The executors met this petition by a motion to strike the same from the files, and a similar motion was made, upon notice to the petitioner, by K. A. Osborn and three others named as residuary devisees in the will. Subsequently, a similar petition for partial distribution was filed by Sarah Young, claiming to be one of the children and heirs of M. Young, and motions to strike this petition from the files were made by the executors and the four devisees above mentioned. The petitions and motions having been submitted, the court made an order, in which it "adjudged and decreed that the said petitions of Pauline Young Hyde and Sarah Young, and each of them, be, and the same hereby are, denied and dismissed." From this order the petitioners prosecute this appeal.

The points made by the appellants for reversal appear in a bill of exceptions. This bill contains a recital by the judge of the trial court to the effect that the draft of the proposed bill of exceptions had not been served on the respondent devisees within the time allowed by law. Said devisees objecting to the settlement of the bill, the judge sustained their objections and refused settlement of the bill "so far as it relates to or purports to in any way bind said devisees," and settled it "so far as it relates to the executors." It is now contended by the respondents that the order must be affirmed for want of a bill of exceptions binding all the necessary parties to the appeal. Under section 650, Code of Civil Procedure, the draft of a bill of exceptions, or a copy thereof, must, within 10 days after notice of entry of judgment, be served upon the adverse party. The phrase "adverse party" is also found in section 940, relating to service of notice of appeal, and as used in that section has been construed many times by this court. Such "adverse party" is defined in Senter v. De Bernal, 38 Cal. 637, to be "every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken." O'Kane v. Daly, 63 Cal. 319; Williams v. Santa Clara Min. Ass'n, 66 Cal. 195, 5 Pac. 85; In re Castle Dome, etc., Co., 79 Cal. 249, 21 Pac. 746; Harper v. Hildreth, 99 Cal. 267, 33 Pac. 1103; Vincent v. Collins, 122 Cal. 390, 55 Pac. 129; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Elliott v. Superior Court, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. And, except as hereinafter stated, service of a notice of appeal on every adverse party is essential to give the appellate court jurisdiction of the appeal. (See cases cited above.) It is true that notice need not be served on all parties to the action if a modification sought can be effected without affecting the rights of those not served. Williams v. Santa Clara Min. Ass'n, supra; Miller v. Thomas, 71 Cal. 406, 12 Pac. 432. And not every person who may be affected by a reversal or modification of the judgment or order is an "adverse party," who must be served. The "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse. Harper v. Hildreth, supra; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; In re Bullard's Estate, 114 Cal. 462, 46 Pac. 297. That is, a party who has appeared and taken part in the proceeding in the lower court. Estate of McDougald, 143 Cal. 476, 77 Pac. 443. No doubt the phrase "adverse party" is to be given a similar interpretation as applied to service of bills of exception. In the present case, the devisees respondent were "adverse parties," who were entitled to service of a draft of the bill. They, as claimants under the will, would be directly and most injuriously affected if the appellants should succeed in reversing the order here appealed from, since, if the facts alleged in the petition for partial distribution should be established, the petitioners (together with their brother and sister) would succeed to the entire estate. The rights of the devisees could not be protected if any modification or reversal of the order should be made. And such devisees, having appeared in the lower court to resist the application for partial distribution, are parties who appear by the record to be adverse. Indeed, the devisees are the only parties to the record having a substantial interest in opposing the distribution sought. The executors, while authorized to resist an application for partial distribution (Code Civ. Proc. § 1660; Estate of Kelley, 63 Cal. 106), have no interest in having the property go to one rather than another of the contending claimants of the estate. If, then, the devisees who appeared and resisted the petitions in the superior court were adverse parties who were entitled to service of a draft of the bill of exceptions, what is the effect of failure to so serve them? A failure to serve some of the necessary parties does not require or authorize the trial court to refuse to settle the bill at all (Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529), nor does it affect the jurisdiction of the appellate court to entertain the appeal. Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; In re Bullard's Estate, 114 Cal. 462, 46 Pac. 297; Herriman v. Menzies, 115 Cal. 16, 25, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; Scott's Estate, 124 Cal. 671, 57 Pac. 654; Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757. But, while an appeal duly perfected will not be dismissed for such failure, a want of service on an adverse party of a notice of intention to move for a new trial is a good ground for affirming an order denying the motion (In re Ryer's Estate, supra; McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732; In re Bullard's Estate, supra; Johnson v. Phœnix Ins. Co., 146 Cal. 571, 80 Pac. 719), and the same effect must follow a failure to serve a draft of a bill of exceptions on an adverse party, if the points made for reversal appear only in the bill. See Gutierrez v. Hebberd, supra; Howell v. Howell, 101 Cal. 115, 35 Pac. 443; Randall v. Duff, 105 Cal. 271, 38 Pac. 739. The devisees who appeared in the lower court were entitled to be heard in opposition to the petitions; they are equally entitled to be heard on the appeal; they cannot be bound by a record in the making of which they have not had the opportunity to participate which the statute gives them; a reversal or modification cannot be ordered as to any party without affecting their rights. It follows that the bill of exceptions cannot be considered for any purpose on this appeal.

But it is contended by the appellants that no bill of exceptions was necessary, and that without it the record contains all that is necessary for a review of the order complained of. In fact, the entire transcript is made up of the bill of exceptions, followed by a notice of appeal, and a stipulation (subject, as to the devisees, to all objections and exceptions) that the "foregoing is a full, true and correct transcript on appeal," and that an undertaking has been filed. If this be regarded as a sufficient authentication of such papers contained in the bill as would constitute what may be called the judgment roll, we find as to each petitioner a petition for partial distribution, based on the theory that such petitioner was a child of the decedent, who had unintentionally omitted in his will to provide for her; two demurrers to the petition; two motions to strike the petition from the files on the ground, among others, that theretofore, a similar proceeding on behalf of the petitioner had terminated in a final judgment denying the relief sought, and adjudging that the omission by the testator to provide for the petitioner was intentional, and that she was not entitled to any share of the estate; and an order, which, after finding in support of such allegation as to a prior judgment, denies and dismisses the petition for partial distribution. This shows no error. Assuming the finding of the lower court to have been sustained by the evidence (as, in the absence of a bill of exceptions, we must) the prior adjudication against the rights of the petitioners concluded them on this hearing. In this discussion we treat the motion to strike from the files as substantially an answer. It raised issues of fact, on which evidence was taken, and findings made. If, however, such motion is not to be treated as an answer, the petitioners are not helped. In that view, there is nothing in the record to be considered except the petitions, the demurrers and the order dismissing and denying the petitions, and on the face of these papers no error appears. The facts recited and found in the order fully justify the conclusion reached.

The foregoing views necessitate the affirmance of the order appealed from without a determination of the points made by the appellant. It is, perhaps, unfortunate that the appeal cannot be decided on the merits of the questions litigated in the lower court, but this result cannot be avoided without depriving the respondent devisees of clear and substantial rights.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

149 Cal. 200

In re LUX'S ESTATE.

(Supreme Court of California. April 11, 1906.)

1. PERPETUITIES — SUSPENDING POWER OF ALIENATION—TRUSTS.

A will, devising property in trust for the life of testator's son and the lives of the children of such son as were living at testator's death, with a provision whereby it might terminate sooner, the property to be then divided between the children of such son then living whether born before or after testator's death, does not contravene Civ. Code, § 715, prohibiting the suspension of the absolute power of alienation by any limitation or condition for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition; as the will speaks only from the death of testator.

2. WILLS—PROPERTY DEVISED — COMMUNITY PROPERTY.

All and not merely one-half of community property, of which testator became the absolute owner by the death of his wife after the making of his will, passed under it, it in terms purporting to cover all his property "real, personal, and mixed, and wheresoever the same may be," notwithstanding a provision whereby he declared that all of the estate of which he was possessed was his separate estate, except a certain lot, and that, in his disposition of his estate by the will, he had undertaken to dispose of all his separate property and one-half of the community property.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

In the matter of the estate of Henry Lux, deceased. From the decree of distribution, V. M. Turney appeals. Affirmed.

W. C. Kennedy, for appellant. Wm. A. Bowden, Wm. P. Veuve, and Leo Archer, for respondents.

ANGELLOTTI, J. This is an appeal from the decree of final distribution in the matter of the estate of Henry Lux, deceased. The sole appellant is one V. W. Turney, who claimed, as the successor of Charles H. Lux, a son of deceased, that an undivided one-sixth of a lot in the city of San José should be distributed to her. His claim is based on the fact that prior to the death of deceased, one Clayton had recovered a judgment against said Charles H. Lux for $493.75, that after such death an execution was issued on said judgment, whereunder the interest of Charles H. Lux in said lot was sold to her, and a certificate of sale therefor issued to her. For this reason, she claims to be entitled to distribution of whatever interest in said lot said Charles H. Lux would have been entitled to from his father's estate, if such execution sale had not been made, section 1678, Code Civ. Proc. providing that distribution may be made, although some of the original heirs, legatees, or devisees may have conveyed their share to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees or devisees.

Disregarding the objections of respondents as to the right of appellant, under these circumstances, to be heard on distribution, the real question presented is as to whether or not Charles H. Lux was entitled to any portion of his father's estate, or rather, to any portion of said lot of land. If he was not so entitled, it is plain that one claiming as his successor in interest in said lot would not be entitled to any relief in this proceeding. For the purposes of this proceeding, appellant, at best, simply stood in the place of Charles H. Lux, and was entitled to relief only as to such portion of said lot as said Lux was entitled to receive on distribution of his father's estate. In re Angle's Estate (Cal. Sup.) 82 Pac. 668. The lower court distributed the estate upon the theory that Charles H. Lux was entitled to no portion of the estate. The deceased left a will which was duly admitted to probate, and on which the distribution was based. Charles H. Lux was not a devisee or legatee. It is claimed that a trust attempted to be created as to a portion of the estate was void, and that as to this portion, the deceased died intestate. It is further claimed that if the trust was valid, nevertheless the deceased died intestate as to an undivided one-half of the lot in question. These claims will be separately considered.

By his will, the deceased, after providing for a few legacies, gave "all the rest, residue and remainder" of the estate to his wife, for her life, and upon her death one-third thereof to each of two daughters, and the remaining one-third to his said daughters in trust. The provisions of the will as to the trust, so far as material to appellant's contention, were as follows, viz.:

"Eighth. The uses and purposes upon which I give, devise and bequeath the remaining one-third (1–3rd) of the aforesaid estate to said Lizzie M. Pott, and said Lena B. MacBride are as follows: During the continuance of the trust term herein provided, the trustees are to have, hold, manage, and control the said trust property, and to pay over the net income derived therefrom to my son, Charles H. Lux, and in the event of his death, then to his children in equal shares, the issue of any deceased child taking by right of representation. Upon the termination of the trust term herein created, then the trust property shall be divided between all the children of Charles H. Lux, then living, in equal shares, the issue of any deceased child taking by right of representation; and to them and in that event I hereby devise the property so directed to be divided amongst them. In the event there be no issue of said Charles H. Lux living at the termination of the trust term herein provided, then I direct that the said trust property shall be divided between my two daughters, Lizzie M. Pott and Lena B. MacBride, share and share alike, and to them and in that event I hereby devise said property. The trust term herein created is to continue during the life of my son, Charles H. Lux, and of all of his children who are living at the time of my death. With the death of the survivor of them the said trust is to terminate. It is furthermore to terminate before that time in the event of the occurrence before that time of the death of said Charles H. Lux, and of the attainment of the age of twenty-one (21) years by all his surviving children. * * *

"Tenth. I hereby authorize and empower my said trustees, or either of them who shall act, and their successors in office, to sell any part of my estate, real or personal, herein devised to them, at public or private sale, and with or without notice, as they may determine, and without the order of any court, and to execute good and valid conveyances and transfers thereof; also to invest and reinvest the proceeds of sales of property, and to purchase or acquire other property, or apply the proceeds of sales of property to the improvement of other property; also to lease property, and to borrow or lend such sums of money as they may deem best, and to secure the repayment of loans by mortgage or other lien or transfer of real or personal property; also to make compromises and settlements."

It is urged that the attempted trust is void in that it is repugnant to the provisions of section 715 of the Civil Code, which prohibits the suspension of the absolute power of alienation by any limitation or condition whatever, "for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 772," which is not applicable to this case. It is manifest, however, that there is in the provisions of the will in question no suspension of the power of alienation for a longer period than during the continuance of lives in being at the creation of the limitation or condition, and the will was apparently very carefully drawn with a view to comply literally with the statute invoked. The will explicitly provides as follows: "The trust term herein created is to continue during the life of my son, Charles H. Lux, and of all of his children who are living at the time of my (the testator's) death. With the death of the survivor of them the said trust is to terminate." In no event can the trust, according to its terms, continue after the death of Charles H. Lux, and such of his children as were living at the time of the death of deceased, in other words, it cannot continue for a longer period than during the continuance of the lives of persons in being at that time. According to other provisions, it may end sooner, but it cannot exist longer. The will speaks and is enforceable only from the death of deceased, and the limitation or condition was created, within the meaning of section 715, Civ. Code, only upon the death of deceased, and not at the time of the execution of the will. While it is true, as stated by appellant, that by reason of the provisions requiring that upon the termination of the trust, the trust property shall be divided between all of the children of Charles H. Lux then living, children born after the death of deceased and before the termination of the trust would receive a share of the property, this in no degree affects the term of the trust, or prolongs the period of suspension of alienation. The devise to the trustee became effectual only at the death of deceased. The limitation or condition which had the effect of suspending the absolute power of alienation was created when the devise became effectual. Under the provisions of the will, the trust cannot continue beyond the continuance of lives of persons in being at that time.

Other objections made to the trust provision require very little notice here. There was no forbidden "trust to convey," as in the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and kindred cases. Provisions similar to those contained in the tenth paragraph of the will, quoted above, were not held invalid in the Estate of Fair, 136 Cal. 79, 68 Pac. 306, as claimed by appellant. We see no reason to doubt that the trust created by this will was fully within the provisions of section 857, Civ. Code, enumerating the purposes for which express trusts may be created. We are unable to perceive the applicability of section 774, Civ. Code, prohibiting the limitation of successive estates for life, except to certain persons.

The claim that deceased died intestate as to an undivided one-half of the particular lot in controversy, is based upon the following provision of the will, viz.:

"Fourteenth. I hereby declare that all of the estate of which I am possessed is my separate estate, except a lot on the east line of First street, between San Antonio and San Carlos streets, in the City of San José, which lot has a frontage of seventy feet and a depth of about one hundred and thirty-seven feet; and in my disposition of my estate hereinbefore contained I have undertaken to dispose of all of my separate estate and one-half of the community property."

The lot of land described in this provision is apparently the land in controversy. It appears that the wife of deceased died after the execution of this will and prior to the death of deceased, whereupon the deceased became, of course, the absolute owner of all the community property, without administration. Civ. Code, § 1401. It is claimed that the provision quoted shows that the testator intended that the will should not be operative as to the undivided one-half of the lot described and that he consequently died intestate in regard thereto. We are of the opinion that construing all the parts of the will in relation to each other (Civ. Code, § 1321), it is clearly apparent that the testator intended that the will should be operative as to all property which he was entitled to devise at the time of his decease. The disposing parts of the will are broad and sweeping, and in terms purport to cover all his property, "real, personal and mixed, and wheresoever the same may be." In the absence of a contrary intention, manifestly appearing in the will, they would be operative as to all property owned by him at the time of his death, which he was then entitled to devise. Such a contrary intention is not shown by the provision relied on. That provision indicates simply the claim of the testator that all of the property then possessed by him except this lot was his separate property, and, further, that it was his intention to dispose by his will of all property over which he had the power of testamentary disposition, viz., all his separate property, and one half of the community property, the other half being, as long as it remained community property, not subject to his testamentary disposition (Civ. Code, § 1402). The provision doubtless shows that the testator contemplated that if he died before his wife, she, under the law, would succeed to an undivided one-half of the lot in question, and that his will would not, in that event, be operative in regard thereto, but it shows no intention to exclude from the operation of the will any property which he might be entitled to devise at the time of his death. Instead of being a limitation on the previous portions of the will, disposing of all the property subject to the testamentary disposition of deceased, it is rather a reaffirmance thereof. It thus appears that Charles H. Lux was entitled to no part of his father's estate, either under the will or as an heir, and appellant as his successor was, therefore, properly denied any relief by the lower court.

Some doubt may exist as to whether the practice adopted in the lower court in this proceeding was entirely regular. To the petition for final distribution, presented with the final account, appellant filed her written objections, setting up her claims as hereinbefore stated, and asking that distribution be made of the undivided one-half of the lot in question, regardless of the will. Demurrers were interposed to the writing so presented by appellant, and these demurrers were sustained. If it be assumed that the allegations made by appellant in her objections were on their face sufficient to entitle her to relief on distribution, and that technical error was committed in sustaining the demurrers thereto, it is nevertheless manifest that so far as the alleged right of Charles H. Lux to take some portion of his father's estate is concerned, and without which appellant could take nothing, appellant's claim was based entirely on the language of the will of deceased. If the trust thereby attempted to be created was valid under the laws of this state, and if a proper construction of the provisions of the will made it operative as to all property owned by deceased at the time of his death, concededly Charles H. Lux was entitled to nothing. Appellant's only contention is that the attempted trust is invalid on its face, and that the will on its face shows an intention on the part of testator that it should not be operative as to an undivided one-half of the lot in controversy. In support of this contention, she has incorporated the will in the bill of exceptions on this appeal, and it is apparent therefrom, as is already shown, that her claim in this behalf is not well founded. Regardless, therefore, of the question as to whether the demurrers were properly sustained, appellant could not have been prejudicially affected by the action of the lower court in that regard. The conclusion of that court to the effect that, upon the proper construction of the will, Charles H. Lux was entitled to no part of his father's estate was correct, and effectually disposes of appellant's claim.

In view of our conclusions upon the questions discussed, we have deemed it unnecessary to consider the question as to the right of the appellant to be heard on distribution.

The order or decree of distribution appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(149 Cal. 167)

In re PEASE'S ESTATE.

(Supreme Court of California. April 10, 1906.)

1. Executors and Administrators—Credits—Payment before Appointment.

Credits in an executor's account for payments made by him before his appointment, claim for which he never presented to the court, and with which at the time he made them he did not intend to charge deceased, are properly disallowed.

2. Same—Necessity of Expenses.

An item of credit in an executor's account for rent of a safe deposit box is properly rejected on his testimony that he kept in the box only some papers which he could have kept safely at home.

3. Same—Expenses of Suit.

An executor is properly disallowed credit for expenditures in a suit which he commenced to recover property of the estate, he having abandoned the suit, though he thought the property belonged to the estate; no good reason for the abandonment being shown.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 448-455.]

4. Same—Notice of Sale—Publication in Wrong County.

An executor is properly disallowed credit for money paid for publishing, in a county other than that provided by statute, notice of sale of real estate.

5. Same—Property Lost to Estate.

An executor is rightly charged with the value of property as lost to the estate, on his testimony that he thought it belonged to the estate, but nevertheless abandoned a suit for its recovery, which he had begun, and allowed the defendant therein to keep it on payment to him of money which he retained for himself.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 394, 395, 484.]

6. SAME—INTEREST.

An executor having used the funds of the estate for his private purposes is chargeable with interest thereon.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 425.]

7. SAME—COMMISSIONS ON SALES.

An executor is entitled to commissions on the whole amount for which property sells, though it is subject to a mortgage, and though part of the purchase money equal to the amount of the mortgage is paid directly to the mortgagee; the sale not being subject to the mortgage, but the mortgage having been presented as a claim against the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2099.]

8. SAME—OBJECTIONS TO ACCOUNT.

An executor may not complain because one filing objections to his account is not a person interested, as the court has the right of its own motion to inquire into all of the items of the account, and to settle it properly.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2158.]

9. COSTS—APPEAL—PRINTING OF TRANSCRIPT.

Appellant, though successful having filed a transcript containing much unnecessary matter, will be limited in his recovery of costs of appeal, so far as the printing of the transcript is concerned, to a proper porportion of the cost thereof.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 968–971.]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Emma S. Pease, deceased. From the order settling the account of the executor, Albert Simon, he appeals. Reversed, with directions.

Walter A. Coffee, for appellant. A. B. Weiler and Fred W. Frey, for respondent.

SLOSS, J. Albert Simon, as executor of the will of Emma S. Pease, deceased, filed his first and final account of his administration of the estate. Objections were filed on behalf of certain legatees, and the executor was directed to file an amended final account. This he did, and after hearing witnesses produced by the executor and the legatees who had again filed objections to the amended account, the court made its order settling the account by disallowing certain items with which the executor had credited himself, adding certain sums to the debit side of the account, and charging him with interest on the difference between the debit and credit sides of the account. The executor appeals from this order, and contends that the evidence was insufficient to justify the court in disallowing any of his credits or in charging him with any further debits or with interest. The various items involved will therefore be briefly considered.

(a) As to credits disallowed. Three alleged payments to St. Luke's Hospital, aggregating $38.50, were found by the court to have been paid by the deceased in her lifetime, and not by the executor. The testimony of Belle Hopkins supports this finding. The executor credits himself with five payments to Western National Bank, G. W. Townsend, River Dale Creamery, and for rent and gas, amounting to $51.30. The appellant's own testimony shows that he made these payments before his appointment as executor, that he never presented any claim for these amounts to the court, and that, at the time he made them, he did not intend to charge his mother (the decedent) with them. On this showing, the items were properly disallowed. An item of $10 for expenses of the executor in going to and from Alameda county on business of the estate was found to be neither necessary nor proper, and the finding is supported by testimony that the estate had an agent, who performed all services in taking care of the property of the estate in Alameda county, and that the compensation of this agent was charged to the estate. The court was justified in rejecting an item of $4 for rent of a safe deposit box, in view of the testimony of the executor himself that he kept in the box only some papers of the estate which he could have kept safely at home. The executor expended $7.50 in a suit which he commenced to recover certain personal property of the estate from one Isabel Hopps. In view of the fact, appearing for his own testimony, that he abandoned the suit, although he thought the property sued for belonged to the estate, no good reason being shown for such abandonment, there is no ground for his contention that this should have been allowed as a charge against the estate. An item of $20, claimed to have been paid to Isabel Hopps for services rendered the estate was reduced to $10, a witness having testified that $10 of the amount paid Mrs. Hopps was for a personal debt of the executor. The court was, of course, justified in accepting the statement of this witness as against that of the executor. Forty-three dollars was paid to the Recorder Publishing Company, a newspaper printed and published in San Francisco, for publishing a notice of sale of real estate. The real estate was situated in Alameda county. Since a notice of sale of real estate should be published in a newspaper printed in the county in which the land is situated (Code Civ. Proc., §§ 1547, 1549), this item was not chargeable against the estate.

(b) As to additional debits. Mrs. Souriau testified that she saw the deceased, just before her death, give the appellant $35, but not as a present. This was sufficient to authorize the court to debit him with the amount. The executor was also debited with $175.60, the value of personal property belonging to the estate. This is the same property above referred to as being in the possession of Isabel Hopps. The executor's testimony that he thought it belonged to the estate, but had abandoned a suit for its recovery, and permitted Mrs. Hopps to keep it on paying him $62, which he retained for himself, is ample to show that the property was lost to the estate through his neglect, and he was rightly charged with its value.

(c) As to charges of interest. The court, after finding the difference between the credit and debit sides of the account, reached the conclusion that the executor should be charged with simple interest on this difference from July 6, 1903, the date when the proceeds of sale of real estate came into his hands, except as to the items of $35 and $175.60, added to the debit side of the account, on which he was to be charged interest from the date of his appointment. This conclusion was based upon a finding that he had used the funds of the estate "for his own private use and purposes." The finding is sustained by the testimony of the executor taken in connection with that of Mrs. Heilbron, and fully justifies the charging of the executor with interest. Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639.

The appellant contends, further, that the court erred in fixing the amount upon which his commissions were to be figured. It appears that there was a sale by the executor of land in Alameda county. The land was subject to a mortgage of $882, which had been presented as a claim against the estate and allowed. The sale was $1,500 to one Thena Heilbron. The court allowed commissions only on the net amount realized after deducting the amount of the mortgage from the amount for which the property was sold. We think commissions should have been allowed on the entire $1,500. An executor or administrator is to be allowed commissions based on the value of the estate which has been taken into his possession and accounted for. Estate of Simmons, 43 Cal. 543, 549; In re Ricaud, 70 Cal. 69, 11 Pac. 471. Here the executor testified: "I never got the $1,500. I only got what was left after paying off the mortgage." The ruling of the trial court was based, apparently, on the view that the $1,500 had not come into the executor's possession. The general rule appears to be that where property subject to an incumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the incumbrance. 2 Woerner's Am. Law of Adm. (2d Ed.) 1166; Buerhaus v. De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; Baucus v. Stover, 24 Hun (N. Y.) 109; cf. Hitchcock v. Mosher, 106 Mo. 578, 17 S. W. 638. An examination of these cases indicates that what was sold was merely the equity of redemption, and it may well be held that where property is sold subject to an incumbrance which still remains, the commissions should be calculated only on the value of the interest sold. Here, however, the mortgage had been presented as a valid claim against the estate. The sale was not made to the mortgagee, but to a third party. Under the Code of Civil Procedure, § 1569, where there is a sale of lands subject to a mortgage or other lien, the purchase money must be applied first to the satisfaction of the mortgage or lien. The property offered for sale and sold is not the equity of redemption (as it may, for this purpose, be termed), but the entire interest of the estate, regardless of the mortgage. It is the executor's duty to apply the purchase price to satisfying and removing the lien for the benefit of the purchaser, and this was done here. The statement of the appellant that he did not get the $1,500, but only the surplus over the mortgage, can mean at most that the purchaser or a broker paid the mortgagee directly, instead of paying the full price to the executor and having him pay off the mortgage. But this does not alter the real nature of the transaction. Whoever paid the mortgagee did it as agent of the executor. In effect, the executor sold the land for $1,500, and with the proceeds paid off the mortgage debt. "The executor is bound to account to the court for the entire proceeds of sales made under its order." Estate of Turner, 128 Cal. 388, 392, 60 Pac. 967. In this account the executor charged himself with the sum for which the sale was made, and he should be allowed commissions on it. "It would be a narrow construction of the statute to hold, that because he did not demand its delivery that therefore in law he did not receive nor pay out that for which he was responsible as received and paid out." Huddleston v. Kempner, 87 Tex. 372, 28 S. W. 936. There is no force in the point that one of the persons filing objections to the account was not shown to be a "person interested." Code Civ. Proc. § 1626. The evidence was sufficient to show that she was a legatee under the will, and even if she had not been, the court had the right, of its own motion, to inquire into all the items of the account, and to settle it properly.

The appellant claims, and the respondents concede, that, in fixing the interest to be charged against the executor on the balance which should have been in his hands, there was some error in computation. This need not be considered, since, when the account again comes before the court for settlement, any such error can be corrected. For the error in the matter of commissions the order will have to be reversed. To properly present the points raised, a much briefer record would have been sufficient. The appellant has, however, filed a transcript of 306 pages, of which the first 179 are made up largely of papers not constituting any part of the judgment roll nor authenticated by a bill of exceptions. Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639. And the bill of exceptions itself, occupying some 120 pages of the transcript, contains a great deal of unnecessary matter and repetition. Under these circumstances, it would be unjust to throw the entire burden of the costs of this appeal on the respondent. Bullard v. His Creditors, 56 Cal. 600.

The order is reversed, with directions to the lower court to settle the account by allowing the appellant commissions as above indicated, and charging him with interest on the balance due from him, recomputed in accordance with the principles applied on the former hearing; in other respects the order of settlement to stand unchanged. The appellant shall be limited in his recovery of costs to this appeal, so far as the printing of the transcript is concerned, to one-third of the cost thereof.

We concur: ANGELLOTTI, J.; SHAW, J.

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149 Cal. 131

BRESEE et al. v. LOS ANGELES TRACTION CO. et al. (L. A. 1,419.)

(Supreme Court of California. April 5, 1906. Rehearing Denied May 4, 1906.)

1. APPEAL—REVIEW—SCOPE OF REVIEW.

That the trial court limited the ground on which a new trial was granted does not deprive the Supreme Court of the right to review on appeal any of the grounds on which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3477.]

2. NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

Where the negligence of a person on a particular occasion is in issue it is usually permissible to prove every fact known to such person at the time which would have a reasonable tendency to increase or decrease the danger of a particular course of action.

3. SAME—IMPUTED NEGLIGENCE—NEGLIGENCE OF DRIVER OF VEHICLE IMPUTABLE TO OCCUPANT THEREOF.

Though a person who is injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver in which he did not participate, yet he is not absolved from all personal care, but must exercise ordinary care to avoid all injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 147.]

4. STREET RAILROADS—INJURIES TO TRAVELERS ON STREET—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a street railway company for injuries received by plaintiff while riding in a vehicle driven by another in consequence of a collision with a car, evidence of the habits of the driver of the vehicle with respect to the dangers arising from collisions with cars, coupled with proof of knowledge thereof on the part of plaintiff, is admissible on the issue of his contributory negligence.

5. SAME.

Where, in an action against a street railway company for injuries received by plaintiff while riding in a vehicle by another in consequence of a collision with a car, it was not claimed that the accident was attributable to the driver's lack of control over the horse due to his manner of holding the reins, evidence of the driver's habits of driving with a loose rein was inadmissible on the issue of plaintiff's contributory negligence.

6. APPEAL—REVIEW—NEW TRIAL—DISCRETION OF LOWER COURT.

The granting of new trial in an action for an injury received by plaintiff while riding in a vehicle driven by another, in consequence of a collision with a street car, on the ground of error in admitting evidence of the driver's habits of driving with a loose rein, will not be disturbed on appeal, though the evidence was of slight importance, since the trial court has a large discretion in the matter of granting new trials.

7. STREET RAILROADS—INJURIES TO TRAVELER—COLLISIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action against a street railway company for injuries received by a traveler in a collision with a street car, the evidence showed that the car at the time of the accident was running at a high rate of speed and greatly in excess of the speed limited by a municipal ordinance, it was error to charge that it was not negligence on the part of the motorman to assume that a person would not attempt to cross the track in front of the approaching car so near as to render a collision probable, it being for the jury to determine whether the speed of the car was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

8. SAME—NEGLIGENCE.

Running a street car at a speed in excess of the rate fixed by a municipal ordinance is negligence as a matter of law, and renders the street railway company liable for any injury caused by the excessive speed.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 175, 200, 201.]

9. SAME—INSTRUCTIONS.

Where, in an action against a street railway company for injuries received by a traveler in a collision with a car, the evidence showed that the car was running at a rate of from 25 to 30 miles an hour, while the maximum speed was limited to eight miles an hour and the injury complained of was directly caused by the impact of the traveler's body against the ground, an instruction that if injuries to the traveler would have resulted though the car had been operated at a speed not in excess of eight miles per hour, then any rate of speed in excess of eight miles per hour was not the proximate cause of the collision and the company was not liable, was erroneous, for whatever additional injury to the traveler was due to the excess of speed was an injury caused by the company's negligence.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Paul Bresee and another against the Los Angeles Traction Company and another. From an order granting a new trial after verdict for defendants, they appeal. Affirmed.

E. E. Millikin, for appellants. J. L. Murphy, for respondents.

SHAW, J. This is an action by the plaintiffs to recover damages for injuries to the plaintiff Ada Bresee, alleged to have been caused by the negligence of the defendants. Paul Bresee is the husband of Ada Bresee, and is made a party solely for that reason. The wife will hereafter be referred to as the plaintiff. The plaintiff was riding in a two-seated canopy top carriage, driven by P. F. Bresee, along Hill street in the city of Los Angeles, at about 10 o'clock at night, and in crossing the track of the defendant company a car, under the management of the defendant Majonnier as motorman, ran against the carriage and threw the plaintiff with great force and violence to the ground, and thereby severely bruised and injured her. The particular negligence charged against the defendants in the complaint is that the car was being propelled along the street at an unlawful, excessive, and reckless speed. The answer pleads contributory negligence on the part of the plaintiff. The jury having returned a verdict for the defendants, the plaintiffs moved for a new trial on the minutes of the court, and in the notice of intention so to do set forth a number of grounds, embracing errors in rulings upon evidence and in giving and refusing of instructions, and that the evidence in several particulars was insufficient to sustain the verdict. The motion was granted, and from the order the defendants appeal.

The order granting the new trial is in the following words: "The motion of plaintiffs for new trial is granted on the ground that evidence relating to Dr. P. F. Bresee's habits of driving on occasions other than that of the accident was improperly admitted, opinion filed." It is contended by the defendants that the limitation expressed in the order excludes from our consideration the sufficiency of the evidence upon any and every point upon which it is conflicting. The order, it will be seen, does not expressly declare that the motion was denied, so far as it was based on other grounds than those mentioned therein, and, therefore, it does not affirmatively exclude the other grounds from our consideration. In Kauffman v. Maier, 94 Cal. 277, 29 Pac. 481, 18 L. R. A. 124, it was said upon this subject: "If the trial court in its order granting a new trial, excludes this as a ground of its action *by direct language*, and the record shows that there was a conflict of evidence," this court will not reexamine the evidence. (The italics are ours.) In that case the lower court did, by direct language, exclude the ground that the evidence was insufficient and declared that, so far as that ground was concerned, the motion was denied, and hence the decision is not a precedent for the present case, where this ground, if excluded at all, is excluded by implication only, and by force of the rule "expressio unius est exclusio alterius." We do not find it necessary to decide whether or not the order in question should be construed to prevent a review of the evidence by this court. It is the established rule of practice that such an order, even if it is expressly limited to a single ground, does not exclude from review on appeal any of the grounds upon which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict or decision. Kauffman v. Maier, supra; Thompson v. California Con. Co. (Cal. Sup.) 82 Pac. 367; Simon Newman Co. v. Lassing, 141 Cal. 175, 74 Pac. 761; Swett v. Gray, 141 Cal. 69, 74 Pac. 439; Siemsen v. Oakland, etc., Ry., 134 Cal. 496, 66 Pac. 672; People v. Castro, 133 Cal. 12, 65 Pac. 13; Newman v. Overland, etc., Co., 132 Cal. 74, 64 Pac. 110; Churchill v. Flournoy, 127 Cal. 362, 59 Pac. 791.

It is conceded on both sides that the plaintiff was a mere guest of P. F. Bresee at the time of the accident, and had neither the control of, nor the right to control, the driving of the carriage, and that under such circumstances the carelessness of the driver, P. F. Bresee, contributing to the injury, cannot be imputed to her so as to constitute contributory negligence on her part; that to sustain the defense of contributory negligence, the defendant must prove personal failure of plaintiff to exercise ordinary care. In the discussion of the evidence to show such contributory negligence of plaintiff, it will be assumed that P. F. Bresee did drive upon the track imprudently near the approaching car, and that his negligence contributed to the plaintiff's injury. The contention of the defendant on this point is that P. F. Bresee, was a careless driver with respect to the act of passing in front of cars while driving about the streets, that he had a disposition to cross tracks in front of and dangerously near to approaching cars, that she knew his character in that respect, and that, so knowing, she did not look to see if a car was approaching when she saw that he was about to cross the track, or, if she saw it, did not warn him, nor make an effort to have him desist from the attempt, or, that she did not make the extra effort in these particulars that ordinary care demanded of her, in view of her knowledge of his careless character, that if she had made such effort he would have been deterred from crossing and she would have been unhurt, and hence, that her own lack of care contributed to her injury.

The evidence on this question, referred to in the order granting a new trial, consisted of testimony to the effect that P. F. Bresee had been for many years almost constantly driving about the city with the same horse and carriage, that on five occasions prior to the accident he had been seen to drive in front of cars so near thereto that the witnesses testifying considered it carelessly and dangerously near, that he usually drove with a loose rein and held the reins loosely in one hand, frequently driving with his head down, or turned to the rear conversing with others riding with him, and that he did not seem to be observant of other cars or vehicles approaching him. This evidence was not introduced for the purpose of proving that P. F. Bresee negligently drove in front of the car on the occasion of the accident. The defendants relied on other evidence to prove that fact, and so stated to the court. The question of its admissibility for that purpose is, therefore, not involved, and this must be kept carefully in mind. It was offered and admitted expressly for the purpose of showing the character of P. F. Bresee as a careless driver. In that connection, and in order to make it relevant, it was further proposed by the defendants to show that plaintiff, at the time, knew, or should have known, his character in that respect. It is first to be noted that the cases on the subject of the introduction of such evidence of character or previous habits to prove the fact of negligent driving on the occasion of the accident are not applicable to the question now under consideration. Upon that question there is much confusion and considerable conflict in the authorities. We think the admissibility of the evidence, for the purposes for which it was here offered, depends upon different conditions and upon a difference in the issue to which it is directed.

The purpose of the evidence was to lay a foundation for the application of the familiar rule that the degree of care necessary to constitute the ordinary care required of a person upon any particular occasion, is measured by reference to the circumstances of danger and risk known to such person at the time. When the negligence of a person upon a particular occasion is in issue, it is usually, if not always, permissible to prove every fact, known to such person at the time, which would have a reasonable tendency to increase or decrease the risk and danger of a particular course of action. There are numerous instances of the application of this rule which are somewhat analogous to the case at bar, though we have not found any case precisely to the same point. Thus, vicious habits of an animal may be proven to show that it was negligence to allow it to go at large or unmuzzled, and particular exhibitions of such viciousness, of which the owner has knowledge, may be shown as evidence of the vicious disposition and of the neglect in issue. Judd v. Claremont, 66 N. H. 419, 23 Atl. 427; Lynch v. Richardson, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444; Muller v. McKesson, 73 N. Y. 199, 29 Am. Rep. 123; 1 Wigmore on Evidence, § 251. And lack of skill of an employé, and particular instances thereof, may be shown, coupled with knowledge thereof by the employer, to prove negligence of the employer in hiring or retaining him. Pittsburgh, etc., Co. v. Ruby, 38 Ind. 312, 10 Am. Rep. 111; Mich. Cent. R. R. v. Gilbert, 46 Mich. 179, 9 N. W. 243; Davis v. R. R. Co., 20 Mich. 120, 4 Am. Rep. 364; 1 Wigmore on Evidence, §§ 208, 250. Although the rule is, as conceded here, that a person who is injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver, in which he did not participate, yet such person is not absolved from all personal care, but is required to exercise ordinary care to avoid the injury. Dean v. Penn. R. R. Co., 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Brickell v. N. Y. Cent. R. R., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; Nesbit v. Garner, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; 1 Shearman & R. on Neg. § 66a. The character and habits of the driver of the carriage with respect to similar dangers, if known to the plaintiff, would naturally have some effect on her own conduct, on the particular occasion in keeping a lookout for the danger herself, in giving him warning, and in enjoining on him a prudent course, and in order to enable the jury to determine whether or not she exercised ordinary care in that respect, it was proper to give evidence of such character and habits, coupled with proof of knowledge thereof on her part. These observations and conclusions, however, are not applicable to the evidence of the driver's previous habits of driving with a loose rein, or of holding the reins loosely in one hand. These habits would not tend to prove either a careless habit of driving in front of cars too close for safety, or a disposition to do so. It was not claimed that the accident was attributable to his lack of control over the horse due to his manner of holding the reins. This evidence was not pertinent to any issue in the case and was improperly admitted. Although it was probably of slight importance, yet, in view of the large discretion committed to the judge of the trial court in the matter of granting a new trial, we cannot say it was not properly granted on that ground. We do not consider it necessary to consider the question of the sufficiency of the evidence to show plaintiff's knowledge of the driver's habits and character and of the particular instances of his negligence. Upon another trial the court can, if deemed best, direct the order of proof so that the evidence of such knowledge on her part shall be first introduced, and if no sufficient evidence to go to the jury is offered on that point, or in respect to some of the instances, the corresponding evidence thereof can be excluded.

At the request of the defendant the court instructed the jury with respect to the conduct of the motorman that: "It is not negligence on the part of such motorman to assume that a person will not attempt to cross the track in front of an approaching car, which is so near as to render a collision probable." The probability of a collision between a moving car and a vehicle crossing in front of it, depends largely upon the speed of the car, and the action of a careful person attempting to cross, in choosing the distance at which to cross in front of such car, will depend upon his knowledge, and means of knowledge, of the speed with which the car is approaching him. There was evidence strongly indicating, if not absolutely demonstrating, that the car in question at the time of the accident was running at a speed of at least 25 or 30 miles an hour. This was in the nighttime and upon a street in the thickly settled portion of the city. With the car going at such tremendous speed, it is not unlikely that persons about to cross the track might choose a place so near as to make collision probable, and yet, from their point of view, it might seem entirely reasonable and safe for them to cross at the place selected. Their failure to perceive the danger might be entirely due to the excessive speed of the car, and to their inability in the darkness to detect it and comprehend the shortness of the time required for the car to pass over the distance between it and the place selected for the crossing. The motorman must be assumed to know approximately the speed of his car. Under such circumstances, and while running at such excessive speed, it cannot be said as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would require him in that case to anticipate such probability reasonably arising from the consequences of his own gross carelessness. The court, therefore, should not have stated as a matter of law that the motorman, under the circumstances had a right to assume that persons would not cross dangerously near in front of him. It should have been left to the jury to say whether or not his speed was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

The court also, at the request of the defendants, instructed the jury with respect to the proximate cause of the injury, as follows: "If you believe from the evidence that said collision, and the injuries so sustained by said Ada Bresee, would have resulted, even had said car been operated at a rate of speed not in excess of eight miles per hour at the time the vehicle in question was turned to cross the railway tracks, then any rate of speed in excess of eight miles per hour that said car may have been running at said time, was not a proximate cause of said collision, and cannot render the defendants liable in this action." This instruction implies a fact not physically possible, namely, that an injury caused by being thrown with great force and violence from the carriage to the ground would have been as great if the force and violence had been less than it actually was, the other circumstances being precisely the same. The action of force and violence, other things being the same, is mechanical and absolute, and it is impossible that different degrees of force should produce the same results, where all other circumstances are precisely the same. So far as the mere fact of the collision was concerned, it may be that, although the speed of the car was more than eight miles an hour, it would have occurred had the speed been less. The injury complained of, however, was alleged to have been directly caused by the impact of the plaintiff's body against the ground, and its extent would necessarily depend upon the force of the impact, and that force would depend on the speed of the car. Any increase in the speed would, necessarily, add to the force and, consequently, to the extent of the injury. At the time this accident happened it was unlawful to propel a street car along the streets of the city at a rate exceeding eight miles an hour, and a speed in excess of that rate constituted negligence, as a matter of law, and rendered the party operating the car liable for any injury caused by such excessive rate. Whatever additional injury, therefore, was due to the excess of speed over eight miles an hour, was an injury caused by the defendants' negligence. The excess in the speed over that rate, an excess which is assumed by the instruction in question, must have been the direct cause of such additional injury. This additional injury from such negligence would render the defendants liable in the action, in the absence of plaintiff's contributory negligence. If the instruction had been limited to the happening of the collision alone, it might not have been objectionable in this respect, although even in that case it is metaphysical in form and would have tended to confuse the jury. But in the assertion that, under the circumstances stated, the excess of speed could not render the defendants liable in the action, it was erroneous. In either event it should not have been given. The order is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

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3 Cal. App. 142

In re REED'S ESTATE.

(Court of Appeal, Second District, California. Feb. 23, 1906. Rehearing Denied by Supreme Court May 31, 1906.)

1. EXECUTORS — SALES—POWER OF COURT—WHO MAY QUESTION.

The question of the power of the court to direct a new sale on setting aside a former executor's sale cannot be raised by the original purchaser; the executor making no objection.

2. SAME—SETTING ASIDE SALE.

Under Code Civ. Proc. § 1552, authorizing the court to set aside an executor's sale if an offer of 10 per cent. more in amount than that named in the return be made in writing by some responsible person, the court may set aside the sale on such an offer being made by the original purchaser.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Proceedings for the sale of real estate by Martin Winch, executor of Amanda W. Reed. From an order refusing to confirm the sale, the purchaser, Francis E. Crawford, appeals. Affirmed.

Wright, Bell & Ward, for appellant. Works, Lee & Works, Oscar A. Trippet, and John A. Goodrich, for respondent.

SMITH, J. This is an appeal from an order refusing to confirm a sale of real estate at which the appellant was purchaser. The sale was made under a power in the will of respondent's testatrix, authorizing the executor to sell and convey the property, real and personal, of the estate "upon such terms and conditions and for such prices as to him shall seem good."

The objections to the order urged by the appellant are: (1) That the sale was fair; (2) that the price was not disproportionate to the value of the property sold at the time of the sale; (3) that to justify the order proof of two conditions were essential, namely, that the price was insufficient at the time of the sale, and that a sum exceeding such bid at least 10 per cent. exclusive, etc., could be obtained; and (4) that the court had no power to direct a new sale. Of these points, the first is sustained by the recitals of the order, and may be admitted. As to the second, the preponderating evidence was no doubt in favor of appellant's contention; but there was some evidence to the contract, which it appears from the statements of the court was regarded by it as sufficient to reject the sale. As to the fourth, it is a matter with which we think the appellant was not concerned; and as the order was made upon the application of the executor, who is respondent, no objection can be urged to it.

The remaining objection is based upon an incorrect construction of the statute, which authorizes the court in its discretion to set aside the sale, "if an offer of 10 per cent. more in amount than that named in the return be made to the court, in writing, by a responsible person." Estate of Robinson, 142 Cal. 157, 75 Pac. 777. There is nothing in the decision in Estate of Leonis, 138 Cal. 194, 71 Pac. 171, inconsistent with this view; that case dealt with a different provision of the statute. In the present case, a written offer of 10 per cent. more than the amount named in the return was made by the appellant himself; and it was then in the discretion of the court, under the provision in question, either to accept such offer and confirm the sale, or to order a new sale. It is, indeed, claimed by the appellant that his bid was the result of a mistake. But this, we think, is immaterial; nor do we think that the court was bound to accept the offer. It may be added, however, that the appellant's bid was increased by 10 per cent. by another written offer by responsible bidder to purchase for the sum of $36,300; and we are of opinion, notwithstanding the objections of appellant—which seem to have had some weight with the court below—that the court might have accepted this bid. The objections referred to are, that under the terms of the sale to Crawford the deed was to contain certain "conditions, covenants and restrictions" as to modes of building, etc., to operate for 10 years, and that the bid of $36,300 was upon the condition that the purchaser should be so far relieved from the conditions imposed on the appellant as to permit them to erect an opera house as described in the bid. The executor expressed his acquiescence in the proposed change, which, it appears, would have been equally beneficial to the estate; and we are of the opinion that the provisions of section 1552, Code Civ. Proc., were substantially complied with.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 338

ALCATRAZ MASONIC HALL ASS'N v. UNITED STATES FIDELITY & GUARANTY CO.

(Court of Appeal, First District, California. March 28, 1906.)

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—CHANGE IN OBLIGATION.

Under Civ. Code, § 2819, exonerating a guarantor if by any act of the creditor the original obligation is altered in any material respect, a surety in a bond conditioned on performance by a contractor of a building contract for $16,300, is released from liability on the owner and contractor changing the plans and increasing the cost $315.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 162–165.]

2. SAME—EXTENT OF LIABILITY.

Since a contractor, under contract for the construction of a building and the delivery thereof free from all liens, is liable only for enforceable liens, a surety in a bond conditioned on the performance of the contract is liable only for enforceable liens.

3. SAME.

A contract for the construction of a building required the owner to pay 75 per cent. of the contract price in installments, and the balance ($4,075) 35 days after the acceptance of the work. A surety executed a bond in the sum of $4,075, conditioned on the contractor delivering the building free from liens. *Held* that, unless the owner was compelled to pay a greater sum than $4,075 to free the building from valid liens, the surety was not liable; it having the right to have this amount applied toward the satisfaction of valid claims.

4. SAME.

A surety in a bond conditioned on a contractor, under contract for the construction of a building, performing his contract and delivering the building free from liens, is not liable for the expenses incurred by the owner in suits for the enforcement of liens, where under the contract he was not required to pay 25 per cent. of the contract price until 35 days after the completion of the building, during which time he could ascertain the lien claimants and pay them from the sum unpaid.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the Alcatraz Masonic Hall Association against the United States Fidelity & Guaranty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Snook & Church, for appellant. Campbell, Metson & Campbell, for respondent.

HARRISON, P. J., The plaintiff entered into a contract with one L. U. Grant, October 19, 1899, for the construction by the latter of a building upon its land at the agreed price of $16,300, and at the same time the said Grant as principal and the defendant as surety executed to the plaintiff a bond of indemnity in the sum of $4,075, conditioned that Grant should faithfully perform the said contract and deliver the building to the plaintiff within the contract time for its completion, free from all liens, demands, and claims, and should pay to the persons performing labor or furnishing materials for the construction of the building the value thereof.

The contract provided that the building should be completed within 150 working days from the date thereof, and that the payment of the contract price should be made in installments as the work progressed, in sums equal to 75 per cent. of the value of the work done and materials furnished, as estimated on the 1st and 15th days of each month, and the balance, to wit, 25 per cent. of the contract price of $16,300 ($4,075) 35 days after the completion and acceptance of the work. After the execution and recording of the contract the plaintiff and Grant made certain alterations and changes therein, by which the cost of the building was increased in the sum of $315, and agreed that the said additional cost should be paid at the same times and in the same manner as payments under the original contract. During the progress of the work payments were made to Grant upon certificates of the architect on account of installments due on the contract, amounting to $12,138.85. Before the building was completed Grant abandoned the contract, and the plaintiff completed the construction of the building and expended therefor $641.23. After its completion certain parties, who had furnished materials and performed labor for Grant in its construction, filed claims of lien therefor, amounting to about $7,500, and subsequently brought actions in the superior court for their enforcement. These actions were, by an order of court, consolidated, and the plaintiff filed its answer thereto, alleging that the building was not subject to liens exceeding in the aggregate $3,834.92, and offering to deposit that sum in court for their satisfaction. Upon the trial of the cause the court found that that was the amount due from the plaintiff to Grant upon the contract at the commencement of the action; and upon its order the sum was deposited in court for the said claimants, and the court thereupon rendered its judgment that the said liens were thereby fully satisfied. In this litigation the plaintiff employed certain attorneys, for whose services he paid $500, and incurred certain costs, amounting to $27. The present action is brought to recover these amounts from the defendant. A demurrer to the complaint was sustained, and from the judgment entered thereon the plaintiff has appealed.

The bond of the defendant makes no reference to the provisions of section 1203, Code of Civil Procedure, and the objection to its validity based upon the rulings of the Supreme Court in reference to that section are inapplicable. It is unnecessary to consider the effect of the provision in the bond for the payment by Grant to the laborers and materialmen, since the complaint herein is limited to the rights of the plaintiff alone. The condition of the defendant's obligation is the failure of Grant to faithfully perform his contract and deliver the building to the plaintiff free from all liens, claims, and demands. Although it is alleged that Grant did not complete the building, but abandoned his contract when it was uncompleted, and the plaintiff was compelled to complete the same, it does not show that it has sustained any damage thereby, or make any claim against the defendant therefor. The total amount of the contract price for the building and for the extra work is $16,615. Deducting from this $12,138.85 paid to Grant upon the certificates of the architect as the work progressed, and $3,834.92 determined by the court to be in the plaintiff's hands applicable for the discharge of the liens upon the building, there remains $641.23, the amount paid by the plaintiff for the completion of the building, thus showing that the plaintiff sustained no pecuniary damage by reason of Grant's failure to complete his contract. The basis of the defendant's obligation which the plaintiff presents in support of its right of action is the failure of Grant to deliver the building free from liens, and upon this point it alleges that upon the completion of the building the sum of $3,834.92 was chargeable against the building for liens and claims thereon; and it also alleges that upon the trial of the action to enforce the liens the court found that the lien claimants were entitled to this amount of money, and that upon depositing that amount in court for the discharge of said liens the court rendered its judgment that the liens were fully satisfied.

1. The alteration of the contract as set forth in the complaint had the effect to release the surety from its contract of indemnity. There is no allegation in the complaint supporting the suggestion in the brief of the appellant that the original contract contained a provision authorizing changes to be made therein; nor is it alleged that the changes were made with the consent of the defendant. For the purpose of determining the sufficiency of the complaint as against the demurrer we can consider only matters therein set forth. There is no principal of law better settled than that a surety has the right to stand upon the very terms of his contract, and that any alteration in the terms of the principal's contract, made by the parties thereto without his assent, will have the effect to discharge him from all liability. By such alteration the contract ceases to be the one for which he became surety, and the extent of such alteration, or whether his liability will be increased or diminished thereby, is immaterial. Having the right to determine in the first instance whether he will become such surety or not, he has the right to be consulted upon the terms proposed for any variation of his obligation, and if made otherwise his obligation is extinguished. The principle of this rule is discussed in Brandt on Suretyship, § 106. See, also, Miller v. Stewart, 9 Wheat. (U. S.) 680, 6 L. Ed. 189; Bethune v. Dozier, 10 Ga. 235. In this state the Legislature has

declared in section 2819, Civ. Code, that if by any act of the creditor without his consent the original obligation of the principal is altered in any respect he is exonerated. That the alterations in the contract agreed upon between the plaintiff and Grant had the effect to alter the obligation of the surety is apparent. A greater length of time was thereby required within which to finish the building, and a greater amount of labor and of expenditure incident thereto than that for which the defendant had agreed to indemnify the plaintiff. Because of these alterations the defendant ceased to be liable on its contract. Judah v. Zimmerman, 22 Ind. 388; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; Eldridge v. Fuhr, 59 Mo. App. 44; Beers v. Wolff, 116 Mo. 179, 22 S. W. 620. The expression found in the opinions in some cases that the surety is discharged by any "material" alteration of the contract has reference to such an alteration as will merely vary the form of the contract without changing its substance, but does not include such an alteration as will increase the obligation for which the indemnity was given. In O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409, the increased cost of the alteration was $25, and in Beers v. Wolff, 116 Mo. 179, 22 S. W. 620, where the contract price was $31,000, the cost of the alterations was $231. It cannot be said that an alteration which cost upwards of $300, as in the present case, is not material. Nor can the court say that if this additional cost had been included in the original contract the defendant would have been willing to bind itself as surety for its performance.

2. The contract with the plaintiff on the part of Grant to deliver the building free from all liens, claims, and demands is to be construed as limited to such liens and demands as can be enforced against the building, and not as including claims of lien which are unauthorized or invalid, or for which the claimants have no right of recovery; and the obligation of the defendant as surety for Grant has the same limitation. Unless the plaintiff has been compelled to pay a greater sum of money to free the building from the liens than the unpaid amount of the contract price for its construction it has suffered no damage. By its contract with Grant it agreed to retain from him the sum of $4,075—the exact amount of the defendant's agreement of indemnity—until 35 days after the completion of the building. This was an additional security in its hands for the faithful performance by Grant of his contract, including the delivery of the building free from liens, and the defendant was entitled to have this amount of money applied by the plaintiff toward the satisfaction of the claims of lien for which it had been retained. Under the well-established rule in this state, if the "owner" in a building contract observes the conditions of the contract on his part to be performed, the amount of liens against his property cannot exceed the amount of the unpaid portion of the price agreed upon for constructing the building; and in the present case when the building was completed the plaintiff had in its hands the full amount for which liens were afterward found to be valid charges against the building. The fact that liens for a greater amount were claimed and filed, and for the enforcement of which actions were brought did not in any respect enlarge the liability of the defendant. The record does not disclose the nature of these claims of lien, or the circumstances under which they were filed, or for which the claims were made; but, as the court found that the amount chargeable against the building was no greater than the unpaid amount of the contract price, it must be assumed that for any excess of that price these claims had no valid foundation. It was therefore within the power of the plaintiff to satisfy the amount of all the valid liens against its building by appropriating therefor the amount in its hands; and in view of the rights of the defendant as a surety, and the plaintiff's obligation towards it, it was the duty of the plaintiff to do so before it could call upon the defendant for any relief. Good faith towards the defendant required it to discharge the liens with the money then held by it for that purpose. The contract of the defendant did not extend to or include any trouble or expense which the plaintiff might incur in the performance of its own duty. Before the expiration of the 35 days from the completion of the building the plaintiff knew or could have ascertained the amount of liens claimed thereon; and as it knew that the amount of the unpaid portion of the contract price was the limit for which any liens could be enforced it was in its power to satisfy these liens by appropriating the money in its hands therefor. If, instead of so doing, it chose to await actions for their recovery, and thereby incur additional expense, it was an act of its own choosing for which the defendant is in no wise responsible. Whatever expense was incurred by reason of the attempt of the claimants to enforce liens to which they were not entitled is not embraced in the defendant's contract of indemnity, whether such attempt was to enforce liens for a greater amount than they were entitled to recover, or liens for which they had no claim whatever. The plaintiff therefore is not entitled to recover from the defendant for the services of its attorneys in defending these actions, or the expenses incurred therein, and the court properly sustained the demurrer to the complaint.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

3 Cal. App. 325

MILLER v. DONOVAN (ENGLE, Intervener).

(Court of Appeal, Third District, California. March 23, 1906.)

1. PUBLIC LANDS—CONTESTS—STATEMENT OF GROUNDS—COMPLAINT AND AFFIDAVIT—SUFFICIENCY.

Under Pol. Code, § 3414, providing that when a contest arises concerning the approval of a survey or location of public lands and when either party demands a trial in the courts of the state, the surveyor general must make an order referring the contest, and section 3415, providing that after such order is made "either party may bring an action in the superior court of the county wherein the land is situated to determine the conflict, and the production of a certified copy of the entry made by either the surveyor general or the register gives the court full and complete jurisdiction to hear and determine the action," a contestant is not required to file a statement of the specific grounds of contest with the surveyor general, a complaint setting forth plaintiff's application and affidavit and averring that he filed with such officer his written protest against the application and certificate of purchase issued to defendant, demanded that the conflicting claims of plaintiff and defendant be referred to the superior court, that said officer declared a contest to exist concerning the right to purchase the land, and that he thereupon made an entry and order referring such contest to said court, was sufficient.

2. SAME—CERTIFICATE OF PURCHASE—EVIDENCE—CONFLICT OF STATUTES.

Contests arising under Pol. Code, § 3414, involving conflicting claims to public lands, are governed by Pol. Code, § 3514, relating to public lands of the state and their disposition, amended in 1874 (Code Amendments 1873–74, p. 52), and making a certificate of purchase prima facie evidence of title, and not by Code Civ. Proc. § 1925, making such certificate primary evidence of title; the former section having been amended since the enactment of the latter section, and being the latest expression of the legislative will.

3. STATUTES—CONSTRUCTION.

It is a cardinal rule of statutory construction that specific provisions on a particular subject control general provisions for the class to which the subject belongs.

4. PUBLIC LANDS—CONTEST—PAYMENT—TITLE—WHEN VESTED.

Under Pol. Code, § 3414, relating to the disposal of contests involving title to public lands, making no distinction between certificates of purchase on which there has been partial payment and certificates where full payment has been made, and providing that when, in the judgment of the officer before whom the contest is made, a question of law is involved, or when either party demands a trial in the courts of the state, he (the officer) must make an order referring the contest to the district court, etc.; section 3519, providing that patent will issue whenever final payment has been made for any tract of land the selection of which has been accepted and approved by the United States authorities, etc.; and section 3521, providing that no patent must issue until after the expiration of one year from the date of approval of the survey or location by the surveyor general, nor until the lands are relinquished to the state by authority of the General Land Office at Washington—the legal title remains in the state until the patent issues, and a contest may arise in the state land office as to the right of the holder of a certificate of purchase, whether the original applicant or his assignee, so long as such certificate is outstanding, or at least until the holder thereof is entitled to call for his patent; there being no difference in the effect of the certificate upon the title whether a part or the whole of the purchase price is first paid.

5. SAME—APPLICATION FOR PURCHASE—AFFIDAVIT—REQUIREMENTS.

The affidavit of an applicant for the purchase of state lands, must set forth all the requirements of the statute, and the facts stated must be true.

6. SAME—COMPLAINT—FRAUD—NECESSITY FOR ALLEGING.

One instituting a contest involving title to public lands need not allege or prove previous knowledge or notice, on the part of an assignee of an applicant for the land intervening in the action, of any fraud in procuring his assignor's certificate, as such assignee has no equities entitling him to greater rights than his assignor.

7. EVIDENCE—BURDEN OF PROOF—FAILURE TO SUSTAIN.

When a party alleges a material fact, and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 122.]

Appeal from Superior Court, Plumas County; E. P. McDaniel, Judge.

Action by W. J. Miller against Louis Donovan; J. M. Engle, intervener. Judgment for plaintiff, and intervener appeals. Affirmed.

Goodwin & Moncur and J. D. Goodwin, for appellant. W. A. Gett and L. N. Peter, for respondent.

CHIPMAN, P. J. This is an action commenced under sections 3414 and 3415 of the Political Code to determine the right to purchase certain lieu lands as indemnity for school land upon a contest, between plaintiff and defendant, Donovan, on reference by the Surveyor General as register of the State Land Office, to the superior court of Plumas county. J. M. Engle by leave of court filed a complaint in intervention as the assignee of defendant's certificate of purchase. Plaintiff moved to strike from the files the complaint in intervention, and also filed a general demurrer to the same. The motion was denied, and the demurrer was overruled. The default of defendant for failure to appear was duly entered, and intervener, Engle, made answer. Judgment was entered in favor of plaintiff and against the intervener, and the latter appeals from the judgment on bill of exceptions.

Plaintiff has moved the court to dismiss the appeal on the grounds: First, that appellant is not a party aggrieved within the meaning of section 938 of the Code of Civil Procedure; second, that this court has no appellate jurisdiction in actions brought under section 3414 of the Political Code, for the reason that such actions were special. Upon this second point we understand that the jurisdiction of the appellate court is questioned only as to the intervener, and as to him because he was not a party to the contest in the land office. The view we have taken of the case does not require that we should decide the motion to dismiss.

1. Appellant contends that, under section 3414 of the Political Code, the contestant

must file a statement of the specific grounds of contest with the Surveyor General. The section makes no such requirement. A contest arises when two persons make separate applications to purchase the same state land, if the land is still open to location; and "when either party demands a trial in the courts of the state, he [the surveyor general as ex-officio register of the state land office] must make an order referring the contest"; and section 3415 provides that "after such order is made either party may bring an action in the superior court of the county in which the land is situated, to determine the conflict, and the production of a certified copy of the entry, made by either the Surveyor General or the register, gives the court full and complete jurisdiction to hear and determine the action." The complaint sets forth plaintiff's application and affidavit, and avers that he filed with this officer his written protest against the application of and certificate of purchase issued to defendant, and demanded that the conflicting claims of plaintiff and defendant be referred to the superior court of Plumas county, and that said officer declared a contest to exist concerning the right to purchase said land, and that he thereupon duly made and entered an order referring said contest to said court. These averments are supported by the evidence, and are sufficient.

2. It is next contended that the certificate held by intervener, Engle, assignee of defendant, Donovan, is not the subject of a contest in the state land office, chiefly for the reason that Donovan had paid in full for the land and his certificate is equivalent to a patent and must be treated the same as if patent had issued. It appears that the land involved is timber land, not suitable for cultivation. Defendant, Donovan, applied to purchase on October 14, 1902, and in April, 1903, one Perrin and intervener, Engle, filed their affidavit in the office of the Surveyor General stating that the land was unfit for cultivation. On May 15, 1903, Donovan's application was approved, and on May 26, 1903, the county treasurer received a check for payment in full for the land, and on June 1, 1903, a certificate of purchase was issued in the name of Donovan reciting payment in full by him and stating that "on surrendering this certificate to the state of California and after the said lands have been confirmed to the state, the said Louis Donovan, or his assigns, shall be entitled to receive a patent for the same." Intervener introduced a deed dated June 8, 1903, purporting to have been executed and acknowledged on that day by Donovan and indorsed as recorded at Donovan's request on June 12, 1903, conveying the land to intervener. The county treasurer testified that he did not know Donovan and that no man representing himself by that name came to his office or offered to pay for the land, and that payment was made by the check of F. A. Hyde, a land attorney. Plaintiff's application and affidavit were filed in the office of the Surveyor General on July 24, 1903, numbered 4323, but approval was refused, and on August 8, 1903, a contest was declared to exist, and the order of reference to the superior court was duly made, and on September 4, 1903, plaintiff's complaint was filed. The court found, on sufficient evidence, that plaintiff was a qualified entryman; that his application and affidavit conformed in all respects to the requirements of the law, and that the facts therein set forth were true. The only evidence introduced by intervener was the original certificate of purchase issued to Donovan and the deed from Donovan to intervener, with the indorsements showing recordation in Plumas county on June 12, 1903. Appellant cites Somo v. Oliver, 52 Cal. 378 (approved in McFaul v. Pfankuch, 98 Cal. 402, 33 Pac. 397), to the effect that a contest cannot be made before the Surveyor General in respect to the right to purchase land for which a patent has been issued to one of the parties. McCabe v. Goodwin, 106 Cal. 490, 39 Pac. 941, is cited, where it was said: "When a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of title." It is claimed that this is the doctrine relative to government entries of public land, as shown in Simmons v. Wagner, 101 U. S. 260, 25 L. Ed. 910; Barney v. Dolph, 97 U. S. 652, 24 L. Ed. 1063; Stark v. Starr, 73 U. S. 402, 18 L. Ed. 925; McNee v. Donahue, 76 Cal. 506, 18 Pac. 438. Furthermore, that the certificate is made primary evidence of title by section 1925 of the Code of Civil Procedure. It is further claimed that contests arising under section 3414 of the Political Code are based on the assumption that title to the contested land still remains in the state, citing Lobree v. Mullan, 70 Cal. 152, 11 Pac. 685; Bode v. Trimmer, 82 Cal. 516, 23 Pac. 187.

As to the application of section 1925, Code Civ. Proc., we have this to say: Section 3514 of the Political Code relates to the public lands of this state and their disposition, and is found in the title so designated. The section, as amended in 1874 (Code Amendments 1873–74, p. 52), makes a certificate of purchase prima facie evidence of title. Section 4480 of the Political Code requires that the "four Codes must be construed (except as in the next two sections provided) as though all such Codes had been passed at the same moment of time, and were parts of the same statute." But section 4481 provides that "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which the subject belongs. Endlich on Interpretations of Statutes, § 399. It seems to us that under section 4481, the section of the Code of Civil

Procedure (1925) relied upon by appellant does not appply; and besides, section 3514 of the Political Code was amended since section 1925 of the Civil Procedure was enacted, and is the latest expression of the legislative will on the particular subject. Section 3414 makes no distinction between certificates of purchase on which there has been partial payment and certificates where full payment has been made. Donovan's certificate shows that patent will not issue until after the "said lands have been confirmed to the state," and also "after having in all other respects (other than paying for the lands) complied with the requirements of the laws providing for the sale of said lands." Section 3519 of the Political Code provides that patent will issue "whenever final payment has been made for any tract of land, the selection of which has been accepted and approved by the United States authorities," etc., but, under section 3521 of the same Code, "no patent must issue until after the expiration of one year from the date of approval of the survey or location by the Surveyor General, nor until the lands are relinquished to the state by authority of the General Land Office at Washington." The section does not require relinquishment of locations of school "land in place" but the location here is for lieu and not for school lands in place. By the terms of the law and by the terms of the Donovan certificate as the facts appear, Donovan was not entitled to a patent when the action was commenced. The government has not, so far as appears, relinquished and may never relinquish these lands.

We do not understand the case of McCabe v. Goodwin, supra, to hold that the state is precluded from entertaining a contest or from ordering a reference under section 3414 because one of the applicants has paid in full at the time he made his application. At page 491 it is stated: "If any other interested person would show that the state is not bound to comply with such contract [the certificate as evidence of a contract to convey (Taylor v. Weston, 77 Cal. 540)], he is authorized by section 3414 of the Political Code to procure a judicial determination of this question by having previously instituted a contest in the Surveyor General's office, and causing a transfer to the superior court." The case seems to proceed upon the assumption that McCabe had a standing in court sufficient to enable him to institute the contest, and what was said as to the effect of the certificate held by Goodwin went to his right to the land, because the original applicant had fully complied with the law and was entitled to patent for that reason, and not solely because the certificate had issued and full payment had been made. We do not think it should be held that an entryman can shield himself from the effects of an entry made in violation of the statute by simply paying for the land. The postponement of the patent for one year may be intended to give opportunity to prevent fraudulent locations from being consummated or to give other locators an opportunity to file applications and present their superior claims to the land. There are certain requirements of the law which have been held many times to be essential to a valid application for location; and the policy of the law is well established to be that these requirements must be shown to have been complied with. It was said in Taylor v. Weston, 77 Cal. 534, 20 Pac. 62, that "this policy would be defeated if persons who falsely pretend to be of the class entitled to purchase could, after deceiving the land department into giving them their preliminary papers, shut off investigation by immediately assigning such preliminary papers to some other party." And we say, further, that investigation cannot be shut off by immediately paying in full for the land. When patent issues the state parts with its title, and not until then. With the rights of parties holding patent we are not now concerned. The cases all hold that the title remains in the state after certificate issues, and the very object of the reference, in case of contest, is to determine to whom the state title should go. This is true of certificates where full payment has been made equally with certificates where only partial payment has been made. Intervener, Engle, stood in the shoes of his assignor, Donovan, and occupied no better or different relation to the lands or to the state than did Donovan. See Taylor v. Weston, supra, for a full discussion of the rights of an assignee of a certificate of purchase and as to the office of such certificate.

We cannot subscribe to the doctrine that the state in effect issues two different and distinct certificates—one, where part payment is made, being only prima facie evidence of title, and the other, where full payment is made, being primary evidence of title and equivalent to patent. We cannot agree with the apparent position of applicant that the certificate of purchase issued by the state is different in cases of full payment and partial payment, or, if the same, have a different effect in passing title. As already said, section 3414 contemplates but one certificate and recognizes no difference in its effect upon the title, whether but 20 per cent. of the purchase price is first paid or the full amount thereof. The certificate is assignable alike in both cases and carries with it like rights to the assignee, but in neither case is it equivalent to a patent. Our view is that the legal title remains in the state until the patent issues, and that a contest may arise as to the right of the holder of a certificate of purchase, whether the original applicant or his assignee, so long as this certificate is outstanding, or at least until the holder is entitled to call for his patent. And such contest may be instituted by a person who connects himself with the paramount source of the title, as in this case. The analogy between such a certificate as we have here and a final receipt issued by the general government, upon final proof and payment, is not complete. Our law furnishes the means for a contestant to connect himself with the paramount source of title and thus clothe himself with the right given by the statute to have his claim adjudicated by the courts, while no such means are given by the United States law in the entry of land. The rule, therefore, laid down in the cases cited by appellant touching the effect of the final receipt upon entry of public land is not apposite.

3. It follows from what has been said that this is the ordinary and familiar case, often before the Supreme Court, of contest between two claimants to state land, one of whom, plaintiff, as in this case, has by pleading and proof brought himself clearly within the law, and the other of whom, intervener, has pleaded what we may concede to be ample to show the right of Donovan, through whom he claims, to purchase the land in question, but has wholly failed to make proof of the facts alleged and denied. Intervener has submitted no proof except the possession of a certificate of purchase and a deed from Donovan, and contends that no such proof was necessary. He plants himself on the proposition that the register of the state land office had no authority or jurisdiction to entertain a contest of Donovan's certificate, and hence the court was without jurisdiction to deal with it. Consistently with this theory intervener abstained from supporting Donovan's application by proof of the facts set forth in his application and affidavit. With equal consistency, holding as we do, it was, in our view of the case, incumbent upon intervener, as it would have been upon Donovan if the sole defendant, to sustain by evidence the averments of his application and affidavit, for, as already said, he stood in Donovan's shoes. The law is well settled, and to the point citations are not called for, that in the purchase of state lands the affidavit must set forth all the requirements of the statute, and the facts stated must be true. In case of a contest in the courts each party is an actor and must stand or fall upon the truth of his own statements, and these statements must embrace all the statutory prerequisites. Neither party gains anything by simply defeating his adversary, but must himself establish a clear right before judgment will pass in his favor. The learned counsel for appellant have had too long experience in cases of this character to controvert these well-established rules, and we do not understand that they now question their correctness; but they stoutly contend, erroneously as we think, that they do not apply to this case. It was not necessary for plaintiff to allege or prove previous knowledge or notice on the part of intervener of any fraud in procuring the certificate by Donovan. Intervener, as assignee, had no equities entitling him to greater rights than his assignor. This is fully shown in the case of Taylor v. Weston, supra, and the principle was applied in Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145; People v. Swift, 96 Cal. 165, 31 Pac. 16.

4. It is complained that none of the material findings are supported by the evidence. The specifications are directed mainly to the findings negativing the facts set forth in the complaint in intervention and embraced in Donovan's application and affidavit. As there was an utter failure to establish these facts by evidence, which were denied by plaintiff, it was proper for the court to negative their existence by findings. When a party alleges a material fact, and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence. The court found that Donovan made his location for the sole use and benefit of Engle, the intervener, and that Engle paid no consideration to Donovan for said land. There was no evidence submitted by Engle of payment to any one except such as might be presumed from the fact that Donovan conveyed the land to Engle by deed which recited a consideration of $2,600, and there was no evidence of nonpayment by Engle offered by plaintiff. We cannot see that the judgment necessarily rests in any degree upon these findings. The real question before the court, first to be determined, was whether either plaintiff or defendant, Donovan, was entitled to the land, and, if either, which one. Had Donovan's claim been fully established, and had the court ordered that patent issue to him, Donovan's patent would have fed his deed to Engle. The real issue was Donovan's right to a patent, not whether Engle paid a consideration.

We have endeavored to cover all the questions presented by the appeal, and have reached the conclusion that the judgment should be affirmed; and it is so ordered.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 335

SHAFER v. SLOAN.

(Court of Appeal, Second District, California. March 27, 1906.)

1. SALES—CONTRACT FOR SALE OF BUSINESS—CONSTRUCTION.

A contract for the sale of "all my right, title, and interest in and to the goods, wares, and merchandise in my storeroom," etc., except certain articles specified, coupled with an agreement that the seller should not enter into or engage in the business or occupation of second-hand dealer in the same town so long as the buyer should continue in business, indicated upon its face the sale of a business.

2. Evidence—Oral Evidence to Explain Written Contract.

Under Civ. Code, § 1647, providing that a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates, oral proof was properly admitted in explanation of the circumstances under which a contract for the sale of the seller's right, title, and interest in and to goods, wares, and merchandise in his storeroom, coupled with an agreement that the seller would not engage in the business of secondhand dealer in the town so long as the buyer should continue in business was made, to show that the buyer was seeking to purchase an established secondhand store business in the town, and that the contract was for the sale of such business.

3. Good Will—Contract for Sale of Business—Construction.

The obvious intention of a contract for the sale of a business, coupled with an agreement by the seller not to engage in the business in the same town so long as the buyer continues in business, is to sell the good will of the business.

4. Same—Validity—Statutory Provisions.

Under Civ. Code, § 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer thereof, or any person deriving title to the good will from him, carries on a business therein, the fact that a contract for the sale of a business is in excess of the rights conferred by the section, in that it undertakes to restrict the right to engage in business so long as the buyer continues therein, omitting the word "similar," does not render the contract void, but only to the extent to which it attempts to enlarge the rights beyond the statute.

5. Same—Breach—Damages—Pleading and Proof.

In an action for breach of a contract for the sale of the good will of a business providing for the payment by the seller, on breach of the contract, of a certain sum to the purchaser, it is unnecessary to plead or prove the impracticability of fixing the damages.

6. Damages — Penalty — Liquidated Damages.

Where it does not clearly appear that the penalty inserted in a contract for the sale of a business and the good will thereof was intended as security for the payment of actual damages in case of breach of contract, the court will regard the amount as liquidated damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 154–160.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by John Shafer against J. G. Sloan. Judgment for plaintiff. Defendant appeals. Affirmed.

Henry M. Willis, for appellant. Byron Waters, for respondent.

ALLEN, J. Action for damages. Findings and judgment in favor of plaintiff for $500, from which defendant appeals. The complaint, the allegations of which were by the trial court found to be true, alleges the sale by defendant and purchase by plaintiff in 1886 of a stock of secondhand furniture, together with the good will, under a written agreement that defendant should not engage in the occupation of keeping a secondhand store in the town of San Bernardino so long as plaintiff should continue in such business, upon default of which defendant should pay to plaintiff the sum of $500. It is further alleged that plaintiff is, and ever since such sale has been, engaged in such business. That defendant in 1903 entered into and engaged in the secondhand business in said town, to plaintiff's damage in the sum of $500.

The principal contention of appellant is that the good will was not sold under the terms of the written contract, which only specified that the sale was of "all my right, title and interest in and to the goods, wares and merchandise in my storeroom," etc., excepting certain articles specified, coupled with an agreement that the seller should not enter into or engage in the business or occupation of secondhand dealer in the town of San Bernardino so long as the buyer should continue in business. We are of opinion that, by a fair interpretation of this entire agreement, it indicates upon its face the sale of a business. The sale of the contents of a store amounts to a sale of the store. The subsequent provision by which the seller agrees not to engage in the secondhand business accentuates the correctness of this interpretation. Section 1647, Civ. Code, provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Under this provision, if any uncertainty exists as to the intent, the oral proof adduced upon the trial—and which, in our opinion, was properly admitted—demonstrated that the defendant was seeking to purchase an established second-hand store business in the town of San Bernardino. If, then, the contract related to the sale of a business, such contract has received a construction in Streeter v. Rush, 25 Cal. 68, in which it is held that the obvious intention of such contract is to sell the good will of such business. It is true the contract is in excess of the rights conferred by section 1674, Civil Code, in that it undertakes to restrict the right to engage in business so long as the party of the first part may continue in business, omitting the words "similar business" found in the section. This, however, would not render the contract thereby void, but only to the extent to which it attempted to enlarge the rights beyond the statute. Brown v. Kling, 101 Cal. 299, 35 Pac. 995. "The damages for breach of contract for the purchase of the good will of an established trade or business are so absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases." Potter v. Ahrens, 110 Cal. 681, 43 Pac. 389. The contract, therefore, being of such character, it was unnecessary to plead or prove the impracticability of fixing the damages, which is the rule when contracts are not of such obvious character. Long Beach, etc., v. Dodge, 135 Cal. 405, 67 Pac. 499. It not appearing clearly that the penalty inserted was intended as security for the payment of actual damages, the court will regard the amount as liquidated damages. Streeter v. Rush, supra.

We think there was no error in the admission of the evidence excepted to, which was all received in explanation of the circumstances under which the contract was made and in relation to the subject-matter of the contract, and the tendency of which was not to create a new contract or to enlarge the terms of the original written contract. There is no point made upon this appeal, nor in the court below, of the insufficiency of the complaint by reason of the absence of the allegation of nonpayment of the damages, and the same is therefore not considered.

We perceive no error in the record, and the judgment is ordered affirmed.

I concur: GRAY, P. J.

I concur, on the authority of Streeter v. Rush, 25 Cal. 67, cited in the opinion: SMITH, J.

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3 Cal. App. 345

SYVERTSON v. BUTLER et al.

(Court of Appeal, Second District, California. March 28, 1906.)

1. PLEADING — CROSS-COMPLAINT — PERMISSION OF COURT.

Under Code Civ. Proc. § 442, providing that, whenever defendant seeks affirmative relief against any party affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint at the same time, or by permission of the court subsequently, a cross-complaint to which no objection is raised by the original plaintiff, and as to which a demurrer by the defendants therein is overruled, will be regarded as on file by consent of the court, although no formal permission to file the cross-complaint was granted.

2. APPEAL—FILING CROSS-COMPLAINT—DISCRETION OF COURT.

Under Code Civ. Proc. § 389, declaring that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in and may order amended and supplemental pleadings or a cross-complaint to be filed, etc., the action of the court in permitting defendant, in an action concerning real property, to file a cross-complaint against persons not originally parties, but who claimed an interest in the land, was an exercise of discretion which will not be interfered with on appeal.

Appeal from Superior Court, Los Angeles County, D. K. Trask, Judge.

Action by F. J. Syvertson against Mary A. Butler and others, in which defendant Butler filed a cross-complaint against Amelia Delonee and others. From a judgment in favor of cross-complaint, Pearl Mecartney and another, as executrices of the will of Amos Mecartney, deceased, defendants to the cross-complaint, appeal. Affirmed.

Pringle & Pringle and Lawler, Allen & Van Dyke, for appellants. O. B. Carter, for respondent.

ALLEN, J. Appeal by defendants Pearl and Meda Mecartney, executrices of the estate of A. Mecartney, deceased, from a judgment rendered in favor of defendant Butler, upon a cross-complaint, against defendants appellants. The plaintiff commenced his action against defendant Butler and others, alleging his ownership and seisin in fee of certain described real estate. Defendant Butler answered, disclaiming any interest in the premises set out in the complaint, other than as to a single lot described, as to which she averred ownership and denied that plaintiff had any estate or interest therein. At the time of filing answer, defendant Butler filed a cross-complaint against plaintiff, appellants, and one Carter, administrator of the estate of Butler, deceased. A copy of the cross-complaint was served upon the attorney of plaintiff, and the summons, with a copy of the cross-complaint, upon the other defendants to the cross-complaint. All defendants to the cross-complaint, other than Pearl and Meda Mecartney, the executrices, made default. They demurred to the cross-complaint upon various grounds, among which was that the court had no jurisdiction of the person of said defendants, in that they were not parties to the original complaint, and that it does not appear that their presence is necessary to a complete determination of the controversy arising from the complaint. The demurrer was overruled, and appellants and other defendants to the cross-complaint suffered a default to be entered. The plaintiff in writing stipulated that a decree might go as prayed for in the cross-complaint. Thereupon judgment went for cross-complainant, from which the Mecartneys, as executrices, appeal.

Section 442, Code of Civil Procedure, provides: "Whenever the defendant seeks affirmative relief against any party * * * affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." While the court did not formally grant permission to file this cross-complaint, the plaintiff interposed no objection thereto, but, on the contrary, assented to the granting of its prayer; and the action of the court upon the demurrer can only be taken as evidence that the court considered the cross-complaint to be on file with its consent. The only question presented, therefore, is as to the authority of the court in actions of this character to order new parties brought in when in its opinion their presence is necessary to a complete determination of the controversy. The power of the court so to do is given by section 389, Code of Civil Procedure, in which case they may and should be brought in. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. "This section does not give the court power to bring into the action for determination a controversy between a defendant and strangers to the action which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete." Alpers v. Bliss, 145 Cal. 570, 79 Pac. 171. The controversy between plaintiff and defendant was with reference to the title to certain real property, which was the thing to which the action related. The power to order others brought into the action is a discretionary one. Alpers v. Bliss, supra. The court in this instance having done that which is the equivalent of an order to bring in new parties, and it appearing that the claims between the cross-complainant and defendants thereto were not irrelevant to the subject of the action, and the plaintiff not objecting, we can see no reason why the action of the court below should be disturbed. The effect of the order overruling the demurrer was the same as would have been an order denying the motion of plaintiff to strike out the cross-complaint.

We perceive no error in the trial court retaining jurisdiction and rendering the judgment. Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 348

HONEYCUTT, County Auditor, v. COLGAN, State Controller.

(Court of Appeal, Third District, California. March 30, 1906.)

TAXATION—PENALTIES — PERCENTAGES — DISTRIBUTION.

Pol. Code, § 3816, provides that on redemption of land from tax sales the original and subsequent taxes and percentages, penalty, and and interest paid on redemption shall be apportioned between the state and county according to a specified rate, and that the additional penalties received on acount of delinquency, together with the costs, shall be paid into the treasury for the use and benefit of the county, or city and county, etc. Section 3817 declares that an owner of land sold to the state for taxes may redeem by paying the county treasurer the amount of taxes, penalties, and costs, with interest, and all costs and expenses of such redemption and penalties, to wit, certain graduated percentages ranging from 10 to 100 per cent., if redeemed within five years or less from the date of the sale. *Held* that, while moneys received for original and subsequent taxes, penalties, and interest growing out of the delinquency on the part of the taxpayer were distributable wholly to the county, the graduated penalties on redemption of land sold for taxes, etc., was subject to apportionment between the state and the county, according to the rate specified in section 3816.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by A. S. Honeycutt, as auditor of Madera county, Cal., against E. P. Colgan, as State Controller. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. R. Fowler and W. H. Larew, for appellant. U. S. Webb, Atty. Gen., for respondent.

CHIPMAN, P. J. Plaintiff is the auditor of Madera county and defendant is Controller of the state. The action is to compel defendant to settle with plaintiff by allowing the latter the several amounts claimed, aggregating $8,547.26. These several amounts making this aggregate are set out in 17 separate counts, in an amended complaint, representing sums accruing at the semiannual settlements from May, 1895, to the December settlement in 1903. It is alleged that these amounts were "part of the punitive penalties collected upon the redemption of real estate in Madera county during the six months immediately preceding their settlement; that no part of said penalties were required by law to be paid into the state treasury, that the whole thereof belongs to the county of Madera" and that said sums were "paid into the state treasury illegally and by error and mistake of the State Controller in requiring" the same to be so paid. It is alleged that the mistake consisted in this: "that the State Controller ever since the month of May, 1895, has required and still does require that all punitive penalties lawfully collected upon the redemption of real estate sold to the state for delinquent taxes shall be distributed between the state and county in the same ratio that the state rate of taxation bears to the county rate of taxation, whereas, in fact, under the provisions of section 3816 of the Political Code the county of Madera, was and is entitled to the whole of the penalties so collected upon redemption of real estate sold to the state for delinquent taxes, and the same should all have been paid" to the county. It is further alleged that said mistake was not discovered by any officer of said county until the month of June, 1903. A general demurrer was filed to the amended complaint, pleading also the statute of limitations. The court overruled the demurrer, and, plaintiff declining to further amend, judgment passed for defendant, from which plaintiff appeals.

The case will be disposed of without considering the statute of limitations. The sections cited infra are sections of the Political Code, unless otherwise noted. The so-called "punitive penalties" mentioned in the complaint are the penalties imposed by section 3817, which must be paid by the person desiring to redeem land sold to the state for delinquent taxes. It is to section 3816 we must look to ascertain the disposition which the statute makes of these penalties when collected. And the question is: Are these so-called "punitive penalties"—or, more properly speaking, these graduated penalties on redemption—to be divided between the state and county as has been the practice under the controller's construction of section 3816, since its amendment in 1895, or are all these penalties to go to the county?

Before examining these two sections it will be well to notice briefly the legislative provisions leading up to the point of redemption from delinquent tax sales. Taxes are payable by installments, the first in November and the second in April, and become delinquent respectively in these months. A penalty of 15 per cent. is added to the taxes delinquent in November and must be collected for the use of the county, and if these taxes be not paid when the second installment becomes delinquent in the following April, the tax collector "shall collect an addition of 5 per cent. thereon." When the last installment is delinquent in April, if unpaid, the tax collector must collect for the use of the county "an addition of 5 per cent. thereon." Section 3756. (These penalties are, as now claimed by respondent, the "additional penalties on account of delinquency" mentioned in section 3816.) When the delinquent list is completed the tax collector is required to publish the same, giving the amount of the "taxes, penalties and costs due" (section 3764), with notice that unless paid "the real property upon which such taxes are a lien will be sold" (section 3765). It will be observed that the word "penalties" in section 3765 is changed to read "percentage" by amendment in 1895 (St. 1895, p. 18, c. 11). Later along in the provisions relating to sale the word "penalties" is used. Section 3813 provides that where the property is sold to the state "it must be assessed each subsequent year for taxes, until a deed is made to the state therefor, in the same manner as if it had not been so purchased," but no further sale shall be made for nonpayment of taxes (section 3814). (These taxes are the "subsequent taxes" which with the "original taxes" are to be apportioned as provided in section 3816.) Semiannual settlements of the county treasurer and auditor and the state controller are required by sections 3866 and 3868 and the question now here has arisen out of these settlements and relates to the penalties required to be paid on redemption under section 3817, and their distribution between the state and county under section 3816. A better arrangement of these two latter sections would have been to reverse the order of their occurrence, fixing the penalties first and directing their distribution afterwards. But the arrangement cannot affect the construction to be given them. Section 3816 is as follows: "Whenever property sold to the state, pursuant to the provisions of this chapter, shall be redeemed as herein provided, the moneys received on account of such redemption shall be distributed as follows: The original and subsequent taxes, and percentages, penalty, and the interest paid on redemption, shall be apportioned between the state and county, or city and county, in the same proportion that the state rate bears to the county, or city and county rate of taxation" (it is under the foregoing clauses as now, claimed by respondent that the graduated "penalties on redemption" are to be apportioned); "the additional penalties received on account of delinquency together with the costs shall be paid into the treasury for the use and benefit of the county, or city and county; the total amount received for state poll tax shall be paid to the state, without deduction of any percentages; the amounts received for road or hospital poll tax, and the amounts received for school, or road district, or other taxes, together with the penalties thereon, shall be paid into the county treasury and placed to the credit of the proper funds." The section then requires an accurate account of these moneys to be kept by the auditor and treasurer and a settlement to be made with the controller semiannually as provided in sections 3865, 3866, and 3868, "in such form as the Controller may desire." Section 3817 provides that where redemption from sale to the state takes place, the redemptioner may redeem "by paying to the county treasurer the amount of the taxes, penalties and costs due thereon at the time of sale, with interest on the aggregate amount of said taxes, penalties and costs at the rate of seven per cent. per annum; and all taxes that were a lien upon said real estate at the time said taxes became delinquent; and also all unpaid taxes of every description assessed against the property for each year since the sale; or, if not so assessed, then upon the value of the property as assessed in the year nearest the time to such redemption, with interest from the first of July following each of said years, respectively, at the same rate, to the time of redemption." (To this point it is conceded that the county is entitled to the items mentioned as charges on "delinquency.") The section then reads: "And also all costs and expenses of such redemption, and penalties as follows, to wit: ten per cent. if redeemed within six months from the date of sale; twenty per cent. if redeemed within one year therefrom; forty per cent. if redeemed within two years therefrom; sixty per cent. if if redeemed within three years therefrom; eighty per cent. if redeemed within four years therefrom; and one hundred per cent. if redeemed within five or any greater number of years therefrom." (These "penalties" are now claimed by appellant to be included in the terms "additional penalties," as used in section 3816, and should all go to the county, while respondent contends that they should be apportioned between the state and the county as penalties on redemption.) The section continues: "The penalty (or percentage as it is sometimes called) shall be computed upon the amount of each year's taxes in like manner, reckoning from the time when the lands would have been sold for the taxes of that year, if there had been no previous sale thereof." The section then directs the auditor, in case a person desires to redeem, to make certificates in triplicate of the estimate of the amount to be paid, which shall be delivered to the county treasurer with the money, who shall give receipts in triplicate indorsed thereon. The redemptioner then is to deliver one of these to the auditor and one to the state controller, and thus the deed "to the state shall become null and void."

The controversy (as has been indicated parenthetically in quoting the statute) relates to the graduated penalties, or punitive penalties, or percentages (whatever they may be called) of 10, 20, 40, 60, 80, and 100 per cent. imposed on redemption. These graduated penalties were first imposed in 1895 and have been, without question, until this action was commenced, opportioned between the state and county, the same as original and subsequent taxes and interest paid on redemption. They were construed to mean penalties or percentage paid on redemption first mentioned in section 3816, and not as "additional penalties received on account of delinquency," subsequently therein mentioned. The distinction between penalties for delinquency and penalties on redemption would seem to be a natural one to draw, and should be kept in mind. Prior to 1895 the state became the purchaser at delinquent tax sales only where there was no bidder for the land and redemption was limited to one year, after which a deed was given to the purchaser. The state now becomes the purchaser in all cases and deed does not pass to the state for five years, although the land continues to be taxed for subsequent years "until a deed is made to the state therefor." Section 3813. Redemption may be made at any time, but if not redeemed the state may sell at public auction when the state gets its deed. The graduated redemption penalty was imposed in a way to encourage redemption, the penalty increasing with each year of nonredemption.

Prior to 1895 there were, as there still are, two classes of penalties, sometimes called percentages, a penalty for delinquency in paying the tax, and a penalty paid on redemption. The penalties for delinquency have always gone to the county while the penalties on redemption have always been apportioned between the state and county. This distinction seems to have been in the minds of the framers of the law of 1895. We do not see how these graduated penalties on redemption, imposed from year to year by increasing proportions, can be regarded as "additional penalities received on account of delinquency." The property is sold to the state upon the first year's delinquency, and is not again sold for taxes. The subsequent taxes are added from year to year until the state gets its deed, and they form a part of the "subsequent taxes" mentioned in section 3816 which are apportioned. The penalties required to be paid on redemption have nothing to do with the delinquency in the payment of the tax and bear no relation to it for the land has passed to the state. They may well be embraced in one or other or both of the terms "percentages" and "penalty" mentioned in section 3816 to be apportioned as therein provided. The "additional penalties" referred to which are to be paid into the treasury for the use of the county, are expressly mentioned as being "received on account of delinquency," and how can we say that this must mean the graduated penalties which are imposed by section 3817, not on "account of any delinquency" but which are expressly stated to be exacted as "penalties on redemption?" We must, according to admitted canons of construction, give some meaning to all terms of the statute if we can do so without violating its obvious purpose. An interpretation which gives effect is preferred to one which makes void. Civ. Code, § 3541. The natural reading of section 3816 would lead to the meaning that all "percentages, penalties (penalty is the equivalent word used) and the interest paid on redemption," shall be apportioned as therein directed, as well as "the original and subsequent taxes," and this would clearly include the graduated penalties on redemption mentioned in section 3817. The percentages and penalty are "paid on redemption" as are the "original taxes." Upon similar rules of construction we must give some meaning to the terms "additional penalties received on account of delinquency" which go to the county. To do this we derive no aid from section 3817, for no mention is there made of penalties for delinquency except such as clearly refer to penalties before sale. We do, however, find in other sections a source of some light which is shed upon these terms, "additional penalties received on account of delinquency." Section 3817, by act of 1883 (St. 1883, p. 23, c. 16), mentions a penalty of 25 per cent. on redemption, and it was apportioned under section 3816 to the state and county as is now done with the graduated penalties on redemption. Section 3816 then provided, as to what are now referred to as "additional penalties received on account of delinquency," as follows: "the 5 per cent. additional * * * shall be paid to the county." This obviously referred to the 5 per cent. penalty for delinquency under section 3756 as it then read and was so construed and so enforced. See Collier v. Shaffer, 137 Cal. 319, at page 322, 70 Pac. 117. But section 3756 was amended in 1891 (St. 1891, p. 447, c. 230) to correspond with the statute requiring semiannual payment of taxes, and imposed three different penalties for delinquency, namely, 15, 5 and 5 per cent., already explained supra. When section 3816 was amended in 1895, there being several of these penalties, it very properly referred to them as "additional penalties (using the plural number) received on account of delinquency." When there was but a single "additional penalty" of 5 per cent. for delinquency, the statute so referred to it and its meaning was not doubted. No more, do we think, should the present statute be held to be of doubtful meaning. It means the additional penalties on delinquency imposed by section 3756. They are imposed by the county before sale and become in fact part of the taxes and we do not see how the language can reasonably be held to include the graduated penalties on redemption, after sale, mentioned in section 3817.

There is an essential difference in the relation of the owner of the taxable land while it is resting under assessment for taxes, and after it has passed into other ownership by sale for failure to pay the taxes. In the first case he is a delinquent because he has failed to perform a duty. The term "delinquency" is apt and is expressive of the owner's attitude to the state. But when his land is taken by the state in lieu of the taxes which he failed to pay, it is then optional with him whether to take advantage of the privilege given him by law to redeem the land or let the state keep it. He is then a redemptioner, and he cannot divest the state of its interest in the land except he redeem within the period of the redemption which continues until the state has disposed of the land (section 3897). He is not any longer a tax delinquent in any proper sense; he is not even a redemption delinquent for there is no duty on him to redeem. Indeed he is not any kind of a delinquent, for the term delinquency does not apply because of his neglect to redeem. The Supreme Court said in San Francisco, etc., L. Co. v. Banbury, 106 Cal. 129, 39 Pac. 439: "If the state has become the purchaser of land at a delinquent tax sale the tax has been extinguished by the sale, and the state, instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer." This affirmative action is neither more nor less than redemption. As throwing still further light upon the meaning of section 3816, it may be well to call attention to the fact that this section was twice amended at the same session of the Legislature in 1895. The first amendment was on February 25th (St. 1895, p. 21, c. 11). There the language used was "the original and subsequent taxes, and all percentages and penalties paid in redemption," but made no mention of interest. The language used further along to cover the penalties for delinquency was "the 5 per cent. additional * * *" shall "be paid to the county." This latter phrase failed to correctly refer to the amendment that had taken place in section 3756 wherein several additional penalties for delinquency had been imposed, as already pointed out. To make clear the meaning, and to include interest and to amend in some other respects, section 3816 was again amended (or re-enacted with amendments) on March 28, 1895. St. 1895, p. 333, c. 218. It there reads: "Additional penalties received on account of delinquency." In the first amendment the words "on account of delinquency" did not appear, and the single penalty of 5 per cent. failed to include all the penalties referred to in section 3756. The change in phraseology seems to point to the construction we have given. The change in the phraseology from "percentages and penalties paid on redemption" to "percentages, penalty, and interest paid on redemption" was intended to include interest, omitted in the first amendment, and we have no doubt was also intended, and sufficiently expresses that intention, to mean the same thing as the phraseology first used in respect of the percentages or penalties on redemption.

Pursuing the changes in the statute some further, some additional light is thrown upon the question. In 1891, when the change was made in section 3756 to meet the semiannual payments of taxes, already noted (St. 1891, p. 447, c. 230), section 3816 was also amended (St. 1891, p. 449, c. 230), and the latter section directed "the original tax and the 25 per cent. and interest paid in redemption" to be "apportioned between the state and county and city and county in the same proportion that the state tax bears to the county and city and county tax." And the section then provides that: "the moneys received from delinquencies shall be paid to the county, or city and county." Undoubtedly these "moneys received for delinquencies" which were to go to the county, under section 3756 as amended, referred to the penalties or moneys received at the same time. The statute as then understood and enforced, recognized the clear distinction between penalties on redemption and penalties for delinquency. This distinction occurs so frequently in the Code sections as to leave no doubt in our minds that it was intended to be observed in the enforcement of the law. It is still further seen in section 3758 where the auditor is directed to "enter against all the items of taxes due and unpaid the penalty for delinquency," clearly referring to section 3756. Also section 3770, where the tax collector is directed to collect "in addition to the taxes due on the delinquent list, together with the penalties for delinquency." Everywhere in the Code the per cent. referred to in section 3756 is spoken of as "penalties for delinquency," and no reason is perceivable why the words "additional penalties received on account of delinquency" should be given any different construction when used in section 3816. A careful examination of the statutes establishing the system or policy of taxation of lands, their sale for delinquent taxes, the conditions on which redemption may be made and the steps to be taken on redemption shows a consistent and uniform purpose of the law to be and the practice under it has been, for a long period of years, to apportion the moneys collected on percentages or penalties on redemption between the state and county "in the same proportion that the state tax bears to the county and city and county tax," and likewise the moneys received for original and subsequent taxes and the interest on such moneys have been so apportioned. Some question has arisen between the parties as to the effect on the question here by reason of the decisions in Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177, and San Diego Investment Co. v. Shaffer, 137 Cal. 323, 70 Pac. 179. These cases concerned taxes imposed under the law prior to 1891 and do not, so far as we can see, aid us materially in the solution of the question now here.

We have not singled out for comment the points made in argument by counsel for appellant in the careful and able presentation they have given the case. But we have endeavored to treat the question before us in a way to cover all material points and to leave no doubt as to our construction of the statute. The conclusion we have reached seems to us to result not only from a reasonable construction of the statute, but to be fair and just to the state and counties concerned. After sale the burden has shifted to the state and the redemptioner's relations are then with the state and the penalties in question begin to be imposed when this relation begins. In the apportionment of these charges on redemption the state receives much the smaller part, the counties receiving the balance. In the long run, should the counties get all these moneys, the benefit to them would be but temporary, for this loss of revenue to the state would have to be made up ultimately by taxation. While these considerations should not control in reaching a decision, they coincide with what is the ultimate aim of judicial determinations —to do substantial justice between litigants. The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 358

NIXON v. GOODWIN.

(Court of Appeal, Third District, California. April 2, 1906.)

1. Fraudulent Conveyances — Invalidity — Statutes.

Under Civ. Code, § 3439, declaring that every transfer of property made with intent to delay or defraud any creditor or other person is void against all creditors and against any person on whom the estate of the debtor devolves for the benefit of others than the debtor, a fraudulent conveyance by the debtor is void at the instance of creditors, or of the debtor's assignee in insolvency, without reference to whether the conveyance was made within 30 days prior to the filing of the debtor's petition in insolvency, provided there were creditors at the time of the conveyance and there was not sufficient other property with which to pay them.

2. Same—Consideration—Insolvency.

Where a transfer of property was made voluntarily and without a valuable consideration by a debtor while insolvent or in contemplation of insolvency, the same is void as to existing creditors, as provided by Civ. Code, § 3442.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 138, 139, 141–158, 186–190.]

3. Corporations — Conveyances — When Insolvent—Fraud—Evidence.

Defendant, while the owner of one-third of all of the stock of a mining corporation, advanced $44,000 to it, and knowing that the company was insolvent resigned from his office as president and director, so that a deed of the company's property could be made to him, which was done on the succeeding day. This transfer was kept secret by the parties for fear of creditors, and was only disclosed by defendant at a meeting of creditors for the purpose of effecting a settlement, when defendant stated that the deed had been made to him to protect all the creditors before himself. A few days thereafter, however, defendant conveyed the property to a bank, which was also a creditor of the corporation, and the bank subsequently reconveyed the property to defendant, taking a mortgage back to secure its indebtedness. The creditors did nothing to ratify these transactions, and in a suit by the corporation's assignee in insolvency to set aside the deed defendant did not testify. *Held*, that the deed was fraudulent as against the creditors of the corporation.

4. Same—Conveyances to Officers.

Where the president of a corporation, who was its largest creditor, resigned as president and director, for the purpose of qualifying himself to take a conveyance of all of the corporation's property, which he did on the succeeding day, the conveyance should be treated as made to him as an officer of the corporation for the purpose of preferring himself over the other creditors of the corporation, and was therefore void.

5. Same — Assignments for Benefit of Creditors.

Where defendant, the president of a corporation, secretly resigned in order to accept a conveyance of the corporation's property in settlement of a pre-existing debt, which was secretly made on the next day, and though he thereafter stated that the conveyance was made for the benefit of all of the corporation's creditors, he subsequently conveyed the property to a bank, by which it was reconveyed to defendant and a mortgage taken by the bank to secure the corporation's debt, such facts were insufficient to warrant a finding that the deed to defendant was made by the corporation for the benefit of all of the corporation's creditors.

6. Fraudulent Conveyances—Evidence.

In an action by a corporation in insolvency to set aside an alleged fraudulent conveyance of the corporation's property to its president, a judgment recovered against the grantor after the conveyance was made was inadmissible.

7. Witnesses — Examination — Nonresponsive Answer.

In a suit to set aside a fraudulent conveyance by a corporation to defendant, its president, a witness was asked whether the money procured from a certain bank was given to defendant for his individual account. Witness answered that it was not, but that it was all defendant's because, when the witness went to the bank and filed the security, the bank gave witness a line of credit to allow the corporation to increase the overdraft $15,000. *Held*, that the answer was properly stricken as not responsive.

8. Fraudulent Conveyances—Action to Vacate—Evidence.

Where, in an action to vacate an alleged fraudulent conveyance, defendant claimed that the conveyance was made to him for the benefit of all of the creditors of the grantor, a deed by which defendant conveyed the property to a bank, a subsequent reconveyance by the bank to defendant, and a mortgage by defendant to the bank securing the latter's claim against the grantor, was admissible to contradict such defense.

9. EVIDENCE—BEST AND SECONDARY EVIDENCE.

In an action to set aside an alleged fraudulent conveyance by a corporation, a question calling for the amount of a creditor's claim against the corporation, which the witness answered by simply stating the amount, was not objectionable as not the best evidence.

10. APPEAL—EVIDENCE—HARMLESS ERROR.

Where, in an action to set aside a fraudulent conveyance by an insolvent, the amount of the insolvent's indebtedness to a creditor was shown by the approved claim of such creditor in insolvency proceedings, the erroneous introduction of a memorandum made by the witness at a meeting of creditors to prove such indebtedness, which was hearsay, was harmless.

11. FRAUDULENT CONVEYANCES—EVIDENCE.

Where defendant claimed that an alleged fraudulent conveyance had been made to him for the benefit of creditors of the grantor corporation, a mortgage on the property included in the conveyance in controversy executed to C. to secure a note given by defendant was admissible to rebut such defense.

12. APPEAL—HARMLESS ERROR.

Where defendant could have derived no advantage from a witness' answer to a question which was objected to, an error of the court in sustaining the objection was harmless.

13. WITNESSES—ATTORNEY AND CLIENT—PRIVILEGE.

Where, in a suit to set aside an alleged fraudulent conveyance by an insolvent corporation, an attorney for certain creditors was asked concerning a paper purporting to relate to an agreement concerning the manner of paying the debts of the corporation, and after identifying the paper stated that he received the same, and after reading it returned it to his client, a question as to whether he advised his client in relation thereto was not objectionable as calling for a communication between attorney and client and for the witness' opinion as an attorney.

14. FRAUDULENT CONVEYANCES — EVIDENCE — ADMISSIBILITY.

In an action to set aside an alleged fraudulent conveyance by a corporation to its president, certain notes purporting to have been made by the corporation to defendant were inadmissible to show an indebtedness due from the corporation to defendant, in the absence of proof that the execution of the notes was authorized by the corporation's board of directors.

15. EVIDENCE — CORPORATE RECORDS — CERTIFICATION.

Code Civ. Proc. § 1918, subds. 6, 7, provide that documents may be proved by the original or by a copy certified by the legal keeper thereof, and if from another state it must be accompanied by a certificate of the Secretary of State, judges of the superior or county court, or mayor of a city, that the copy is duly certified by the officer having the local custody of the original. *Held*, that an affidavit attached to extracts from the minutes of the meetings of a corporation's board of directors, held in another state, reciting that the affiant was president of the corporation and to the best of his knowledge and belief the extracts were true extracts of the minutes of the several meetings, was not properly certified to authorize the admission of such extracts in evidence.

16. FRAUDULENT CONVEYANCES — EVIDENCE — ADMISSIBILITY.

In an action to set aside an alleged fraudulent conveyance from a corporation to its president, evidence as to the first money that was borrowed by the corporation from its president was inadmissible, in the absence of a showing first made that the corporation had authorized the borrowing of the money.

17. SAME.

Where, in an action to set aside a fraudulent conveyance of property from a corporation to its president, there was no legal offer to show what took place at a certain meeting of the corporation's board of directors, a question as to who was present at such meeting was immaterial.

18. WITNESSES—KNOWLEDGE.

In an action to set aside a fraudulent conveyance by a corporation to its president, evidence that certain money borrowed by the corporation from its president belonged to him was properly stricken, because of the witness' lack of knowledge concerning the source from which the money was produced.

19. EVIDENCE—CORPORATE RECORDS—DIRECTORS' MEETINGS.

Recitals of the minutes of a meeting of a corporate board of directors cannot be proved by parol.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 512, 546.]

20. FRAUDULENT CONVEYANCES — EVIDENCE — ADMISSIBILTY.

Where, in an action to set aside an alleged fraudulent conveyance by a corporation to its president, a witness testified that on the date of the conveyance the corporation owned 60.000 shares of the capital stock of a mining company, but that witness did not know its value since about a year prior to that time, evidence as to the value of the stock a year prior to such conveyance was immaterial.

Appeal from Superior Court, El Dorado County; M. P. Bennett, Judge.

Action by George S. Nixon, as assignee of the Montauk Consolidated Gold Mining Company, against William Dallas Goodwin. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John M. Fulweiler, for appellant. L. T. Hatfield and William E. Kleinsorge, for respondent.

BUCKLES, J. This action was brought to cancel a deed of conveyance executed and delivered to defendant William Dallas Goodwin on April 3, 1901, by Montauk Consolidated Gold Mining Company, a foreign corporation, upon the grounds that it was made with the intent to hinder, delay, and defraud the creditors of said mining corporation, and to prevent the property of said corporation from coming into the hands of its assignee in insolvency, and to evade the provisions of the insolvent act of 1895. Defendant interposed a demurrer to the complaint on all the statutory grounds. The appeal is from the judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

The court found that the Montauk Consolidated Gold Mining Company was insolvent on April 3, 1901, and that defendant knew of said insolvency; that defendant was a stockholder in said corporation and a member of the board of directors thereof until some time between the 1st and 3d of April, 1901, when he resigned as director and president for the purpose of having the said deed made to him; that on April 3, 1901, said mining corporation executed to defendant the deed in controversy for the purpose of placing the property of said corporation beyond the reach of the creditors of said corporation, and to hinder, delay, and defraud said creditors; and that said defendant had full knowledge that said deed was without valuable consideration and was for the purpose and with the intent to hinder, delay, and defraud said creditors, and to prevent the property of said corporation from being distributed ratably among its creditors. The demurrer alleged, among other things, that plaintiff had no capacity to sue to set aside said deed, and that only the creditors could do so, because the said deed was executed, delivered, and recorded more than 30 days before the filing of the petition in insolvency against the Montauk Consolidated Gold Mining Company; and the appellant insists on this idea in his brief and cites in support thereof Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495, and Babcock v. Chase, 111 Cal. 351, 43 Pac. 1105. But neither of these cases seems to furnish any authority for appellant's contention. In Francisco v. Aguirre the question was over the delivery of the furniture in a lodging house. In Babcock v. Chase the deed was made five years prior to the adjudication in insolvency, and at a time when the insolvent, Wilson, is not alleged to have had any creditors. The deed was made to Burtch on a consideration of $5, and it is further alleged that Burtch subsequently conveyed to Martenstein and Chase for a like expressed consideration, but that there was no real consideration in either transaction, and that it was all at the request of Wilson, that the land might be held for his benefit. The court held: "Upon the allegations of this complaint these deeds cannot be successfully attacked by the grantor, Wilson, or his assignee in insolvency. No express trust is charged, and there is nothing recited in the pleading that would authorize the introduction of evidence to establish a trust in parol." But in the case at bar the complaint alleges the insolvency of the mining company at the time it made the deed, and in the second count alleges the deed to have been made for the benefit of all the creditors, but was not accepted by the creditors, and that such assignment, transfer, and conveyance to defendant tended to coerce the creditors of the said mining company to compromise or release their demands. In Salisbury v. Burr, 114 Cal. 451, 46 Pac. 270, the court held that under section 3439 of the Civil Code every transfer of property made with intent to delay or defraud any creditor or other person of his demands is void against all creditors, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. It is further said: "This broad provision renders it void, at the instance of creditors or of the assignee in insolvency." And we think this must be so, without reference to whether the deed was made within 30 days of the time of filing the petition in insolvency, providing that there were creditors at the time and not sufficient other property with which to pay them, as in the case at bar, and the attempted transfer was made with intent to hinder, delay or defraud the creditors. This settles the right under the pleadings in this case of the assignee in insolvency to bring the action to set aside the deed made as here alleged. The demurrer was properly overruled.

The said deed was made April 3, 1901, and the petition in insolvency was filed June 6, 1901, and appellant contends that, the deed not having been made within 30 days before the insolvency proceedings were instituted, the conveyance was not a prohibited or void one under the insolvent act of 1895, and that there is no evidence to support finding 6 that the said mining company, "acting in concert with said defendant and for the purpose of hindering, delaying, and defrauding its creditors, and to prevent its property from being distributed ratably among its creditors, executed to defendant the deed, a true copy of which is set out in the complaint," and other matters in said finding. In a case like the one at bar the question of fraudulent intent is one of fact, and not of law; and while a transfer or change cannot be said to be fraudulent merely on the ground that it was made without valuable consideration, yet if any transfer or incumbrance of property be made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, the same shall be fraudulent and void as to existing creditors. Section 3442, Civ. Code. The burden of proof is upon the plaintiff to show that the said deed was made for the purpose of hindering, delaying, or defrauding the creditors, or to prevent them from receiving an equal pro rata on their claims. At the time this deed was made, April 3, 1901, the defendant knew the insolvent condition of said mining company. He was a stockholder, owning one-third of all the shares of said mining company, and up to the very day before the said deed was made he was a director and the president thereof, and the evidence shows he resigned both positions April 2, 1901, so that this deed might be made to him, and the deed was made the next day. He was the largest creditor, and there was no consideration paid for the deed, other than the debt of $44,000 the said mining company owed him. Both appellant and the mining company sought to keep the transfer a secret, because they feared the creditors whose claims they could not meet, and that if the transfer was made public it would cause trouble with the labor at the mine.

The appellant did not testify. But at a meeting held with some of the creditors a month after the deed was made he then for the first time informed them all the property of the mining company had been deeded to him for the purpose of having him take care of all the creditors, with the understanding that all the creditors should be protected and paid before he would collect his own indebtedness. But on April 17th appellant made a deed of conveyance of all the property to the Placer County Bank, being a creditor of said mining company to the amount of $13,106.84. The said bank subsequently made a reconveyance to appellant, and he then gave it a mortgage on the same property to secure the indebtedness. The other creditors knew nothing of the deed to appellant, nor of the transaction with the Placer County Bank, and in no way ratified the deed from the mining company to appellant. Nothing whatever is said in the said deed to indicate that it was made for any purpose other than for the sole benefit of appellant. The rule is that a director of an insolvent corporation cannot receive to himself any preference or advantage over other creditors in the payment of his debt (Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439); and surely the same rule would apply with equal force to one who is a large creditor of the corporation of which he is a director and the president, and who resigns to-day that he may to-morrow (secretly as to all other creditors) accept a conveyance to himself of the corporation's property.

Nor would such be a transfer coming under the provisions of section 3452 of the Civil Code, where a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another, because such action, when taken by a director, or one so lately holding that relation, would be taking an unfair as well as unlawful advantage of other creditors, and would be an attempt pure and simple to prevent a ratable distribution of the insolvent's assets among its creditors. The defendant does not stand as an ordinary common creditor; for, notwithstanding his resignation as director and president for the purposes for which tendered, he cannot escape the conclusion inevitably to be reached that he stands still in the same light the law views a director of a corporation when it forbids him making himself a preferred creditor, and any attempt at so doing, in our opinion, would subject him and his acts to the same prohibition as though he were still a director. A man cannot be permitted to so easily throw off his trust relations, and, as here, for the purpose of giving him an advantage over ordinary creditors, that he may take the property which he as a director had been holding in trust for all the creditors and apply it on his own debt to their detriment. Under the circumstances in this case, that all the debts, or nearly so, owing by the corporation were contracted while defendant was a director and presumably contracted at his instance and request, as he was president, it seems to us the deed made to him on April 3d, the day after he had resigned, was just as fraudulent and void as if it had been made April 1st, and while he was yet a director. Could he thus divest himself of his trust relations, so that he might make legal the act which the law declares illegal while a director? I think not, for the same undue advantage which the law prohibits is still exercised. A director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or any other security, and may enforce the same like any other creditor, but always subject to severe scrunity and under the obligations of acting in the utmost good faith. Taylor on Corporations, 634. Goodwin while a director could loan money to his corporation, and when such corporation had the use of his money is bound to repay him, and as long as the matter remained a question between Goodwin and the mining company he could enforce collection even while he remained a director. Schnittger v. Old Home Consolidated Mining Company, 144 Cal. 603, 78 Pac. 9. In this case just cited the rights of the other creditors were not involved. The officers of a corporation hold its property in trust for its stockholders, and incidentally for the creditors, and any transaction on the part of the directors which is tainted with fraud or in violation of the duties of their trust is voidable. Snediker v. Ayers, 146 Cal. 407, 80 Pac. 511.

The claim of the appellant that all the evidence in the case tends to show that the deed was made for the sole purpose of enabling him to protect and pay all the debts of the mining company does not seem to be sustained; but, on the contrary, we think it very clearly appears from all the evidence that appellant took the deed for the sole purpose of protecting and paying his own debt. It is true that after the creditors became aware af the deed and were clamoring for an adjustment of the indebtedness, and not until July 16th, more than three months after he took the deed, appellant did make an effort to settle with the creditors by having the net proceeds arising from the working of the mine and a certain first payment on a contemplated sale of the mine, paid into the Placer County Bank in the name of some one as trustee in trust for the creditors. But under the circumstances above detailed it cannot be said that this is any evidence tending to show that the deed was made for the benefit of all the creditors, and there is no evidence in the case indicating that the said mining company made the deed in question to appellant for any purpose other than to prefer him as a creditor; and if for that purpose the deed cannot stand, under the doctrine that a director cannot use up the property of his corporation to pay his debt to the disadvantage of the other creditors. It is true there is testimony indicating appellant offered to give the creditors a second mortgage on the property described in the deed in question. It is true one or two of the witnesses had heard appellant say the deed was made for the benefit of all the creditors; but when the appellant absents himself from the trial, and does not testify in the case, this evidence, weak as it is in the first place, is entitled to no weight at all. For the purpose of properly determining the question here involved it seems to me that it is immaterial whether the evidence shows that the deed was authorized or ratified by two-thirds of the stockholders, for appellant was a stockholder and president when the determination was reached to convey all the property of the mining company to him. How could he have resigned for the purpose of accepting this attempted conveyance, if not a director at the time the transfer was determined upon? The meetings of the stockholders and board of directors were held in New York on April 2 and April 3, 1901, and it was then the transfer was determined upon.

Assignments of error at the trial:

The petition of involuntary insolvency was filed June 6, 1901. The plaintiff produced and offered in evidence, and they were admitted over defendant's objection, creditors' claims which had been presented and approved in the said insolvency proceedings. The objection to these claims is based upon the affidavits attached thereto which fails to show that the debt represented therein was contracted prior to April 3, 1901. The claim of Mebius, Drescher & Co. for $5,149.81 was the first one offered. The testimony of P. C. Drescher shows that $5,044.81 of this claim was due April 3, 1901. There were 24 of these claims. There is no evidence as to the contents or items of these claims, further than the testimony of Drescher, Curtis, and Shaw, and this shows that at least the larger amount of their claims accrued prior to April 3, 1901. The bill of exceptions admits that all these 24 claims were the same in substance as to when the debt was due and owing, and as to allowance and filing and other matters, except amounts, as that of Mebius, Drescher & Co. This being so, and $5,089.81 of this claim having accrued prior to April 3, 1901, the objection of appellant is not well taken. This disposes of 24 of his exceptions.

The twenty-fifth, twenty-sixth, and twenty-seventh specifications of error were to the admission of the judgment roll in the case of John Dias v. Montauk Consolidated Gold Mining Company, a copy of the execution, and the original execution. The action was for personal damages. The judgment not having been recovered until June 5, 1901, the objection should have been sustained; but appellant could not have been injured by the introduction of this judgment roll. There was, therefore, no reversible error.

The witness Coles on redirect examination was asked whether the money gotten from the Placer County Bank was given to appellant for any of his individual accounts, and answered: "No, sir; not a dollar. Well, I can take a different view. It was all Mr. Goodwin's, because when I went to the bank and filed the security the bank gave me a line of credit, allowed us to increase our overdraft to $15,000." Plaintiff moved to strike out this last answer, and the motion was granted. The answer was not responsive and was properly stricken out.

The introduction of the deed, the mortgage, and the deed of reconveyance, in the transaction appellant had with the Placer County Bank is assigned as error. This whole transaction had a tendency to show that the deed in controversy was not made for the benefit of the creditors as claimed by the grantee. The transfer of the property mentioned in this deed by the corporation to appellant must be judged by the terms of the deed and in the light of the contemporaneous and subsequent acts of the parties. These furnish the data for the determination of the intent and motives with which it was made. Bump on Fraudulent Conveyances, § 601. The acts of the appellant in attempting to prefer the Placer County Bank, shown by his transferring the property to a creditor and his subsequent mortgaging it to secure such creditor's debt, all have a tendency to show that he was not acting in good faith when he says this deed was made to enable him to take care of all the creditors of the mining company and pay all their claims, and a tendency to show, further, that the deed was not made for the benefit of all the creditors, but for the purpose to hinder, delay, and defraud such creditors. For this purpose the transaction with the Bank of Placer County was a legitimate inquiry, and therefore the deed, the mortgage, and the deed of reconveyance were properly admitted.

The claim of Baker & Hamilton offered in evidence by plaintiff was objected to on the same grounds as the other claims which had been proven in the insolvency proceedings, and, we think, rightfully admitted. Objection was made to the testimony showing the amount of the debt due Mebius, Drescher & Co. Drescher was asked to state the amount of their claim, and answered, "$5,044.89." The objection was upon the ground that this was not the best evidence. He was simply asked the amount of his firm's claim, nothing more, and the question and answer were not subject to the objection made. Objection was made to the introduction of the amount of indebtedness shown by a memorandum made by the witness Kleinsorge at a meeting of creditors in May. This was error, as being hearsay, but was not reversible error, inasmuch as the amount of the indebtedness was shown by the approved claims in the insolvency proceedings.

Plaintiff offered in evidence a mortgage on the property included in the deed in controversy to L. L. Chamberlain June, 1901, to secure the payment of a promissory note of $3,692 given by defendant. Defendant objected on the ground the said mortgage was immaterial, irrelevant and incompetent. The objection was overruled and the mortgage admitted. The mortgage was material as tending to show that said deed was not made for the benefit of the creditors of the said corporation, but rather to hinder and delay them.

The witness Kleinsorge was asked about written instrument Defendant's Exhibit 2 for identification which had been presented to him at one time purporting to be an agreement whereby appellant agreed to sell to D. H. Coles and Dwight Treadway the property of the mining company upon certain conditions; said he did not remember when he received it. "I received it from Mr. Drescher, and I read it" and returned it to him. He was then asked by appellant: "Q. Did you advise him in relation to it?" The plaintiff objected on the ground that the question called "for the opinion of the witness and also for a communication between attorney and client. It is calling for his opinion as an attorney." The question was not objectionable upon the ground stated. Kleinsorge was the attorney for Drescher and other creditors, and this paper purported to relate to an agreement concerning the manner of paying the debts, and was no doubt presented to him for his advice by his client. To have answered whether or not he advised Mr. Drescher in relation would not have been any advantage to the defendant, for he would probably not have given any information as to what advice he gave, if any. Sustaining the objection was not reversible error.

Defendant offered in evidence ten promissory notes, of different dates and amounts, but aggregating $33,850, purporting to be notes given by the said mining company to appellant, and all, with the exception of the one for $5,000 due May 15, 1899, were shown by indorsements thereon to have been paid. Plaintiff objected to their introduction, on the ground that they were irrelevant, incompetent, and immaterial, and no authority having been shown to authorize the execution of the same, and the court properly sustained the objection. These notes could not have been material to show indebtedness due from the said mining company to appellant unless their issue and execution were authorized by the board of directors, and there was no evidence of such authorization. The defendant did offer in evidence a paper purporting to contain extracts from the minutes of meetings of the board of directors wherein at least some of the said promissory notes appeared to have been authorized by the board and containing authorizations to borrow money. The minute book was not produced. And to this there was attached the affidavit of George C. Wilde under date of March 24, 1904, setting forth that he was the president of the Montauk Consolidated Gold Mining Company, and to the best of his knowledge and belief the said extracts are true extracts from the original minutes of the several meetings. But this instrument was not admissible as evidence, because not properly certified. Subdivisions 6, 7, § 1918, Code Civ. Proc.

Witness D. H. Coles, secretary of the said mining company, was asked by appellant in relation to the money the mining corporation had borrowed of appellant, testified the books he had in his hands were the original cash book and ledger of the corporation, and that prior to April, 1901, the corporation had borrowed money of appellant, and that he could tell from the books when the first loan was made. He kept the books and had made the original entries. He was asked: "What was the first money that was borrowed from William Dallas Goodwin? Does the book show that?" Plaintiff objected, because "premature, no foundation laid to show that anybody had any authority to borrow any money, and immaterial, and so forth." If it be conceded that the question was a material one, because the appellant had a right to show the corporation's indebtedness to him as tending to support his theory of the transfer to him of the corporation assets, still we think it necessary to first show the authorization of the corporation to borrow this money. This had not been shown, and therefore the objection was properly sustained. Coles was further asked if any other sums were borrowed from Goodwin for which no note was given, and the court sustained plaintiff's objection thereto, on the ground that, if there was money borrowed, it must have been a transaction by the board of directors, and a record made of it, such record constituting the best evidence. There was no such record presented and its absence was not accounted for. Coles further testified that he was the Coles mentioned in the paper offered purporting to be extracts from the minutes of the board of directors, and that he was the only Coles connected with this company, and was a director. He was then asked: "Who else was present besides you at the meeting of the board of directors?" (referring to the meeting of September 9, 1898). The question should have been answered; but, as it now appears that defendant did not offer in a legal way to show what took place at that meeting, the question as to who was present becomes immaterial. Further testifying, Coles said that in April, 1899, the said mining company borrowed of said Goodwin $10,000, and on October 17, 1899, the further sum of $5,000. He was then asked: "Was or was not that the money of William Dallas Goodwin?" And answered: "It was." The answer was stricken out on plaintiff's motion on the ground that the witness did not know the source of production of the money. The ruling was correct; but at the same time the witness had just testified, without objection or motion to strike out, that he knew the money the company received from Goodwin belonged to him and his wife. Coles testified he was present at the meeting of the directors and stockholders in New York April 3, 1901, when the deed in question was made by the corporation to the appellant. He was then asked by the defendant: "State, if you please, the consideration of that deed." Plaintiff objected to the question on the ground that it was immaterial as to what the consideration was because the records must show a valid transaction, and, further, that the deed was not assented to by the proper quantity of stock. The minutes of the board of directors of that meeting were not produced, and not even an extract of the minutes of that meeting was offered. That was a very important meeting and lasted two days. The president resigned and a new one was elected. Appellant was present, and the minutes, if properly kept, disclosed the action taken by him. Whatever may have been the reason for omitting the introduction of the minutes of that meeting, its proper recitals could not be proved by an oral statement. If there was any consideration for this deed, defendant could have shown it in the proper way. Coles had testified that on April 3, 1901, the said mining corporation owned 60,000 shares of the capital stock of the Ribbon Gold Mining Company, par value, but did not know its value since about one year before April 3, 1901, when defendant asked him, "What was the value of the stock one year prior to April 3, 1901?" And again, "What was the value of this stock prior to April 3, 1901?" Plaintiff interposed the objection to both of these questions, and the court sustained the same. In the first place, it was not material as to what the stock was worth one year before the deed was made, and in the second question there was but a repetition of the first; for any answer the witness could have given would have been as to the value one year prior to April 3, 1901.

There were 24 assignments of error as to the admission of testimony, and, having carefully considered each one, we do not find any reversible error therein. We think the evidence sufficient to uphold every material finding, and that the judgment is amply supported by the findings.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

149 Cal. 117

STERLING v. GREGORY. (L. A. 1,400.)

(Supreme Court of California. April 2, 1906.)

1. SALES—BREACH BY SELLER—ACTION—EVIDENCE—SUFFICIENCY.

In an action for breach of a contract to buy from plaintiff all the oranges grown in a certain grove, evidence *held* to warrant a finding that the agreement was in consideration of defendant having the handling of the oranges grown in another grove.

2. CONTRACTS — CONSTRUCTION — ENTIRE AND SEVERABLE CONTRACTS.

The question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction, from the intent of the parties and all the circumstances.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 754.]

3. SALES—CONTRACT—CONSTRUCTION.

Where defendant agreed to buy all the oranges grown by plaintiff in a certain grove, in consideration of defendant's having the handling of the oranges grown in another grove, the contract was entire, and the agreements not severable.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 175.]

4. CONTRACTS—RESCISSION—PARTIAL FAILURE OF CONSIDERATION.

Under the express provisions of Civil Code, § 1689, a partial failure of consideration moving from one party authorizes the other to rescind.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1173.]

5. TRUSTS—ACTION BY TRUSTEE—COSTS—LIABILITY.

Under the express provisions of Code Civ. Proc. § 1031, where plaintiff, suing as trustee of an express trust, is unsuccessful and there is no showing of mismanagement or bad faith on his part, the costs are to be made chargeable only on the estate.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 324, 377.]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. E. Sterling, as trustee, against A. Gregory. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Otis, Gregg & Surr, for appellant. Frank C. Prescott and Prescott & Morris, for respondent.

SLOSS, J. Action for damages for breach of contract. The plaintiff was the owner of certain orange groves in San Bernardino county, known as the "Upper Orchard," and alleges an agreement with defendant, by the terms of which the latter agreed to buy all the oranges grown on this orchard at the price of 1¼ cents per pound. After the contract was partly executed, the defendant refused to accept or pay for any more fruit, and the plaintiff, after selling the remaining fruit for less than the contract price, brings this action to recover the difference. The answer denies that the contract was merely for the purchase and sale of the oranges grown on the groves described in the complaint, and alleges that the agreement between the parties was that defendant should handle, pack, ship and sell for the account of plaintiff all the oranges grown on two other orchards belonging to plaintiff, and known as the "Triangle" and "Klondike" groves; that as part of the same contract and in consideration of having the handling of the crops from said groves the defendant agreed to buy all the oranges on the "Upper Orchard" at 1¼ cents per pound. The answer then goes on to allege that before the deliveries from the "Upper Orchard" were complete, the plaintiff broke his contract as to the "Triangle" and "Klondike" groves by selling the fruit grown on those groves to other parties; that thereby there was a partial failure of consideration as to the defendant, and he promptly rescinded the contract and restored to plaintiff everything of value which he had received from him. The findings on these issues were in favor of defendant, and he had judgment for his costs. Plaintiff appealed from the judgment within 60 days, and brings up the evidence by means of a bill of exceptions.

The appellant contends that the findings as to the contract between the parties are unsustained by the evidence. But this contention cannot prevail. While the plaintiff testified that he made no agreement regarding the fruit on the "Triangle" and "Klondike" groves other than he would give the handling of it to the defendant in case he should decide to ship it, two witnesses, in addition to the defendant himself, testified to an unconditional agreement that the defendant was to have the handling of the fruit from these groves at 50 cents per box, and was to buy the fruit from the "Upper Orchard" at 1¼ cents per pound. And the further finding that the purchase and sale of the oranges from the "Upper Orchard" was a part of the contract for the handling of the fruit from the other groves, and was made in consideration of defendant's having the handling of such fruit, also finds sufficient support in the record. There is testimony to the effect that the agreed price of 50 cents per box for handling would have allowed the defendant a profit of 25 cents per box. And the defendant, in stating the conversation between himself and the plaintiff regarding the transaction, gave this version: "I told him * * * that a cent and a quarter was full market value at that time; but inasmuch as I would have the privilege of shipping the two other orchards below the railroad, the Klondike and the Triangle, that would realize me some profit that we would be sure of, as we were not taking the chances of the market on these two orchards, and that I thought I could handle the other orchards, paying him the cent and a quarter with this understanding, * * * Mr. Sterling accepted my proposition." This testimony, if believed by the trial court, as it evidently was, fully justified the finding.

The appellant's main contention is that the contract, assuming it to have been made as found by the court, was not an entire contract; that the stipulation for the sale of fruit from the "Upper Orchard" and the one regarding the handling of other fruit, were distinct and severable, and that, therefore, a breach of one furnished no ground for rescinding the other. It may readily be conceded that if the evidence went no further than to show that, at one and the same time, the parties agreed that the plaintiff should sell to the defendant, at a given price, the oranges from one grove, and that he should deliver to the defendant for handling, the oranges from other groves, for a compensation of 50 cents per box, the agreement for sale and the agreement for handling, would form separate and independent undertakings, and a breach of one would not authorize a rescission of the other. The several things required to be done by plaintiff were to be done at different times, and the money consideration to be paid for them was not entire, but was apportioned to each of the items to be performed. There is ample authority for the proposition that in such case the stipulations are ordinarily regarded as severable and independent. As examples of cases declaring contracts to be severable under such circumstances as those supposed may be cited. Norris v. Harris, 15 Cal. 250; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Herzog v. Purdy, 119 Cal. 102, 51 Pac. 27; Potsdamer v. Kruse, 57 Minn. 193, 58 N. W. 983; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17. But it must be remembered that the question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction. The court seeks to determine the intent of the parties from a consideration of all the circumstances surrounding the making of the contract. The rule is well stated in Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, as follows: "A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and independent. * * * On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. * * * It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, but on the whole, the weight of opinion, and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or *by the act of the parties.* This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case." And the cases relied on by appellant, in which this court has declared certain contracts to be severable, all recognize that the intention of the parties governs and that stipulations apparently distinct and separate may, by the agreement of the parties, be made to be mutually dependent and to form parts of an entire contract. Thus, in Norris v. Harris, 15 Cal. 227, Field, C. J., said: "But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or *is made so by the agreement of the parties, etc.*" More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621, declares that where the price is, by the contract, apportioned to each item to be performed, "the contract will *generally* be held to be severable." And in Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27, the court, in speaking of a similar contract, said: "Such a contract of sale the law regards *in general* as severable, and we discover no evidence here to take the case out of the rule, *nothing to show that the sale of one item was contingent upon the sale of the others, or that the contract was for other reasons an entirety.*" (In all the foregoing quotations the italics are ours.)

The case at bar differs in its facts from all those cited in that the answer alleged and the court found that the two undertakings of the plaintiff as to the different groves were, in fact, by the agreement of the parties, made parts of one contract, and the agreement to buy the oranges from one grove was in consideration of defendant's having the handling of the oranges from the other groves. This was in effect an allegation and finding that the contract was entire and not severable. Such finding being, as we have seen, sustained by the evidence, it follows that on the refusal by the plaintiff to fully perform his part of the contract, there was a partial failure of consideration, which under section 1689 of the Civil Code, gave the defendant the right to rescind. Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39. By the judgment, the defendant recovered costs against the plaintiff. Since, under the admitted allegations of the complaint, the plaintiff sued as trustee of an express trust, and there was no charge of mismanagement or bad faith on his part, the costs should, under the provisions of section 1031, Code Civ. Proc., have been "made chargeable only upon the estate, fund, or party represented."

The judgment will therefore be modified by inserting therein a provision that the costs recovered by the defendant shall be chargeable only against the trust property described in the complaint, and, as so modified, the judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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7 Cal. Unrep. 259

SHEPARD v. F. A. ROBBINS PRESS WORKS. (S. F. 4,489.)

(Supreme Court of California. April 11, 1906.)

APPEAL — FILING OF TRANSCRIPT — TIME—GRANTING NEW TRIAL—CONDITIONAL ORDER.

A motion for a new trial in an action to quiet title was denied upon condition that plaintiff consent to an amendment of the findings and judgment, and the order denying the motion stated that defendant's counsel should prepare an order specifying in detail the amendment to be made, and it was provided that, if plaintiff did not consent within 10 days, a new trial should be granted. Some four months later an order was made reciting the pendency of the motion for a new trial, specifying the amendment to be made and stating that if plaintiff failed to consent to the amendment within 10 days a new trial would be granted. Plaintiff at no time consented to the amendment. *Held*, that 10 days within which plaintiff might consent to the amendment and avoid the new trial did not begin to run until after the making of the second order, so that it was not until after the expiration of 10 days from that time that the 40 days allowed for the filing of a transcript on appeal began to run.

Department 1. Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by Elizabeth A. Shepard against F. A. Robbins Press Works, in which A. D. Shepard, as administrator, was substituted as plaintiff. From a judgment for plaintiff, defendant appeals. On motion to dismiss the appeal. Motion denied.

A. J. Treat, for appellant. Thomas, Gerstle & Frick, for respondent.

ANGELLOTTI, J. This is a motion by plaintiff to dismiss an appeal from the judgment, on the ground that appellant has not filed in this court a transcript on appeal within the time allowed by law. It is conceded that the 40 days, within which such transcript must be filed, did not begin to run until the motion for a new trial made by defendant was decided by the lower court (rule 2 of this court [78 Pac. vii]), and the question here is as to when that motion was decided, within the meaning of our rule. The notice of motion to dismiss was served on November 24, 1905, and filed November 25, 1905, at which times no transcript on appeal had been served or filed. The action was one to quiet title to certain land. On June 22, 1905, in the matter of defendant's motion for a new trial, which had previously been argued and submitted on a bill of exceptions, the trial court made the following order, viz.: "It is ordered that defendant's motion for new trial be denied, but upon the condition, however, that plaintiff consent that the findings, judgment, and decree heretofore herein made, be amended and modified so as to make the southerly side of the disputed fence the northerly boundary of the Shepard property. If consent be not given by plaintiff within 10 days then it is ordered that a new trial be granted. Defendant's counsel will prepare and present to the court an order to this effect specifying in detail the amendment to be made." No order specifying in detail the amendment to be made was presented to the court until November 1, 1905, on which last-named day the trial court made the following order, viz.: "This cause having been tried and findings filed and judgment rendered in favor of the plaintiff, and the defendant having filed its bill of exceptions on motion for a new trial, and the same having been allowed and certified, and the motion for a new trial having been argued and submitted; and it appearing to the court that the case was tried upon the theory that the plaintiff claimed that the south line of the fence referred to in her complaint was the dividing line between the respective properties of the parties in said action; and it further appearing that the plaintiff by her findings and by her judgment has erroneously been given a boundary on the north line of her property three-fourths of an inch to the north of the north side of the fence between the north line of plaintiff's property and the south line of defendant's property; and it further appearing to the court that the true northerly line of plaintiff's property is a straight line along the southerly line of the said fence, as said line is prolonged from east to west, and that the court inadvertently signed findings and judgment in favor of plaintiff establishing the northern boundary line of her property in a straight line from east to west five and three-fourths (5¾) inches north of the southerly line of said fence; and it further appearing to the court that the said southerly side of said fence was at the time of the erection of the barn herein referred to situated six (6) inches north of the outside face of the corner post of the barn located in the northwest corner of plaintiff's property, to wit, four and one-quarter (4¼) inches from the outer face of the corner board of said barn: Now therefore, it is ordered, that if plaintiff within 10 days after the service of a copy of this notice upon her attorneys signs and files a relinquishment to defendant of all land north of a point beginning four and one-quarter (4¼) inches from the north or outer face of the corner board of the barn on the northwest corner of the property of the plaintiff, said last-named point being originally the southerly side of the fence between the property of the parties, and running thence in a straight line from west to east along the southerly line of said fence, as the same existed during the trial of said cause, the motion for a new trial upon the part of the defendant shall be denied. Further ordered that if within said 10 days plaintiff shall fail to sign the relinquishment herein referred to and directed, then the motion of the defendant for a new trial will be granted upon all the grounds of said motion." This order was served on the attorney for plaintiff on November 13, 1905, and plaintiff having failed to file the required relinquishment, the trial court on December 8, 1905, made an unconditional order purporting to grant defendant's motion for a new trial.

Plaintiff's claim is that the order of June 22, 1905, became, by reason of the failure of the plaintiff to consent to the required modification, an order granting a new trial absolutely, at the expiration of 10 days from the making of such order. See Holtum v. Greif, 144 Cal. 521, 78 Pac. 11, and cases therein cited. If this claim be well founded, it is apparent that the time for filing the transcript expired long before the giving of the notice of motion to dismiss. We are of the opinion, however, that under the terms of the order in question, the time for plaintiff to comply with the expressed condition upon which a new trial would be denied, could not commence to run until the subsequent order, to be prepared by defendant, should be made by the court, specifying in detail the particular modification to which the plaintiff should consent. It is plain from the meager record before us that there was some doubt as to where the line designated in the order as "the southerly side of the disputed fence" was, such fence not being at all points still in existence, and the order made clearly shows the intent of the court that a subsequent order, specifically showing the modification desired, should be made, that plaintiff should have 10 days thereafter within which to consent thereto, and that if within such 10 days she consented to the modification specified in such subsequent order, the motion for new trial should be denied. Under the terms of the order of June 22, 1905, the 10 days within which plaintiff might comply with the specified condition could not commence to run until November 1, 1905, the date of the making of the second order. Her failure to comply with the condition could not be effectual to render the order one granting a new trial earlier than at the expiration of said 10 days. Until that time, therefore, there was certainly no decision of the motion for new trial, within the meaning of our rule. It is apparent, therefore, that the time for filing the transcript on the appeal from the judgment had not expired at the time of the service and filing of the notice of motion to dismiss the appeal. It is not necessary for the purposes of this motion to decide whether the failure of plaintiff to file her consent to the required modification rendered the order one granting a new trial at the expiration of 10 days from November 1, 1905, and we do not decide that question. It is enough here that there was no decision of the motion prior to such last-mentioned time.

The motion to dismiss the appeal from the judgment is denied.

We concur: SHAW, J.; SLOSS, J.

149 Cal. 146

In re ALEXANDER'S ESTATE. (S. F. 4,434.)

(Supreme Court of California. April 10, 1906.)

1. WILLS—ESTATES CREATED—FEE SIMPLE.

Civ. Code, § 1336, provides that words in a will referring to death or survivorship relate to the time of testator's death, unless possession is actually postponed, when they must be referred to the time of possession. A will provided that one of testatrix's children, "if" she remained unmarried should have all that belonged to testatrix, and, if she married, the house that she bought should belong to her, and that "the rest" should be divided among the children. *Held*, that there was a gift to the child in fee in case of her nonmarriage at testatrix's death, and not an estate limited in its creation to the period during which she might remain unmarried, with a remainder to the other children to take effect on her death, or, if she should marry, on her marriage.

2. WILLS — CONDITIONS — VALIDITY — RESTRAINT OF MARRIAGE.

Under Civ. Code, § 710, providing that conditions imposing restraints on marriage, except on the marriage of a minor are void, a condition subsequent in a devise to a daughter, terminating the devisee's estate in fee on her marriage at any time is void.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1537.]

Department 1. Appeal from the Superior Court, Alameda County; F. B. Ogden, Judge.

Judicial proceedings on the estate of Emilie Alexander, deceased. From a decree of final distribution, George Alexander and others appeal. Affirmed.

Frederick E. Whitney, for appellants. E. M. Rosenthal, for respondent.

SLOSS, J. Appeal from decree of final distribution. Emilie Alexander died on June 5, 1904, leaving a will which was admitted to probate in the superior court of Alameda county on July 7, 1904. The testatrix was a widow, and was survived by three sons, George, Henry and Caesar Alexander, and two daughters, Mrs. Ray Rosenthal and Gussie Alexander, all over the age of 21 years. The estate having been duly administered, distribution was prayed for, and after proper proceedings for that purpose a decree was made, distributing the entire estate to Gussie Alexander, one of the daughters, absolutely. From this decree the other children of the testatrix appeal.

The controversy hinges on the construction of the decedent's will, which was olographic and written in the German language. A translation reads as follows:

"Oakland, the 28th March, 1903.

"This is my last wish while I still have good health and full understanding, that if

Gussie Alexander remains unmarried, that all that I have as well as real estate belongs to her, should she marry, then the house belongs to her for which she has the contract that she bought it, hers. The rest my other children shall divide among themselves; Henry Alexander, George Alexander, Caesar Alexander, and Ray Rosenthal. This is my last wish. [Signed] Mrs. Emilie Alexander.

"The testament which Mr. Rosenthal has can be torn up, it is against my wish."

The phrase "the house belongs to her for which she has the contract that she bought it, hers," refers to a dwelling house which had been conveyed by the testatrix to Gussie prior to the making of the will, and this property formed no portion of the estate. At the date of the will Gussie Alexander was the only unmarried daughter of the testatrix, and she never has married. The sons were all engaged in business. From these facts we must determine what interest or estate is given to Gussie Alexander under the will, and what to the other children of the testatrix. The essential words of the will are, "if Gussie Alexander remains unmarried, that all that I have * * * belongs to her, should she marry * * * my other children shall divide [it] among themselves." The contention of the appellants is that these words give to Gussie an estate limited in its creation to the period during which she may remain unmarried, with a remainder over to the other children, to take effect on her death, or, if she should marry, on her marriage. The respondent, on the other hand, claims that the gift to Gussie is a fee, which is to vest on condition that she is unmarried, and that the period at which the contingency of marriage or nonmarriage is to be determined is the death of the testatrix. We see nothing in the language of the will to indicate that, in any view, Gussie is given a life estate. There are no words in the instrument referring to her life or death. The only event affecting her title, whether by way of condition precedent or subsequent, or of limitation, is her marriage. She takes, therefore, either an estate limited in duration to the period during which she remains unmarried, or a fee conditional upon her being unmarried at some time. (Whether such fee, once vested, is to be cut off by a subsequent marriage, is considered in another part of this opinion.)

A devise or bequest for the time during which the grantee remains unmarried is a not unusual form of gift. In such case the vesting of the estate does not depend on a condition precedent, nor is it divested by a condition subsequent. The provision regarding marriage is a limitation, not a condition. 2 Woerner's Am. Law of Adm. (2d Ed.) 962. On marriage, the estate ceases by the expiration of the term for which, at the outset, it was created. But the words of this will are not the words ordinarily used for the creation of such limited estate. This is not a gift to Gussie "while she remains unmarried," or "so long as she remains unmarried" or "until she marries." On the contrary, the estate is given to her "if she remains unmarried." The word "if," in legal as in ordinary phraseology, imports a condition, and there is no reason to give it another construction here. This then is a gift to Gussie on condition that she remains unmarried. Unmarried when? Certainly the gift cannot be on condition that she remains unmarried at all times, since in that view, she could never take anything as long as she lived. If she married, the condition would be broken; if not, it would not have been fully complied with. The only reasonable construction to give these words is to hold that they refer to the state of affairs that may exist at the death of the testatrix. And this accords with the general intent of the testatrix, deducible from the whole will, and the circumstances under which it was executed. Her sons were, by reason of their occupations, self-supporting, and the one daughter, being married, was provided for. Obviously the testatrix wished upon her death to make special provision for her other daughter, if that daughter should be left without the protection of a husband.

The words "if she remains unmarried" may be construed to refer to the date of the testatrix's death without violating any settled rules of construction. While, with reference to its effect a will speaks from the death of the testatrix, it will, where the testator speaks of a condition of things as actually existing, be held as referring to the date of the will. 2 Woerner's Am. Law of Adm. (2d Ed.) 887, 888; 1 Redf. on Wills (4th Ed.) 880. This will, by necessary implication, speaks of Gussie as an unmarried woman. Such reference to her is to be taken as speaking of her condition at the date of the execution of the will. And the condition of her remaining unmarried is given full operation by referring the time of its performance to the death of the testatrix. There are many cases of similar construction. A devise to A., with a limitation over in case of his death, vests an absolute estate in A., unless he dies during the testator's lifetime. Wills v. Wills, 85 Ky. 486, 3 S. W. 900; Herbert v. Executor of Tuthill, 1 N. J. Eq. 141; Jones v. Webb, 5 Del. Ch. 132; Biddle's Estate, 28 Pa. 59; Phelps v. Phelps, 55 Conn. 359, 11 Atl. 596; Wright v. Charley, 129 Ind. 257, 28 N. E. 706; Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900; 2 Jarm. Wills (6th Ed.) 661. Similarly, a gift to various persons "or the survivors of them" refers to those surviving at the death of the testator. 2 Jarm. Wills, supra; Stevenson v. Lesley, 70 N. Y. 512; Matter of Mahan, 98 N. Y. 372. The Civil Code of this state provides (section 1336) that "words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession," but the above authorities, as well as many more that might be cited, show that the same rule exists universally, irrespective of any statute.

A case very similar to the one at bar was Denfield, Petitioner, 156 Mass. 265, 30 N. E. 1018. There the will, after devising certain property to the testator's daughter, went on to say: "The above provision for my daughter is made on condition she remain single." The court said that the condition "seems to be satisfied by holding that it is to continue until the time comes for distribution of the residue. It means on condition she remain single at that time. Otherwise it could never be determined in her lifetime whether she was to take the gift absolutely or not." In principle, the case seems directly in point, notwithstanding the fact that there were special circumstances (not existing here), which led the court to hold that the time when the condition was to be fulfilled was the date of distribution, rather than the death of the testator. If Gussie takes by reason of her having remained unmarried until the death of her mother, it is unnecessary to consider at length the effect of the gift to the other children, if she should marry. For the same reasons governing the construction of the gift to her, it may well be argued that the event of her marriage, which is to vest the estate in her brothers and sisters, must occur before the death of the testatrix. Bu if it be said that the intent was that this language should constitute a condition subsequent, terminating her estate in fee, and vesting it in others on her marriage at any time, the condition would be void as in restraint of marriage. Any distinction that may have existed at common law between such conditions as applied to real and to personal estate (30 Am. & Eng. Ency. of Law [2d Ed.] 802) has been abolished in this state by section 710 of the Civil Code, under which conditions imposing restrains upon marriage (with two exceptions not here involved), are void. Under any view, the distribution to the respondent was proper.

The decree is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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149 Cal. 214

In re WALKER. (S. F. 4,470)

(Supreme Court of California. April 11, 1906.)

1. WILLS—ESTATE IN TRUST—CREATION OF TESTAMENTARY TRUST TO SELL LAND.

Civ. Code, § 2289, provides that on the death of a trustee the superior court of the county where the property is situated must appoint another trustee and direct the execution of the trust. A will provided that a certain lot should be sold, and that the executor, who was appointed as trustee for such purpose, should invest the proceeds and pay the income to certain beneficiaries until their majority, when the investment should be delivered to them. The executor sold the lot, and after his death the purchaser petitioned for the appointment of a trustee to carry out the trust. *Held*, that the petition was erroneously granted, as the trust was merely for the investment of proceeds and the payment of income to the beneficiaries, and not for a sale of land.

2. EXECUTORS—EXECUTOR'S SALE—CONFIRMATION.

Code Civ. Proc. § 1561, provides that where an executor has power, under a will, to sell property, he must make return of sale, and that no title passes until the sale be confirmed, and section 1575, provides for compelling the executor to make a return. *Held*, that where an executor had authority to sell land for the benefit of certain persons and, purporting to act under the power, he did so, but failed to make any return so that there was no confirmation, the beneficiaries having so ratified the sale as to estop them from disputing it, the court having jurisdiction of the probate proceedings might, because of the estoppel, confirm his sale and direct execution of the conveyance upon a compliance with the terms of the contract by the purchaser.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Petition by Mrs. Annie L. Gallagher for the appointment of a trustee in place of a deceased trustee to carry out a trust created by the will of Jane Walker, deceased, and from an order granting the petition, Sadie Mayhew and another, beneficiaries of the trust appeal. Reversed.

R. H. Cross, for appellants. R. Clark and Sargent & Bardin, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of Monterey county, made under the provisions of section 2289 of the Civil Code, appointing a trustee in place of a deceased trustee, "to fulfill and complete the purposes of the trust and to complete the contract set out in the petition of the petitioner." The trust in question was claimed to have been created by the last will of John Walker, the provisions of said will which are material being as follows, viz: Third. "I desire that my lot commonly known as Lot No. 3 in Block 41 of the Second Addition to Pacific Grove, Monterey Co. state of California be sold as soon as an advantageous price can be obtained for the same and that William F. Gibson, whom I hereby appoint as trustee for that purpose shall invest the proceeds in some income producing property or first mortgage security and pay the proceeds to my grandnieces Sadie and Nannie Mayhew, one-half thereof to each. I desire that such income shall be paid to Sadie and Nannie Mayhew directly, so that they can use the same themselves; and a receipt from them to my said trustee shall be sufficient to relieve him from any further responsibility therefor. When my said grandnieces shall attain their majority, then I direct my trustee to pay over said trust fund or deliver the investment to said grandnieces. If either shall die previous to attaining her majority, the survivor shall take her sister's portion." Seventh. "I give my executor hereinafter named full power to sell any and all of my estate real and personal as he may deem expedient at either public or private sale and without first obtaining an order of court therefore. * * *" Eighth. "I hereby appoint William F. Gibson of the city and county of San Francisco, state of California, as executor of this my last will and request that he be allowed to qualify and to act as such without giving bonds to any court."

This will was dated January 10, 1895, and deceased died in the year 1897, a resident of the city and county of San Francisco. Such will was admitted to probate in the superior court of such city and county, and the proceedings for the administration of the estate are still pending therein, no distribution as yet having been had. Wm. F. Gibson was appointed and qualified as executor of the will and continued to act as such until his death in 1901. On February 4, 1899, he, purporting to act as executor and trustee, agreed in writing to sell to respondent, Mrs. Annie L. Gallagher, the lot of land described above for $800, $80 to be paid as a deposit, and $720 within three years, with interest, Mrs. Gallagher to pay all taxes on the land, and agreed that a deed should be executed on full payment of the purchase price. Something over $600 had been paid by Mrs. Gallagher to Gibson under this agreement, prior to his death, and after his death $30 was paid by her to the administrator with the will annexed of the estate of John Walker. At the time of the making of this agreement, Nannie Mayhew, one of the beneficiaries, had attained her majority, and the only other beneficiary, Sadie Mayhew, attained her majority June 7, 1899. The evidence showed that after the attainment of their majority, the beneficiaries received from Gibson small amounts aggregating $185, proceeds of said agreement, and after his death, other portions of said proceeds from the administrator with the will annexed, all of which they still retain. No return of the sale made by Gibson was ever made to the superior court having jurisdiction of the estate. The order appealed from was made by the superior court of Monterey county on May 1, 1905, being based on an application therefor made by respondent May 31, 1904. The beneficiaries of the trust, Sadie Mayhew and Nannie Mayhew, appeal from such order.

It is apparent that the sole object of this proceeding is to enable Mrs. Gallagher to complete her contract for the purchase of this land and obtain title thereto. It is, of course, essential to the right of a court to appoint a trustee under the provisions of section 2289, Civil Code, to fill a vacancy, that there should be an existing trust to be executed. It is claimed by respondent that a valid trust for the sale of this lot and the investment of the proceeds of such sale was created by the will of Mrs. Walker and that this trust for the sale had not been fully executed. We are of the opinion that under a proper construction of the provisions of the will, the sole purposes for which Gibson was appointed trustee were to invest, for the benefit of Sadie and Nannie Mayhew, the proceeds of the sale which the testatrix, in effect, directed to be made, and to pay the come of such investment to such beneficiaries during their minority, at the expiration of which they were to receive the principal in equal shares, and that the provision as to sale was simply a direction to her executor to sell as soon as an advantageous price could be obtained. It is true, as urged by respondent, that no particular form of expression is necessary to constitute a valid trust, but it is essential that the intention of the testator to so do should be apparent, and so far as the sale of the land by a trustee is concerned, we can see no evidence of such intent in the will before us. It will be observed that there is no direct devise of the land to Gibson, and that the provision as to the appointment of Gibson as trustee apparently has reference solely to the matter of investment of the proceeds, and payments of the same to Sadie and Nannie Mayhew. The duties imposed upon him as trustee in regard thereto were not such as to render it imperative that the legal title to the land should vest in him, and there is nothing from which the intent to create a trust for the sale of the land can be inferred. The fifth paragraph of the will contains a substantially similar provision as to the desire of the testatrix for the sale of certain shares of stock and the immediate payment of the proceeds of such sale to certain persons without any bequest in terms. In both of these cases, the direction for the sale is solely to the executor, who elsewhere is empowered to sell at either public or private sale and without any order of court, and the duties of the appointed trustee commence only upon the receipt of proceeds of the sale of the land, relate only to the disposition of such proceeds, and continue only to the time when both beneficiaries attain the age of majority. It would therefore seem apparent that no case was made authorizing action by the superior court of Monterey county under section 2289 of the Civil Code.

Respondent earnestly contends that the appellants are estopped from disputing the validity of the agreement of sale made by Gibson, by reason of the fact that, after attaining majority, they, apparently acquiescing therein, received and retained and still retain the proceeds of such agreement. This may be true, but, in our opinion, that question is not one to be determined in this proceeding. We are not here concerned with any question as to the validity against them of the agreement made by Gibson, or as to the acts of the parties thereunder, but solely with the question as to whether there is an existing trust, for the proper administration of which it is necessary that a trustee should be appointed. If the acts and conduct of Sadie and Nannie Mayhew, the sole parties entitled under the will to receive the proceeds of the sale of said land, or the land itself in the event that no sale is made, have been such as to estop them from asserting the invalidity of the agreement for sale, appellants may doubtless have that fact adjudged in a proper proceeding, and obtain such relief against such beneficiaries as is appropriate. This proceeding was necessarily based entirely upon the theory that there was a trust for the sale of the land, created by the will, and the petition contained no allegation of any fact tending to create an estoppel as to the beneficiaries.

It may properly be suggested that under the circumstances mentioned by respondent we can see no reason why the respondent cannot have adequate remedy in the court having jurisdiction of the probate proceedings. The executor had the power under the will to sell this property for the sole benefit of Sadie and Nannie Mayhew, and, purporting to act thereunder, he made this sale to respondent. By reason of the statute (Code Civ. Proc. § 1561) the sale was ineffectual without confirmation by the superior court having jurisdiction of the estate, and it was the duty of the executor to make a return of such sale. This, so far, has not been done, but there is no reason why such a return should not still be made, and the court having jurisdiction of the estate has the power to require it to be made. Code Civ. Proc. § 1575. If the only persons interested in the proceeds of any sale of this property have so ratified the contract made by the executor as to estop them from disputing it, we can see no reason why the court could not, upon that ground alone, confirm the sale, and direct the execution of a conveyance upon a compliance by the purchaser with the terms of the contract. Certainly, under such circumstances, their objections would not be effectual to prevent a confirmation.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

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149 Cal. 219

In re SHEPPARD'S ESTATE. (S. F. 4,419)

SHEPPARD v. KENDALL et al.

(Supreme Court of California. April 13, 1906.)

1. Wills—Probate—Petition for Revocation—Sufficiency.

A petition for revocation of the probate of a will, merely alleging in general terms that a certain person exercised undue influence over testator, but stating no facts from which a legal conclusion of undue influence could be drawn, stated no cause of action.

2. Same—Amendment—Delay.

Where a petition for the revocation of the probate of a will was filed 10 months after the will was admitted to probate, leave to amend the petition five months after it was filed was properly denied, in the discretion of the court.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Application by A. B. Kendall and others for probate of the will of Joseph Sheppard, deceased. The will was admitted to probate, and thereafter Lafayette Sheppard petitioned for revocation of the probate. From an order granting a motion to dismiss the petition, petitioner appeals. Affirmed.

William A. Coulter and McNab & Hirsch, for appellant. T. L. Carothers, L. G. Morse, John A. Percy, and John W. Preston, for respondents.

McFARLAND, J. On February 1, 1904, the probate court made an order admitting a certain written instrument to probate as the last will of Joseph Sheppard, deceased. Afterwards, on December 5, 1904—within the year allowed by section 1327, Code of Civil Procedure, for contesting a will which had been probated—Lafayette Sheppard, claiming to be son and heir at law of said deceased, filed a petition for the revocation of the said probate of said will. The executors and other interested parties answered the petition; and the matter coming on regularly to be heard by the court on May 23, 1905, the defendants moved the court for judgment on the pleadings that the proceeding for the revocation of the probate be dismissed; and after due hearing the court made an order granting the motion and dismissing the petition. From this order this present appeal is taken by said Lafayette.

The order appealed from was granted upon the ground that the said petition does not state facts sufficient to constitute a cause of action, or any ground for the revocation of the said probate of the will. The only averments in the petition of grounds for the revocation are as follows: "Your petitioner alleges that the making, signing and publishing of said paper purporting to be the last will and testament and codicil thereto of the said Joseph Sheppard, deceased, was procured through the undue influence, prejudice, and imposition from and by Isabel Sheppard, the stepmother of petitioner, and from and by Mrs. E. C. Reed, one of the many relatives of the said stepmother who were not related to decedent, but who are beneficiaries and legatees under said alleged last will. "That the said Mrs. E. C. Reed, on the death of petitioner's said stepmother, continued and repeated the said undue influences, prejudices and impositions, and made use of her confidential relations with the said Joseph Sheppard, as his constant companion and professional nurse, during a long period to and at the time of making said alleged will, when the mind of said Joseph Sheppard was weak and enfeebled from the infirmities of age and disease, to repeat and continue to prejudice and unduly influence the said Joseph Sheppard against your petitioner, and to unduly and unjustly influence the said decedent in making and executing the said alleged will, and by such prejudice and undue influence did procure the making of said alleged will and codicil." In our opinion the trial court did not err in holding these averments insufficient. Of course, there is no hint in the petition of any legal ground for revocation other than that of "undue influence"; but undue influence is averred only in general terms as a conclusion of law, and that kind of averment is fatally defective. Undue influence is a legal conclusion to be drawn from certain facts, and the facts must be pleaded. In Estate of Gharkey, 57 Cal. 279, the court say: "When the grounds of contest embrace duress, menace, fraud, undue influence, * * * such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts (not evidence of the facts) relied on must be stated, and issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of contest, or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found constitute a valid reason why the proposed paper should not be admitted to probate." In the case at bar the averments in the petition, waiving the objection that they are nearly all merely recitals and not positive allegations, amount to nothing more than a general statement that undue influence was exercised over the testator; there are no averments of facts which compelled him to do that which was not his will to do, and procured an instrument which did not express his free intention.

At the time the order appealed from was made the appellant did not ask to amend, but previously to that time, on April 3, 1905, which was more than one year after the order admitting the will to probate, appellant made a motion to be allowed to file certain offered amendments, which was denied on May 9, 1904; and appellants contend that the refusal to allow these amendments was error, which can be considered on this appeal. The contention is not maintainable. The allowance of amendments to pleadings is mostly within the descretion of the trial court, and when the amendments to a petition for the revocation of a will are not offered until after the expiration of a year from the probate, their denial would not be reversed unless the circumstances showed very extreme abuse of discretion, which does not here appear. Moreover, the offered amendments, if allowed, would not have supplied the defects of the original petition.

It is contended that the court erred in denying appellants' motion for a continuance of the trial; but that matter is immaterial if, as we hold, the court was right in rendering judgment on the pleadings.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

149 Cal. 208

STATE v. MILLER. (S. F. 4,367.)

(Supreme Court of California. April 11, 1906.)

1. ESCHEAT — ENFORCEMENT—INFORMATION — ABSENCE OF HEIRS—SUFFICIENCY OF ALLEGATION.

Civ. Code, § 1386, provides that if a decedent leaves no heirs to take his estate, the same escheats to the state. Section 1404 provides that the title of nonresident alien heirs is forfeited unless they appear to claim the property within five years from the death of deceased. Code Civ. Proc. § 1269, regulates proceedings by the Attorney General for the forfeiture of escheated estates, and provides that the information must set forth the facts in consequence of which the estate is claimed to have escheated with an allegation that by reason thereof the state has right to the estate. *Held*, that in this information an allegation that there are no heirs to take the estate is sufficient as against resident heirs, while an allegation that five years have elapsed within which no nonresident alien heirs have appeared to claim the estate is sufficient as to that class of heirs.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 13.]

2. SAME—TIME FOR PROCEEDINGS.

Inasmuch as the rights of possible nonresident alien heirs cannot be barred within less than five years after the death, an escheat proceeding commenced within less than five years is premature.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 10.]

3. SAME — ABSENCE OF HEIRS — EVIDENCE — PRIMA FACIE CASE.

Under the further provision of Code Civ. Proc. § 1271, declaring that all persons named in the information or any other person claiming interest in the estate may appear and answer, and that, if no such person does appear, judgment must be rendered that the state is the owner of the property, it is not necessary in an escheat proceeding to offer any evidence in support of the allegation that there are no heirs, but the failure of claimants to appear is sufficient to support a judgment of forfeiture.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escheat, § 16.]

Department 1. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Proceeding by the state of California against G. F. Miller, as administrator of the estate of Henry Hemker, deceased, to escheat the property of decedent to the state. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., George A. Sturtevant, Deputy Atty. Gen., and H. W. A. Weske, for the State. L. W. Juillard, for respondent.

SHAW, J. Henry Hemker died in this state, intestate, on May 9, 1903. His estate was duly administered by the defendant, and on February 27, 1905, upon settlement of the final account therein, it was adjudged that the defendant had in his hands belonging to said estate, for distribution, the sum of $2,053.55 in money. No person having ever claimed as heir, or otherwise, any part of the estate, the Attorney General on May 15, 1905, began this proceeding by information, under section 1269, Code of Civil Procedure, to obtain a judgment of the court declaring said property escheated and the title thereto vested in the state of California. The court below sustained a general demurrer to the complaint, and thereupon gave judgment for the defendant. The plaintiff appeals.

The complaint alleges that the deceased left "no surviving wife or kindred of any kind or degree," and that "there are no heirs to take said estate." In People v. Roach, 76 Cal. 296, 18 Pac. 407, in a proceeding of this kind begun within 12 months after the death of the deceased, there was a similar allegation that the deceased left no wife or heirs to take the estate. It was held that this was an allegation of fact which was "impossible in law, and which cannot be admitted by demurrer," citing Louisville, etc., Co. v. Palmes, 109 U. S. 255, 3 Sup. Ct. 193, 27 L. Ed. 922, in which case it was declared that an alleged fact, impossible in law, is not admitted by a demurrer. In People v. Roach, supra, and in State v. Smith, 70 Cal. 156, 12 Pac. 121, it was further decided that our statutes on the subject of escheats, when considered together, do not contemplate that a proceeding of this kind should be commenced before the expiration of five years after the death of the deceased, and that it is premature if begun sooner, although it may have been commenced after the settlement of the administration. The reason given for this ruling is that there may be nonresident alien heirs, in whom the title would vest, subject to forfeiture or escheat upon failure to appear and claim within the five years, and that, in that event, until that time has elapsed, the state can have no title or right to a judgment declaring an escheat. In State v. Smith there were nonresident alien heirs who were known to exist. In People v. Roach this did not affirmatively appear, but the existence of such heirs was assumed as a possibility necessary to be considered in the disposition of the case. In both of those cases it is clear from the opinions that the court had in mind the existence of nonresident alien heirs, only, and was discussing the rule which should be applied with reference to them alone. Under our law of succession the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. Civ. Code, § 1384; Smith v. Olmstead, 88 Cal. 586, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336; Phelan v. Smith, 100 Cal. 164, 34 Pac. 667; Bates v. Howard, 105 Cal. 183, 38 Pac. 715; Murphy v. Clayton, 114 Cal. 528, 43 Pac. 613, 46 Pac. 460; Estate of Packer, 125 Cal. 397, 58 Pac. 59, 73 Am. St. Rep. 58. In the case of nonresident alien heirs this title becomes barred, or forfeited, under the provisions of sections 672 and 1404 of the Civil Code, at the end of five years from the death of the deceased, unless within that time such heir appears and claims the property. Estate of Pendergast, 143 Cal. 140, 76 Pac. 962. And this occurs without any judicial proceeding, and even if the heirs be well known. In such cases the purpose of a proceeding under sections 1269–1272, Code of Civil Procedure, is merely to establish the disputable facts, that the heirs are nonresident aliens and that they have not claimed. From these facts spring the forfeiture, and the investiture of title in the state. As to such nonresident alien heirs, therefore, it follows that the proceeding could not be maintained until after the lapse of the five years necessary to produce the forfeiture. As applied to the fact considered by the court in those cases, the fact that the heirs were nonresident aliens, it was proper enough to hold that the cases were prematurely begun. The resident heirs, however, are not barred ipso facto by any statutory forfeiture. They can be barred only by a judgment in a proceeding by information such as is here sought, and then only after the lapse of 20 years from the judgment. The only sound reason for holding the proceeding premature as to this class of heirs, is that it is necessary to await the five years before proceeding against the nonresident aliens, whose existence is always possible where the heirs are unknown, and as the statute provides for but one proceeding, it must be postponed as to all classes of heirs until it can be maintained against all.

Upon another point, however, we think the case of People v. Roach, supra, requires some modification. The case went off upon the theory, that such heirs as there might have been in that estate were nonresidents and aliens. The existence of such alien heirs being assumed, the only point necessary to be decided in the case was that it was prematurely begun. The effect of an allegation, that there were no heirs was fully considered, but there does not seem to have been any consideration of the question, how that fact could be alleged and proved, where such allegation and proof are required by a statute. If it were legally impossible that it could be true, then, manifestly it could not be legally established at all. An examination of the provisions of the statute leads us to the conclusion that it is not thereby intended that the fact of the nonexistence of heirs shall be established in that proceeding, in the ordinary method, by the production of evidence to that effect. Such a requirement would defeat every such proceeding and render the statute wholly nugatory. Section 1269 provides that the information must set forth "the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate." With respect to resident heirs, the estate could not escheat, unless there were no such heirs in existence, or at least unless there were none in existence in contemplation of law, however the actual fact might be. It would be necessary, under this provision, therefore, with respect to such heirs, to make an allegation that there were "no heirs to take the estate," which is the condition necessary under section 1386 of the Civil Code, to cause the property to escheat to the state. We do not see how this can be done except by a direct averment to that effect, nor how it can be held that this is not a sufficient allegation of the fact to serve as a support for the proceeding. As to nonresident aliens, it would be sufficient to aver that none has appeared and claimed and that the five years had elapsed. The proof is regulated by section 1271. It provides that any person named in the information, or any person claiming an interest, though not named, may appear and contest the title of the state, but that "if no person appears and answers within the time, then judgment must be rendered, that the state be seised" of the property claimed in the information. From this it is clear that there need be no further proof. The failure of any claimant to appear, after the 40 days' publication required, is by this statute made sufficient proof, provisionally and for the purpose of authorizing a judgment of the fact that there are no heirs, "to take the estate," and of the right of the state to such judgment. It is true that it also provides that if any claimant appears, and takes issue upon the information, there must be a trial of the issue, as in civil actions, and that if, upon such trial, "it appears from the facts found or admitted that the state has good title" to the property or any part thereof, "judgment must be rendered that the state be seised thereof, and recover costs of suit against the defendant." It is silent with regard to the effect of a finding that the person so appearing is entitled to a part of the estate, but obviously in that event there should be a judgment in his favor for such share. This provision for a trial, however, must be taken to refer solely to the issue between the claimant and the state concerning the share claimed by such person, and not to the right of the state against persons not appearing. The meaning and effect of the statute is that if, on the trial of such issue, the proof shows that the claimant is not an heir, or entitled to the estate, or some share thereof, then such claimant must fail, and judgment must thereupon go in favor of the state for the whole of the property described, although there may be no proof of the nonexistence of heirs, other than the constructive proof afforded by the fact that no heir or person entitled has appeared." The state is not required to prove the impossible in any other manner, or to any greater extent, than this.

The reasonableness of this construction is shown by the provisions of section 1272, that at any time within 20 years after judgment of escheat, any person not a party or privy to the proceeding, may appear and prove his heirship, or right to the property, and thereupon shall receive the property, or its proceeds if it has been sold in the proceeding. This shows that the real purpose and effect of the proceeding, with regard to unknown heirs, is not to establish by ordinary modes of proof, the nonexistence of heirs, but merely to make a statutory, prima facie, showing of failure of heirs, in order to start the running, as against such nonappearing heirs, of a period of 20 years, after which such heirs will be barred, if not under legal disability, otherwise, within five years after such disability ceases. We are of the opinion that the information shows no present right in the state, because begun within the five years after the death of Hemker, but that the allegations are sufficient to have put all claimants upon their proof, if the proceeding had been instituted after the five years had elapsed.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

3 Cal. App. 371

PEASE v. FINK.

(Court of Appeal, First District, California. April 4, 1906.)

1. APPEAL AND ERROR—EFFECT OF APPEAL—JURISDICTION OF LOWER COURT—AMENDMENT OF PROCEEDINGS.

The superior court has authority to correct a misprision of its clerk in entering an order on a motion for a new trial, and to make the record state the facts, though an appeal has been taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2198–2201.]

2. NEW TRIAL—BILL OF EXCEPTIONS—STATEMENT OF CASE.

The only difference between a bill of exceptions and a statement of a case, within Code Civ. Proc. § 659, requiring a party intending to move for a new trial to serve a notice of his intention, designating the ground on which the motion will be made, and whether the same will be made on affidavits or by a bill of exceptions or a statement of the case, is that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion, and, if the insufficiency of the evidence is the ground of an exception, or is stated in a notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document.

3. APPEAL—RECORD—SCOPE.

A notice of intention to move for a new trial stated that it would be made on a bill of exceptions thereafter to be prepared. The document set forth in the transcript was entitled "Statement of the Case." The statement contained all the matters essential to a bill of exceptions, stated in the same manner as would be appropriate therein. *Held*, that the document must be treated as a part of the record on appeal from the order denying a new trial; the errors relied on being sufficiently indicated.

4. SAME.

Code Civ. Proc. §§ 939, 950, require appellant to furnish a copy of a bill of exceptions or a statement in the case, and at the hearing the statement is available for considering the objection that the evidence is insufficient, if the appeal is taken within 60 days after the rendition of the judgment. A judgment was rendered December 7th. The appeal therefrom was taken January 13th following. Appellant set forth in the transcript a document entitled "Statement of the Case," which set forth all the matters essential to a bill of exceptions. *Held*, that the document was a part of the record, not only for a review of the errors of law therein specified, but also for determining whether the evidence was sufficient.

5. PRINCIPAL AND AGENT—PROOF OF AGENCY—DECLARATION BY AN AGENT.

Under Civ. Code § 2319, declaring that an agent has authority to make representations not including the terms of his authority, the declaration of a person claiming to be the agent of another is insufficient to establish the agency or the terms of his authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 40, 416–419.]

6. SAME—RIGHTS OF THIRD PERSONS.

One dealing with another, on his mere statement that he is the agent of a third person, takes on himself the risk of being able to show the existence of the agency, and, if he accepts such statement and is deceived, he has no relief against the third person.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 391–401.]

7. SAME—EXISTENCE OF RELATION—EVIDENCE.

On the issue whether a third person was the agent of defendant in entering into a contract for the exchange of land, whereby defendant was to convey to plaintiff certain land in consideration of plaintiff conveying land to defendant, evidence that a certificate of title to the land which defendant was to convey was made by a searcher of records and in the form of a report addressed to defendant, which was delivered to the third person, was inadmissible to show that the third person was defendant's agent, in the absence of evidence showing the report was delivered to or sent by defendant.

8. SAME.

The evidence was inadmissible to show that plaintiff was justified in believing that the third person was defendant's agent.

9. SAME.

The possession by a third person of a deed does not show that he is the agent of the grantor for any other purpose than to deliver the deed and to receive the purchase price named therein.

10. SAME—RATIFICATION.

Plaintiff entered into a contract with a third person, representing himself as the agent of defendant for the exchange of land. Subsequently a purchaser was negotiating for the purchase of the property which the contract required defendant to convey to plaintiff. At that time, plaintiff held a deed on the premises, and it was agreed that the purchaser could receive a satisfactory deed from defendant by the destruction of plaintiff's deed. Plaintiff's deed was destroyed, and defendant made a conveyance to the purchaser. Defendant had no knowledge at the time of any representations of the third person. *Held*, that defendant did not ratify the acts of the third person.

11. SAME—EVIDENCE OF EXISTENCE OF RELATION—ADMISSIBILITY.

On the issue whether a third person was the agent of defendant, in a transaction whereby the third person entered into a contract with reference to certain land belonging to defendant, evidence of transactions between defendant and the third person, in reference to other property, was inadmissible especially where the party dealing with the agent had no knowledge of such transactions.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 409.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by W. R. Pease against A. A. Fink. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Williamson, for appellant. J. S. Reid, for respondent.

HARRISON, P. J. Action to recover damages for breach of contract. In the complaint herein the plaintiff shows that, in pursuance of an agreement between him and the defendant for an exchange of properties owned by them respectively, they each executed a deed of conveyance to the other; that at the time of such conveyances there was an incumbrance upon his land which had been placed there by himself, amounting to $4,000; that one of the terms of their agreement was that the defendant would assume and pay the said indebtedness and hold the plaintiff harmless therefrom; that the conveyance to the defendant contained a clause by which he assumed such obligation; that the defendant failed and neglected to comply with his said agreement or to discharge said incumbrance; that by reason of such failure the plaintiff was compelled to and did pay the sum of $1,342, and sustained other damage amounting to $570. He therefore asks judgment against the defendant for these amounts of money. The evidence at the trial disclosed the following facts: In December, 1899, the plaintiff was the owner of a parcel of real estate in Oakland, situated at the northwest corner of Fourth and Jackson streets, which was incumbered by a deed of trust executed by the plaintiff to the Union Savings Bank to secure his promissory note for $4,000, and he was desirous of selling the same or exchanging it for some unincumbered real property. Being occupied with his business, he intrusted the matter to his father, Edwin R. Pease. The latter having been informed that the defendant owned some land in Berkeley, and that Philip Munroe was his agent, visited the office of Munroe in San Francisco, and being told by him that he was the agent of Mr. Fink, the defendant herein, and had the handling of the Berkeley property, went with him to Berkeley and examined the same. Upon reporting to the plaintiff the result of his visit and examination, the latter expressed his willingness to exchange the Oakland property for it, and thereupon his father had a further conference with Munroe, at which they agreed upon an exchange of the Oakland property for 10 lots in the Berkeley tract which had been selected by him. Accordingly, on December 28, 1899, the plaintiff signed and acknowledged a deed of conveyance of the Oakland property, but without having the name of any grantee inserted therein, reciting, however, that "this deed is made subject to a mortgage for $4,000 now on said property, together with the accrued interest thereon." He placed this instrument in the hands of his father, and it was by him delivered to Munroe, who at the same time delivered to the father a deed from the defendant to the plaintiff for the aforesaid 10 lots in the Berkeley tract. Neither of these deeds was ever placed upon record. The deed made by the plaintiff was retained by Munroe in his possession until it was produced at the trial herein upon the demand of the plaintiff, and the one delivered to the plaintiff was destroyed about a year later as hereinafter stated. The lots described in the deed from the defendant to the plaintiff are subdivisions of a block of land in Berkeley, and with other subdivisions of the same block, at the time of these negotiations, stood of record in the name of the defendant. Munroe was a dealer in real estate, and some months prior thereto had agreed with the defendant for the purchase of the block from him at any time within a year at the rate of $75 a lot, with the privilege of taking one or more lots at any time whenever he might dispose of them. After the aforesaid exchange of properties had been agreed upon, Munroe requested the defendant to make a deed of the Berkeley lots, leaving the name of the grantee blank, and thereupon the defendant signed and acknowledged a deed therefor without inserting the name of a grantee, and delivered it to Munroe, who delivered it to the plaintiff. The deed itself had been destoyed prior to the trial herein without having been placed of record, and there was a conflict of testimony as to whether it contained the name of any grantee at the time of its delivery to the plaintiff, but under the findings of the court it must be assumed that before its delivery to the plaintiff his name had been written therein as grantee. In November, 1900, a third person was negotiating for the purchase of some Berkeley property, including the lots described in the deed delivered to the plaintiff, and certain others of which the title still stood of record in the name of the defendant, and, for the purpose of consummating the negotiation, the plaintiff and the defendant, together with the purchaser, met at the office of Munroe. It was then agreed between them that, as the deed for the 10 lots then held by the plaintiff had never been recorded, the purchaser could receive a satisfactory deed by the destruction of that deed and a conveyance to him from the defendant of the entire tract. Accordingly, the deed to the plaintiff was destroyed, and the defendant made a conveyance to the purchaser of all of the property, and received from him his check for the entire purchase price of the land embraced in the conveyance, and gave to the plaintiff his own check for $600, the price for which the plaintiff had agreed to sell his 10 lots. In April, 1901, the Union Savings Bank caused the Oakland property to be sold under the power contained in the aforesaid deed of trust, and its proceeds applied upon the obligation held by it against the plaintiff. There being a deficiency of such proceeds, it afterwards commenced an action against the plaintiff for the recovery of such deficiency, and the plaintiff was compelled to pay $1,342 in settlement of this action. Upon the trial the court found in accordance with the allegations in the complaint, except as to the consequential damage therein claimed, and rendered judgment in favor of the plaintiff. From this judgment, and from an order denying a new trial, the defendant has appealed.

1. In the transcript which was originally filed herein the order denying a new trial has the following recital: "In this cause defendant's motion for a new trial came on regularly this day to be heard, J. S. Reid, Esq., appearing as attorney for the plaintiff, the defendant's attorney failing to appear. Whereupon it is ordered by the court that said motion for a new trial be and the same is hereby denied." In the brief of respondent, thereafter filed, one of the points made in his behalf was that, as it thus appeared that the defendant had abandoned his motion

in the superior court, he could not now be heard to allege error in denying it. The appellant thereupon procured an amendment of this entry to be made by the superior court, so that it now reads: "In this cause defendant's motion for a new trial came on regularly this day to be heard, J. S. Reid appearing as attorney for plaintiff, and A. E. Cooley, Esq., appearing for W. F. Williamson, Esq., as attorney for defendant. Whereupon it is ordered by the court that said motion for a new trial be and the same is hereby denied." And upon application therefor, and suggestion to this court of a diminution of the record, he was allowed to file a certified copy of such minute entry as a part of the record herein. The respondent, however, contends that this amended entry cannot be considered, for the reason that by virtue of the previous appeal the superior court had lost jurisdiction to make any amendment of its original entry. The principle upon which it is held that, after an appeal from its judgment, a superior court is divested of authority to make any change in the judgment, is inapplicable here. The amendment was not sought for the purpose of making a change in the judicial action of the court, nor did it have the effect to change in any respect the order from which the appeal was taken. It was made to correct a misprision of the clerk in entering the order, and to make the record correctly state the circumstances under which it was made. The judicial action of the court—the order denying a new trial—is in identical language in both the original and the amended entry thereof. The authority of a court to correct its records at any time so that they may speak the truth is well settled. Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

2. It is further urged by the respondent that the appeal from the order denying a new trial cannot be considered for the reason that in the notice of intention therefor the defendant stated that it would be made upon affidavits and a bill of exceptions thereafter to be prepared and settled; whereas, the document set forth in the transcript is entitled, "Engrossed Statement of the Case," and was settled and allowed as such by the judge before whom the cause was tried. The procedure for obtaining a new trial, authorized by section 659 (2) of the Code of Civil Procedure, implies that a bill of exceptions may have been settled before notice of the motion shall have been given, and that in such case the bill shall be used on that motion. If, however, no bill has been settled, the same procedure is prescribed for its settlement as for the settlement of a statement of the case. There is no substantial difference between the two documents when settled; the only difference being that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion. If the insufficiency of the evidence is the ground of an exception to the decision, or is stated in the notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document. The legal effect of a document is to be determined upon a consideration of the matter which it contains, rather than by the name which is given to it, and the document is not to be disregarded merely upon the ground that it is erroneously entitled, or is without any title. Although the document set forth in the transcript herein is entitled "Statement of the Case," it may also be treated as a bill of exceptions. All of the matters which would be essential to a bill of exceptions are contained therein, and are stated in the same manner as would be appropriate in such bill. The fact that, in addition thereto, the exceptions taken at the trial are grouped together, and specified as errors of law committed by the court, does not impair its force as a bill of exceptions, and may be disregarded. It must be held, therefore, that the document may be considered as a part of the record upon the appeal from the order denying a new trial. The appellant sufficiently indicated the errors of law upon which he relied by so characterizing the exceptions taken by him at the trial which he enumerated. There is no statutory requirement that either document shall specify the purpose for which it is prepared or settled, and the document when settled is therefore available for any purpose authorized by the Code. Section 950 of the Code of Civil Procedure provides that, on an appeal from a final judgment, appellant shall furnish the court with a copy of any bill of exceptions or statement in the case on which he relies, and at the hearing of such appeal, if it is taken within 60 days after the rendition of the judgment, the statement of the case is available for considering the objection that the evidence is insufficient to sustain the decision. Code Civ. Proc. § 939 (1); Wall v. Mines, 128 Cal. 136, 60 Pac. 682. The judgment herein in favor of the plaintiff was rendered December 7, 1903, and the appeal therefrom was taken January 13, 1904. Whether the document be regarded as a statement of the case or as a bill of exceptions, it forms a part of the record to be considered on the appeal from the judgment, not only for a review of the errors of law therein specified, but also for determining whether the evidence is sufficient to sustain the decision.

3. Counsel for the respective parties have presented in their briefs an able and elaborate discussion of several principles of law claimed to be pertinent to a decision of the appeal, but from the conclusion that we have reached upon one of the alleged errors of the superior court it becomes unnecessary, as well as inappropriate, to determine the other propositions. The basis of the plain-

tiff's cause of action is the agreement of the defendant to assume the payment of the obligation secured by the deed of trust, and, accordingly, the court has found that the defendant made such agreement, and that the deed from the plaintiff of the Oakland property of December 28, 1899, was made in pursuance of an agreement between the plaintiff and the defendant. There is, however, no evidence in the record upon which these findings can be sustained. It is very clearly shown therein that the defendant was not present at any interview or negotiation in which the transaction or execution of the deeds was discussed, and that he never knew or heard of any negotiations for an exchange of the properties, or the execution of the deed of the Oakland property, until after the commencement of this action, and that neither the plaintiff nor his father ever met the defendant, or exchanged any verbal or other communication with him until nearly a year after the date of the said deed. The ground upon which the respondent relies in support of the findings is that, in the negotiations between the plaintiff's father and Munroe for the exchange of the properties, Munroe was the agent of the defendant for that purpose, and that the defendant is bound by all of the acts and representations of Munroe as his agent. There is, however, no evidence in the record tending to establish the fact of such agency, or that Munroe had any authority from the defendant, except the testimony of the plaintiff's father that Munroe stated to him that he was such agent; and the rule is of long standing that the declarations of a person claiming to be the agent of another are insufficient to establish such agency or the terms of his authority. Civ. Code, § 2319 (2); S. & L. Soc. v. Gerichten, 64 Cal. 520, 2 Pac. 405; Smith v. Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540. On the other hand, the defendant testified that Munroe was not his agent, and that he had never employed or authorized him to act as his agent for the sale of any property; that he never had any dealings with any one in connection with the Oakland property or any conversation with any one about its purchase or sale, or the payment of any incumbrance thereon, and had never had in his possession any paper or instrument referring to it, or known anything about the property until the commencement of this suit, and Munroe himself testified that he had never acted as the agent of the defendant, and did not act as his agent in the transaction of December, 1899, and did not at that time state to the plaintiff's father that he was his agent. One who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show that such agency existed. McDonald v. Cool, 134 Cal. 502, 66 Pac. 727. If, instead of satisfying himself thereof by independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. The testimony of these declarations was inadmissible for the purpose of proving such agency, and should have been excluded by the court upon the defendant's objection thereto, and when received should not have been considered.

During the trial the plaintiff offered in evidence a certificate of title to the Berkeley lots made by a searcher of records December 23, 1899, in the form of a report addressed to the defendant, which the witness testified had been given to him by Munroe, and at the time of introducing the same his counsel stated that it was for the purpose of showing that the plaintiff was warranted in believing that Munroe was the agent of the defendant. The defendant objected to its introduction, unless the plaintiff should in some way connect the defendant with it. The court overruled the objection and allowed the certificate in evidence, without any evidence that it had been made at the instance of or with the knowledge of the defendant, or that it had been delivered to or seen by him. The evidence so offered not only had no tendency to show that Munroe was the agent of the defendant, or to justify the plaintiff in believing that he was such agent, but the objections of the defendant were well taken, and the court erred in overruling them. The possession by Munroe of the deed from the defendant to the plaintiff of the Berkley lots had no tendency to show that Munroe was the agent of the defendant for any other purpose than to deliver the deed, and, if the purchase price was named therein, to receive the same; nor did it have any tendency to show, or authorize the plaintiff to believe, that his previous negotiations with Munroe had been authorized or approved by the defendant. If no purchase price was named in the deed, the defendant, in the absence of any showing of fraud, or of bona fides on the part of the plaintiff, might be estopped from disputing the title thereby transferred; but its delivery to the plaintiff would not authorize him to believe that Munroe had authority to deliver it to him as a gratuity, nor did the possession of the deed by Munroe have any tendency to show, or give any ground to the plaintiff for believing, that the defendant had authorize Munroe to purchase any property for him, or to accept any property in exchange for the Berkeley lots, or to fix the terms upon which an exchange should be made, or to enter into an executory contract which should be binding upon the defendant for the payment of an obligation of the plaintiff.

The contention of the respondent that the act of the defendant in November, 1900, was a repurchase of the Berkeley lots by him from the plaintiff, and thereby a ratification of the act of Munroe in exchanging the property, is not sustained by any evidence in the record. There is no testimony that it was a purchase, and the plaintiff himself testified that the defendant said nothing to him in regard to purchasing the lots. It, moreover, clearly appears from the evidence that at that time the defendant had no knowledge of any of the acts or representations of Munroe in reference to the Oakland property, and without such knowledge there could be no implied ratification. The evidence of transactions between defendant and Munroe in reference to other property was unavailing for establishing any agency in this transaction, or to authorize the plaintiff to believe that Munroe was acting in this transaction as the agent of the defendant, since both the plaintiff and his father testified that they had neither of them met the defendant until about a year after the transaction, and there is no evidence that they had any knowledge of the other transactions to which they referred in their testimony.

The judgment and order denying a new trial are reversed.

We concur: HALL, J.; COOPER, J.

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3 Cal. App. 396

ALPER et al. v. TORMEY et al.

(Court of Appeal, Third District, California. April 6, 1906.)

REPLEVIN—OWNERSHIP OF PROPERTY—LIEN—FINDINGS—EVIDENCE.

In an action to recover possession of steel rails, evidence *held* to sustain findings that the rails belonged to an insolvent corporation of which intervener was assignee, and that defendant, who held the same as bailee, had no lien thereon for storage.

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Action by A. Alper and another against Patrick Tormey, and L. N. Buttner, as assignee of the Union Stockyard Company of San Francisco, intervener. From a judgment in favor of intervener, and from an order denying defendant Tormey's motion for a new trial, he appeals. Affirmed.

R. H. Lattimer and L. F. Tormey, for appellants. Louis H. Brownstone, for respondents. M. R. Jones, for intervener.

CHIPMAN, P. J. Action to recover from defendant Tormey the possession or the value of certain 60 tons of steel rails. L. C. Wittenmyer, as assignee of the Union Stockyard Company, an insolvent debtor, filed a complaint in intervention, claiming that the property belonged to said insolvent debtor. Defendant Tormey answered the plaintiff's complaint, claiming that said rails were delivered to him as bailee by one A. S. Garretson for safekeeping and that he, defendant, has a lien on the rails as security for services in "safely and securely keeping the said steel rails," which services he alleged to be of the value of $1,500. He further alleged that one E. J. Randall is the owner of the rails as successor to said Garretson. Plaintiffs answered the complaint in intervention denying the ownership and right of possession of the stockyard company, and alleged that prior to the commencement of the action said company sold and transferred to plaintiffs the said rails and that plaintiffs are now the owners thereof and entitled to possession. Defendant Tormey also answered the complaint in intervention specifically denying its allegations and averring a lien as set forth in his answer to the plaintiffs' complaint. Judgment passed for the intervener and this appeal is by defendant Tormey from the judgment and from the order denying his motion for a new trial. The cause was here on the appeal of plaintiffs, and as to them the judgment was affirmed. 82 Pac. 1063.

The only question now here is whether the evidence was sufficient to support the findings that the Union Stockyard Company is the owner of the rails as alleged in its complaint and that defendant Tormey agreed to store them without compensation. In his brief appellant does not claim ownership in Randall, and we shall assume that the allegation of such ownership, alleged in his answer, is waived. He now claims that the evidence fails to show ownership in the Union Stockyard Company, and that if ownership in anybody is shown, it is in Garretson, which, if true, defeats the action. It appears from the testimony of appellant Tormey that a quantity of steel rails, among them the rails in question, was, in the year 1890, deposited on his land, near the property of the company, by Garretson; that Garretson was a stockholder in the company, as was appellant, who was also president of the company from 1892 to 1895; that the company used a large quantity of the rails as they were needed, which were taken from the place where stored on appellant's land and with his knowledge and without objection, many being so used by appellant's direction while he was president of the company and for its purposes; that appellants supposed at the time they were so stored on his land that the rails belonged to the company and were to be used for the improvement of its property and that appellant never claimed to own any of the rails and now makes no claim of ownership to them; that appellant never made any claim for storage until this action was commenced; that he "never gave any attention to the protection of these rails" as he "thought they would protect themselves"; that when they were delivered on his property it was understood that Garretson "could have the rails at any time he wanted them." He testified further: "I knew the Union Stockyard Company helped themselves to these rails so I presumed it was understood at the time that the agreement was to deliver these rails to the Union Stockyard Company." As to his claim for storage appellant testified: "I base my claim to the $1,500 storage on the interest that the money would have fetched me for the land which they promised to take from me." The land referred to did not include the land on which the rails were stored. We think there was sufficient evidence to support the findings.

The officers and stockholders of the company seem to have been the only persons who assumed or exercised any ownership of the rails and this was done for the company alone; no other persons had any use for the rails or showed by evidence that they had or made claim of ownership. The evidence justified the inference that the rails belonged to the company. When the rails were stored on appellant's land it was with his consent and without any understanding that he was to charge for storage and no claim for storage was made by appellant at any time either before, or after, or while he was president of the company. Under his direction as president as well as by the direction of the vice president and manager of the company with appellant's consent, the company made use of the rails as required, and as we have seen it was not until this action was brought that appellant asserted any claim for storage. And his claim then was not for storage services rendered, but, as he testified, it was for interest on the money he expected to receive for the sale of certain land to the company, but which it failed to purchase.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 443

GATES v. QUONG et al.

(Court of Appeal, Third District, California. April 18, 1906.)

1. Chattel Mortgages—Mortgage of Crop—Loss of Lien.

Under Civ. Code, § 2972, providing that the lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as it remains on the land of the mortgagor the lien ceases on the removal of the crop from the land on which the crop grew, unless the removal is tortious.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 221.]

2. Estoppel—Equitable Estoppel—Prejudice to Person Setting up Estoppel.

An estoppel in pais cannot be claimed by a corporation as to transactions with its agent where nothing said or done therein misled the agent to the injury of the corporation.

3. Chattel Mortgages—Mortgage of Crop—Loss of Lien.

The removal of a crop from the land on which it was grown is not tortious as to a mortgagee of the crop where the removal is by virtue of a sale of the crop by the landlord of the mortgagor pursuant to a provision of the lease between the landlord and tenant giving the landlord the exclusive right to sell the crop, which was also made a part of the crop mortgage, and the removal did not fall within the exception to Civ. Code, § 2972, that the lien of a crop mortgage is not lost by a tortious removal of the crop, irrespective of the question of notice of the mortgage.

4. Same—Priority as Between Mortgagee and Garnishing Creditor.

As between a garnishing creditor of the owner of a crop who served his garnishment on the holder of the surplus arising from the proceeds of a sale of the crop, and the mortgagee of the crop after the mortgage lien on the crop had been lost by removal of the crop from the premises on which it was grown, the mortgagee was not entitled to priority.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Interpleader by T. L. Gates against Tom Quong and the Earl Fruit Company. From a judgment in favor of Quong, the fruit company appeals. Affirmed.

Chauncey H. Dunn, for appellant. E. E. McFarland, for respondent Gates. Gregory & Gregory, for respondent Tom Quong.

CHIPMAN, P. J. Action in interpleader to determine the right to certain moneys in the hands of plaintiff as the purchase price of certain prunes sold to him. Defendant Earl Fruit Company claimed the money under a crop mortgage executed to it by one Lee Toy. Defendant Tom Quong claimed under a garnishment served on plaintiff, issued in a suit against said Toy. It appears that Toy entered into posession of an orchard tract under an agreement with the owner, one Frank Buck. Toy executed a chattel mortgage on the growing crop to defendant company. One of the questions arising out of the controversy was whether Toy had any mortgageable interest in the prunes. Much attention is given in the briefs to this question; appellant claiming that the agreement possessed all the elements necessary to constitute a leasehold interest in Toy, such as made his share of the prunes grown on the leased premises the subject of chattel mortgage. The court found against the defendant company on this issue, which finding is challenged as unsupported by the evidence. We do not find it necessary to pass upon this question.

The court found "that by the terms of said lease said Buck had the right and was exclusively empowered to sell and deliver to any person or persons he might direct any and all fruit raised upon said demised premises. * * * That said prunes were sold by said Buck to said Gates 'and' were removed from said leased premise and were delivered to plaintiff. That said Earl Fruit Company did not know of said sale until said delivery was nearly completed. That it then notified said Lee Toy and said T. L. Gates that the proceeds of said sale must be paid to said Earl Fruit Company by virtue of said crop mortgage, but neither said Lee Toy nor said T. L. Gates agreed thereto. That no lien * * * existed upon said prunes or the proceeds of the sale thereof * * * after their removal from said leased premises in favor of said Earl Fruit Company." The court further found "that no person representing the Earl Fruit Company was present at said sale of prunes, and that said Earl Fruit Company had no part nor voice therein and neither consented nor objected thereto upon condition that the proceeds should be paid to said company, or by reason of any conditions whatever"; and that neither Buck, nor Toy, nor Gates at any time agreed with one another or with said company "that the purchase price of said lot of prunes should be paid by plaintiff to said Earl Fruit Company, for the purpose of being applied upon said attempted crop mortgage, or for any purpose whatever." Appellant attacks part of these findings as unsupported by the evidence. The court gave judgment for defendant Tom Quong, from which the Earl Fruit Company appeals on bill of exceptions.

Section 2972 of the Civil Code provides as follows: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor." Without deciding that the mortgage in this case created any lien on the crop attempted to be mortgaged, but conceding that it did, the lien ceased upon the removal of the crop from the land on which the crop grew. Civ. Code, § 2972; Horgan v. Zanetta, 107 Cal. 27, 40 Pac. 22. The evidence was that the prunes were sold at $17.50 per ton taken from the tree, i. e., undried, and that "nearly all" were picked and delivered to plaintiff at a point away from the demised premises "in town," but what town does not appear. Just what proportion remained undelivered when the agent of the defendant company saw Toy and Gates, does not appear. No point is made, however, on this state of the evidence and both parties seem to treat all the prunes as having been delivered to plaintiff, and that the money involved represents the proceeds of all the prunes in question. Appellant's objection to the findings is aimed particularly at that clause to the effect that neither Toy nor Gates agreed, at the time when the delivery of the prunes was nearly completed, "that the proceeds must be paid to the Earl Fruit Company on its crop mortgage." Upon this point the evidence was sufficient to support the findings. Nor do we think that the evidence shows such a state of facts as would give rise to the principle of estoppel in pais, for we cannot see that the agent of the company was misled to its injury by anything said or done by either Toy or Gates. There was not only no agreement or consent on their part, according to their testimony, that the proceeds should be applied on the mortgage indebtedness, but there was nothing said or done by them from which the agent of the company could reasonably infer such consent or agreement. As there was no agreement of this kind there was no evidence supporting appellant's theory that a novation was established; that is, that in lieu of the mortgage lien a new contract was entered into between Toy, Gates and the company's agent. The case of McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69, does not seem to us to apply here, for the reason that the court, on sufficient evidence, found that there was no agreement such as appellant relies upon.

Recurring to the assumed lien of the crop mortgage; although it was lost by the severance of the crop and its removal from the demised land, the cases recognize an exception to the rule of the Code where there is a tortious removal of the crops. Appellant claims that there was such removal here and cites in support of the exception to the rule, Wilson v. Prouty, 70 Cal. 196, 11 Pac. 608; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Bank of Woodland v. Duncan, 117 Cal. 416, 49 Pac. 414. Aside from the fact that the company never objected to the removal or sale of the prunes, we think the evidence clearly shows authority in Buck to make the sale and a rightful exercise of that authority. Whatever view may be taken of the agreement between him and Toy, as to the mortgageable interest of Toy, the agreement specifically provided: "That all produce shall be sold by lessor [Buck], or by persons indicated by him, and all returns from sales shall come to lessor and be retained by him until he shall be paid the said rent; * * * the balance, if any, to be paid over to lessee." Appellant made this agreement a part of its crop mortgage and of course had knowledge of its provisions. Buck did not have actual notice of the mortgage until after the prunes were delivered and even with such notice it would not have affected his right to sell the prunes. Constructive notice of the mortgage by Gates would not make the purchase by him tortious for the mortgage showed on its face that Buck had the right to sell the fruit. Gates' first actual notice of the mortgage was when the prunes were about all delivered and no attempt was then made by the company, or at any other time, to stop delivery. Appellant's agent seems to have assumed either that the mortgage lien followed and attached to the proceeds of the prunes, or that there was a binding agreement between Gates, Toy, and this agent, apart from the mortgage lien, to pay the proceeds to the company. There was evidence supporting the findings of the court which in effect were that the lien was lost, and that there was no such agreement.

Appellant contends that even if Buck was given the right to sell the crop, the fact did not amount to a consent on the part of the company that the sale should release its lien; that Buck's right was nothing more than that of a first mortgagee and as he is making no claim to the fund, the company, as second mortgagee, is entitled to the surplus remaining after Buck was paid. But this view does not meet the claim of Tom Quong, the attaching creditor, who served his garnishment after the company had lost its lien. When the attachment was served the defendant company had no more claim upon the fruit than any general creditor.

Taking, then, the most favorable view of the Buck-Toy agreement, that appellant had a lien by virtue of its mortgage, the findings that the lien was lost before the attachment was levied, support the judgment, and it is therefore affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 158

WORTH v. EMERSON et al.

(Court of Appeal, First District, California. Feb. 24, 1906. Rehearing Denied by Supreme Court June 4, 1906.)

1. JUDGMENT—MOTION TO VACATE—ERROR.
Where it appeared from the judgment roll that the judgment was rendered on motion of plaintiff and after the court had heard evidence offered and after due deliberation, any error committed therein not shown on the face of the record could not be corrected by motion to vacate, but only by appeal or through a motion for a new trial.

2. APPEAL—MATTERS NOT APPARENT OF RECORD—AFFIDAVITS.
A judgment cannot be impeached for error committed on the trial or in the rendition of the judgment, by affidavits outside the record, but only by bill of exceptions made a part of the record.

3. APPEAL — RIGHT TO ALLEGE ERROR — STRANGERS TO THE ACTION.
Error in rendering a judgment against one of the defendants to an action to enforce the lien of a street assessment, after the dismissal of the action against the other defendants, was available only to the person against whom the judgment was rendered, and not to a stranger to the action.

4. SAME—NOTICE—SERVICE.
In an action to foreclose a street assessment on land belonging to several defendants, wherein judgment was rendered for plaintiff, nonappealing defendants were not adverse parties, and no notice of appeal was required to be served on them.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by E. Worth against Esther B. Emerson and others. From an order vacating a judgment in favor of plaintiff and granting defendant Emerson a right to redeem, plaintiff appeals. Reversed.

Ralph L. Hathorn and Brooks Palmer, for appellant. J. C. Bates, for respondent.

HARRISON, P. J. Action to enforce the lien of a street assessment. Appeal from an order setting aside a judgment previously rendered in favor of plaintiff.

The action was commenced November 4, 1898, against Esther B. Emerson, John Doe, Robert Doe, and Jane Doe; the plaintiff alleging in his complaint that "the defendants on November 5, 1896 (the day the assessment became a lien) were, and still continue to be, the owners" of the lot of land described in the complaint, and that the said defendants John Doe, Robert Doe, and Jane Doe are sued by fictitious names because their true names are unknown to plaintiff. Summons was served upon the defendant Emerson, and her default for want of an appearance was entered October 19, 1901. No service was made on either of the other defendants. February 17, 1904, an answer to the complaint was filed by John H. Grady, stating that he is "sued herein as John Doe, one of the defendants in the above-entitled action." After this answer was filed, but on the same day, the court, on the motion of the plaintiff, dismissed the action "as to the defendants therein sued by the fictitious names of John Doe, Robert Doe and Jane Doe, and John H. Grady, appearing herein as John Doe," and after hearing the evidence on the part of the plaintiff entered its judgment, declaring the amount of the assessment to be a lien upon the land described in the complaint, and directing a sale of the land in satisfaction thereof. February 25th Grady gave notice of a motion to vacate and set aside the judgment, and in support thereof filed an affidavit, in which he stated that he had succeeded to the right, title, and interest of the defendant Emerson in said lot of land, and her right to redeem the same from a sale to the state of California by a deed from her bearing date February 13, 1904, and had thereafter paid certain money for the purpose of redeeming the land from a sale thereof made to the state of California for delinquent taxes. The motion came on for hearing March 18th, and on May 27th was granted by the court. The only evidence presented in support of the motion was the judgment roll in the action and the above affidavit and notice of motion. From the order thus made the present appeal has been taken.

The order appealed from was not made upon the ground or claim that the judgment was rendered by reason of any mistake or inadvertence, or that there was any misprision of the clerk in entering it. It was not void upon its face, and it appears from the judgment roll itself that it was rendered upon the motion of the plaintiff, and after the court had heard the evidence offered on his behalf, and after due deliberation thereon. If any error was committed therein, it was a judicial error, which could be corrected only upon an appeal, or through a motion for a new trial. Egan v. Egan, 90 Cal. 15, 27 Pac. 22; First National Bank of Fresno v. Dusy, 110 Cal. 69, 42 Pac. 476. And any error committed by the court upon the trial, or in the rendition of the judgment, in order to be available for the purpose of vacating or setting the judgment aside, must be manifested by a bill of exceptions and made a part of the record. The validity of a judgment cannot be impeached by affidavits outside of the record.

The grounds upon which Grady asked that the judgment be set aside were that the court had no power or authority, in a street assessment case, to dismiss the action as to a portion of the defendants alleged to be the owners of the land, and render judgment against only one of the owners sued; and that, as he was sued as John Doe, a fictitious defendant, and had filed an answer alleging that he is the owner of the land, the court had no power, authority, or jurisdiction to dismiss the action as to him, sued as John Doe, and render judgment against the defendant Emerson. To say that, in an action or proceeding which is within its jurisdiction, a court has no power or authority to make a certain order, or render a certain judgment therein, is merely to say that the court has no jurisdiction to commit error, which is equivalent to saying that it is erroneous to commit error. It may be conceded that the court erred in rendering judgment against the defendant Emerson after dismissing the action against the other defendants (Clark v. Porter, 53 Cal. 409); but such error was available to Mrs. Emerson alone, and not to a stranger to the action, or one not a party thereto. The judgment so rendered was voidable therefor at her instance, but was not void. Chase v. Christiansen, 41 Cal. 253. It was competent for her to waive the error, as she has done by not appealing from the judgment, and submit to a sale of her interest in the land in satisfaction of the lien. Such error, however, is not available to either of the defendants so dismissed from the action. Upon a dismissal as to them, their rights in the land were unaffected by the judgment as if the action had been originally brought against Mrs. Emerson alone. Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

Grady is not named in the complaint, nor was he served with any process in the action. His claim in his answer that he is "one of the defendants in the action, sued herein as John Doe," is refuted by the affidavit which he presented in support of his motion. The John Doe who is named in the complaint as a defendant in the action is designated therein as a person who was one of the owners of the land at the date of the assessment, and thence continuously until the commencement of the action; whereas Grady, in his affidavit, claims to have acquired his interest in the land on February 13, 1904, the day before he filed his answer, and does not claim to have had any interest therein prior thereto; and the only interest which he claims to have then acquired was derived from the defendant Emerson, whose default in the action had been previously entered. He does not claim to have been at any time a co-owner with Emerson, and therefore was not one of the defendants in the action or entitled to be made a defendant therein; and his filing an answer to the complaint was unauthorized.

The proposition on the part of the respondent that the appeal should be dismissed for want of a service of the notice of appeal on Mrs. Emerson is overruled, upon the authority of Foley v. Bullard, 97 Cal. 517, 32 Pac. 574.

The order appealed from is reversed.

We concur: HALL, J.; COOPER, J.

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3 Cal. App. 190

SIERRA LAND & CATTLE CO. v. BRICKER et al.

(Court of Appeal, Second District, California. Feb. 28, 1906. Rehearing Denied by Supreme Court June 4, 1906.)

1. CORPORATIONS—INCORPORATION—EVIDENCE.

The articles of incorporation of plaintiff with the filing marks thereon are evidence of the proper filing of such articles, and of plaintiff's due incorporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 113–118.]

2. SAME.

A receipt showing that defendants contracted with plaintiff in its corporate name was competent evidence as to plaintiff's incorporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 109–111.]

3. DEPOSITARIES—DEPOSITARY FOR HIRE.

Under the direct provision of Civ. Code, § 1503, where defendant contracted to receive back property sold to plaintiff and repay the purchase money if the same should prove unsatisfactory, when defendants refused to receive the property on offer to return the same became the property of the defendants and plaintiff thereafter held it as a depositary for hire.

4. CONTRACTS — ACTION FOR BREACH — EVIDENCE.

In an action to recover the purchase price of a team sold under a contract that it would be taken back and the purchase money refunded if unsatisfactory, evidence as to the unsoundness of one of the horses was admissible as indicating the reasonable character of plaintiff's claim that the team was unsatisfactory.

5. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even though it was unnecessary to show such fact, the admission of such evidence was harmless.

6. CONTRACTS—OFFER OF PERFORMANCE.

Under Civ. Code, § 1496, providing that the thing to be delivered need not in any case be actually produced upon an offer of performance unless the offer is accepted, an agreement to return property bought if unsatisfactory is satisfied when an offer is made and refused.

7. SAME — ACTION FOR BREACH — CONDITIONS PRECEDENT.

Under Civ. Code, § 1440, providing that if a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party, the cause of action on a contract to receive back property and return the purchase money accrued when the seller refused to receive back the property and return the purchase money.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Sierra Land & Cattle Company against W. J. Bricker and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Will D. Gould and E. C. Oggel, for appellants. B. W. Hahn and Hahn & Hahn, for respondent.

ALLEN, J. Action for money. Verdict and judgment for plaintiff, from which judgment, and an order denying a new trial, defendant appeals.

Plaintiff avers in its complaint that it purchased a span of horses from defendants upon an agreement that if, after trial, the same should prove unsatisfactory, such horses should be returned and defendants would repay the purchase money, together with expenses of shipping to the place of trial, and expenses incident to such trial. Further, that the team, upon trial, was found to be unsatisfactory, and plaintiff immediately notified defendants of such fact, offered to return said horses, and demanded the repayment of the money, all of which defendants refused. Defendants deny all of the allegations. The evidence in the record is sufficient to support the verdict. No question of rescission is involved. The action is based upon a contract, the breach of which is clearly shown. The articles of incorporation of the plaintiff, with the filing marks thereon, were evidence of the proper filing of such articles and the due incorporation of the plaintiff, even were such proof necessary, when we consider the written receipt in evidence from which it appears that the defendants contracted with the plaintiff in its corporate name and received money admitted thereby to have been money of the plaintiff. This written receipt was competent evidence in the regard just mentioned, as well as tending to prove the actual receipt of the money, which was denied. Under the contract established, when defendants refused to receive the property upon the offer to return, the same became the property of the defendants, and plaintiff thereafter held that same as a depositary for hire. Civ. Code, § 1503. There is no issue pending in the case involving any counterclaim or demand growing out of a violation of the plaintiff's duty as such depositary, and all testimony received with reference to the use or retention of the horses under the pleadings was immaterial. Plaintiff is the real party in interest, as shown by the receipt and other competent testimony. The evidence with reference to the unsoundness of one of the horses was not improper, as indicating the reasonable character of the claim of the plaintiff that the team was unsatisfactory; even when that fact is unnecessary to be shown, no prejudice could result to defendants by such proof. An agreement to return if unsatisfactory is satisfied when an offer is made and refused. "The thing to be delivered need not in any case be actually produced upon an offer of performance unless the offer is accepted." Civ. Code, § 1496. The cause of action accrued when defendants refused to perform their part of the contract. Civ. Code, § 1440.

We discover no merit in the many other specifications of error in anywise prejudicial to defendants, or worthy of notice.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

7 Cal. Unrep. 263

SHOWERS et al. v. ZANONE.

(Court of Appeal, Third District, California. April 13, 1906.)

1. Appeal — Findings — Conflicting Evidence—Review.

Findings of a trial court based on conflicting evidence will not be disturbed on appeal, if there is any evidence in the record on which they might be properly based.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

2. Drains — Construction — Liability for Expense—Evidence.

In an action to recover one-fifth of the cost of a drainage ditch, evidence *held* to support a finding that defendant fully consented to the scheme and promised to defray her part of the expense involved therein.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by Jacob Showers and others against Madaline M. Zanone. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Mahan & Mahan, for appellant. Gillett & Cutler, for respondents.

McLAUGHLIN, J. This is an action to recover one-fifth of the cost of a drainage ditch constructed by the plaintiffs. The complaint contains two counts. In the first a cause of action for money expended for the use and benefit of defendant at her request is stated. In the second it is alleged that the plaintiffs were duly authorized by defendant to make arrangements for and construct said ditch, she agreeing to pay her pro rata share of the expense. In this connection it is stated that she acted by and through an agent who communicated her authorization and consent to plaintiffs, and that by her conduct preceding the commencement of the work, and during its progress, she led plaintiffs to believe that she acquiesced in the plan proposed to her, and that said agent had authority to speak and act for her in the premises. The court found for plaintiffs, and judgment was entered accordingly. The sole point urged on this appeal is that the findings are not supported by the evidence.

It is a cardinal rule of appellate practice that the findings will not be disturbed when the evidence is conflicting. Broder v. Conklin, 121 Cal. 284, 53 Pac. 699; Rose v. Rose, 112 Cal. 343, 44 Pac. 658; Astill v. South Yuba W. Co., 146 Cal. 57, 79 Pac. 594. The weight and effect to be given the evidence was for the trial court to determine, and even though it was demonstrated that the preponderance of evidence was against the conclusion reached, we could not disturb that conclusion if any evidence was found in the record upon which it might properly be based. All doubts must be resolved, and all intendments indulged in favor of the judgment, and we "must construe the testimony as favorably as possible for the respondents." Carteri v. Roberts, 140 Cal. 165, 73 Pac. 818; People v. Wong Suey, 110 Cal. 117, 42 Pac. 420; Taylor v. Kelley 103 Cal. 178, 37 Pac. 216; Olmstead v. Dauphiny, 104 Cal. 635, 38 Pac. 505; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

Viewing the evidence in this case in the light of these well-settled rules, it certainly cannot be said that the findings are not supported by the evidence. The business relations between the defendant and her alleged agent prior to this transaction, her visit to the scene of the contemplated improvement in his company, their joint examination of the premises and what was said and done by each at that time and subsequently, had a strong tendency not only to show his agency, but her consent to and acquiescence in the plan which had been proposed to her. Her inquiry upon the street in Eureka, and her conduct when the claim of plaintiffs was presented to her were of potent significance. She knew and so did her agent, that the work was in progress, and the latter at least must have known that the plaintiffs were counting on her to pay a portion of the expense incurred. Both defendant and her agent were cognizant of the fact that the ditch would be of great benefit to her land by securing it against overflow, and the facts and circumstances surrounding its construction were such as to warrant the finding and judgment that she was liable for one-fifth of the expense. Bergthold v. Porter Bros. Co., 114 Cal. 688, 46 Pac. 738; Puget Sound L. Co. v. Krug, 89 Cal. 243, 26 Pac. 902; Burnett v. Fisher, 57 Cal. 152; Anglo-Cal. Bank v. Cerf, 147 Cal. 399, 81 Pac. 1081; Meechem on Agency, 83; Donnelly v. S. F. Bridge Co., 117 Cal. 422, 49 Pac. 559; Carpy v. Dowdell, 115 Cal. 687, 47 Pac. 695; Dolbeer v. Livingston, 100 Cal. 621, 35 Pac. 328; Scott v. Jackson, 89 Cal. 262, 26 Pac. 898. Indeed, her failure to disclaim liability, and the excuse she gave for failure to pay, coupled with her pertinent inquiry as to what was being done, and other facts incident to her visit to the scene would alone lend strong support to a finding that she had fully consented to the scheme and had promised to defray her portion of the expense it would involve.

True, all this testimony was flatly contradicted, and it may even be said that the evidence would support findings directly to the contrary, but we have pointed to the reasons which forbid our interference, and hence the judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 408

WETZEL v. SUPERIOR COURT OF SISKIYOU COUNTY.

(Court of Appeal, Third District, California. April 7, 1906.)

1. Certiorari—Grounds—Errors.

A judgment will not be reversed on certiorari for mere errors committed in the exercise of its rightful jurisdiction.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 42.]

2. Same.

A writ of review is not a writ of error on which the rulings of the trial court and matters within its jurisdiction may be reviewed, unless they are matters necessary to determine the jurisdictional facts.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 1, 42.]

Petition by Sigmund L. Wetzel for a writ of review to review the proceedings of the superior court of the county of Siskiyou, which terminated in a judgment determining petitioner to be insane, and ordering his commitment to a state hospital. Writ denied.

Jacob P. Wetzel, for petitioner.

CHIPMAN, P. J. Petitioner presents to the court what purports to be a statement of the proceedings of the superior court of the county of Siskiyou, which resulted in a judgment that the said Sigmund L. Wetzel was insane and that he be committed to and confined in the Napa State Hospital at Napa, Cal. The prayer of the petition is "that a writ of error issued out of the honorable District Court of Appeal, directed to the superior court of the county of Siskiyou, commanding and directing it to certify up to this honorable court a transcript of the records in the papers in the said matter, of Sigmund L. Wetzel, an insane person, and that this honorable court [review] the proceedings and rulings in said matter, as rendered, ordered and adjudged by the said superior court, because of the error heretofore alleged in this petition, and do whatever is meet and just in the matter." Assuming that the intention of the petitioner is to obtain a writ of review, it is sufficient to say that the court had jurisdiction to hear and determine the matter.

The judgment of a court will not, on certiorari, be reversed for mere error committed in the exercise of its rightful jurisdiction. Hutchinson v. Superior Court, 61 Cal. 119; Holbrook, etc., v. Superior Court, 106 Cal. 589, 39 Pac. 936. The writ of review is not a writ of error upon which the rulings of the court and other matters within its jurisdiction may be reviewed, except they be matters necessary to determine the jurisdictional facts. Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580. So far as appears from the petition and accompanying papers and purported copy of records, the errors complained of were mere errors occurring at the hearing and related to the admissibility of evidence, to the refusal of the court to continue the hearing, to the giving of certain instructions and like questions.

There is nothing in the record to show and no claim is made that the court was without jurisdiction.

The writ is denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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3 Cal. App. 404

PRINCE v. KENNEDY.

(Court of Appeal, Second District, California. April 7, 1906.)

1. ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—COMPLAINT.

A complaint in an action by attorneys for compensation alleging that plaintiffs were partners engaged in the practice of law as attorneys and counselors, was not insufficient for failing to allege that plaintiffs were authorized by the laws of the state to practice law.

2. SAME.

In an action by attorneys, the complaint alleged that plaintiffs at the request of defendant rendered for him services for which he agreed to pay the reasonable value, and that such services had been fully rendered and performed, and that a certain sum was the reasonable value thereof. *Held*, that an objection that the complaint did not allege that anything was due from defendant was untenable.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 365.]

3. TRIAL—FINDINGS BY COURT—CONFORMITY TO ISSUES.

A complaint alleged that plaintiffs as attorneys rendered services for defendant for which he agreed to pay the reasonable value which was $750. The answer denied that the services were of any value, and alleged for a separate defense that defendant had employed plaintiffs to collect a certain claim due to defendant, but that plaintiffs had neglected to collect the same. The court found that the allegations of the complaint were true except the allegation that the services were worth $750, and found the reasonable value thereof to be $500. *Held*, that the matter set up in the alleged separate defense raised no material issue, and the findings disposed of every issue in the case.

4. APPEAL—RECORD—FAILURE TO MAKE FINDINGS—ABSENCE OF EVIDENCE.

A judgment will not be reversed for failure of the trial court to find on an affirmative defense where the record does not contain the evidence.

5. EVIDENCE—BURDEN OF PROOF.

A party alleging an affirmative defense has the burden of proving it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 119–121.]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by George H. Prince against H. Kennedy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Stutsman & Stutsman and Taylor & Forgy, for respondent.

GRAY, P. J. In this action it is alleged in the complaint "that Taylor & Forgy is and at all times herein mentioned was a copartnership, composed of W. S. Taylor and E. W. Forgy, who are, and at the times herein mentioned were, engaged in the practice of law as attorneys and counselors at law, in the city of Los Angeles, Cal.; that within two years last past, as such attorneys and counselors at law, and at the special instance and request of the defendant, H. Kennedy, said Taylor & Forgy rendered to and for said defendant services for which said defendant agreed to pay the reasonable value thereof; that no time was agreed upon for the payment thereof, but said services have been fully rendered and performed and $750 is the reasonable value thereof; that no part of said sum has been paid, and the whole thereof, to wit, the sum of $750, is now due, owing and unpaid." An assignment of the said claim to the plaintiff is also duly alleged in the complaint. The answer, in effect, admits the performance of services, but denies that they were performed within two years last past, and also denies that they were of any value. The answer then proceeds as follows: "And for a further and separate defense this defendant alleges that within six months last past defendant employed W. S. Taylor, one of the members of the firm of Taylor & Forgy, as attorney at law, to collect a certain claim of $525 due defendant as commission upon a sale of real estate from one, Andrea Daneri; that said Taylor and said Taylor & Forgy failed and neglected to collect said claim or any part thereof; that they wholly failed and neglected to institute proceedings to collect said claim, and defendant says that he has no information upon which to found a belief, and basing his denial upon that ground he denies that said Taylor or said Taylor & Forgy performed any services in that behalf." The court found "that all the allegations of the complaint are true," except the allegation that the services were of the reasonable value of $750 and found the reasonable value thereof to be "$500 and no more"; and "that no part of said reasonable value of such services has been paid." From the judgment entered in plaintiff's favor on these findings the defendant appeals.

1. It is objected first that the complaint is insufficient to support the judgment, and fails to state a cause of action because it is not alleged therein that Taylor & Forgy were attorneys at law "authorized by the laws of this state to practice law." This contention is fully negatived by the case of Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600. The allegations of the complaint herein are much broader than in the Ballerino Case. There the complaint contained no allegation that the services were performed as attorneys at law. Here it is so alleged, and, further, that the firm was "engaged in the practice of law," etc. From this it will be presumed, if necessary, that they were regularly authorized to practice law. This point is devoid of merit.

2. The point that the complaint does not allege that anything is due from defendant to plaintiff is also devoid of merit. The complaint alleges specific facts leading to the irresistible conclusion that $750 is due from defendant to plaintiff; and that is sufficient.

3. The findings are also clearly sufficient to support the judgment and fully dispose of all the issues in the case. To find that the allegations of the complaint are true negatives every denial of those allegations, and to except the allegation of value of the services from this general finding and to dispose of the question by a specific finding that said value is $500 leaves the findings open to no objection on the score of uncertainty. It is impossible to misunderstand the findings as they are drawn, and we think them sufficient under the authority of Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816; County of Sutter v. McGriff, 130 Cal. 124, 62 Pac. 412, and many earlier cases in this state of similar import.

4. The matter set up in the alleged separate defense in the answer constituted no defense to the action, raised no material issue and no finding as to it was necessary. There was nothing in it to show that the employment therein referred to had any connection with the services for which suit was brought, nor were any damages alleged or claimed by way of counterclaim or otherwise. Moreover, if it were conceded that the answer contained an affirmative defense, it is settled by numerous cases and beyond question that a reversal will not be had for failure to find on it where, as here, the record does not contain the evidence. Roberts v. Hall, 147 Cal. 434, 82 Pac. 66. The burden is on the party alleging an affirmative defense to prove it, and the court will not presume, in the absence of the evidence, that there was evidence upon a point in respect to which there is no finding. Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113. As to whether the appeal was taken for delay, and as to whether damages should be added to the judgment for that reason, the court is unable to reach a unanimous concurrence either way, and therefore damages are not added as for an appeal taken for delay.

The judgment is affirmed.

We concur: SMITH, J.; ALLEN, J.

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3 Cal. App. 409

VAN LEUVEN v. VAN LEUVEN.

(Court of Appeal, Second District, California. April 9, 1906.)

APPEAL—REVIEW—ADMISSION OF EVIDENCE—FAILURE TO EXCEPT.

The admission of an exhibit in evidence will not be reviewed on appeal, where no exception was taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1503, 1508.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by W. H. Van Leuven against A. B. Van Leuven. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Henry M. Willis, for appellant. Frank C. Prescott and Prescott & Morris, for respondent.

GRAY, P. J. This action is brought by one brother against another to reform a written contract of a sale of an interest in real estate, so as to make it also an agreement to purchase on the part of the defendant, and to enforce performance of said agreement to purchase. The findings and judgment are in plaintiff's favor, and the defendant appeals from the judgment and from an order denying him a new trial.

1. The court found, in substance, that it was agreed by defendant to pay plaintiff $325 on or before the 14th day of November, 1903, in consideration of the conveyance to defendant by plaintiff of plaintiff's interest in the Whaley place, and that said agreement was omitted from the written agreement through a clerical error and mutual mistake

of the parties. Appellant contends that this finding is not supported by the evidence. It appears from the evidence that defendant had originally purchased the Whaley place, paying therefor $1,400 of money he had on hand, $1,700 that he borrowed from the Union Bank, and $325 from and of the plaintiff's money. After this purchase, the brothers quarreled for some weeks and finally entered into negotiations for a business settlement with the view of placing themselves in a position where no further communication between them should be necessary. To show that in the course of these negotiations the defendant agreed to buy plaintiff's interest and pay him this $325 for it much evidence, oral and written, was introduced. C. E. Truesdell, one of the lawyers who had a hand in the settlement and drew up the contract, testified, among other things, "what I want the court to understand is of a conversation that was had there that A. B. Van Leuven was to purchase W. H.'s interest in the Whaley place; it must have been left out of the contract by an oversight on Mr. Prescott's and my part." It is needless to go into all the evidence on this subject. It is sufficient to say that the very purpose of the agreement and of the negotiations for the agreement was to effect a settlement and segregation between these quarreling brothers, and this could not be done without the defendant buying out his brother and paying off this $325 that the latter had in the land. It was the clear intent and purpose of the parties that this should be done, and it is plain from the evidence that defendant intended that it should be done, and that the contract which was to be formally prepared and signed should accomplish that purpose. The omission of this most essential part of their agreement cannot be accounted for on any other theory consistent with the evidence, than on that of a mistake and oversight on the part of all concerned in the preparation of the written contract. The finding has ample support in the evidence.

2. There can be no reasonable question that plaintiff was interested in the land to the extent of $325 of his money which had gone into the purchase of it. Plaintiff's interest in the land is admitted by defendant's becoming a party to the contract of sale. The finding of such interest is supported by the evidence.

3. As to appellant's complaint concerning Exhibit L-1, there was no ruling of the court, except that it might be marked for identification. It was not admitted in evidence, nor was there any exception taken by appellant to any action of the court in connection with this exhibit. There is, therefore, nothing concerning it that this court can review.

The judgment and order appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

3 Cal. App. 412

CORSON v. McDONALD.

(Court of Appeal, Second District, California. April 9, 1906. Rehearing Denied May 28, 1906.)

1. FRAUDS, STATUTE OF—SUFFICIENCY OF WRITING—EXTENSION OF MORTGAGE—EXERCISE OF MORTGAGOR'S OPTION.

Where a mortgage provided that the mortgagor might extend it for a year from the expiration of the term thereof, it was not necessary that the mortgagor's decision to extend be expressed in writing, as the agreement constituted a written proposition on the part of the mortgagee which on acceptance by the mortgagor became a valid contract in writing on the part of the mortgagee.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 195.]

2. MORTGAGES — CONSTRUCTION — EXTENSION OF TIME—CONSTRUING MORTGAGE AND NOTE SECURED.

A provision in a mortgage that the mortgagor might extend it for a year from the expiration of the term thereof included the notes secured.

3. APPEAL — DISPOSITION OF CAUSE — PROCEEDINGS IN LOWER COURT—AMENDMENT.

A clerical error constituting a discrepancy between the finding and the judgment may be corrected in the trial court, by a reduction of the judgment notwithstanding an affirmance on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2201.]

4. MORTGAGES — FORECLOSURE BY ACTION—ATTORNEY'S FEES—LIEN.

Where a note secured by a mortgage provides for attorney's fees, it is proper on foreclosure to make the fee a lien on the land.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1678.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by May Delevan Corson against Mrs. Mary A. McDonald. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

John Satterwhite, for appellant. Willoughby Rodman and Rodman & Garrett, for respondent.

SMITH, J. Appeal from a judgment foreclosing a mortgage, and from an order denying the defendant's motion for a new trial.

The mortgage was given to secure a promissory note of date November 26, 1897, for the sum of $3,500, payable with interest on or before one year from date, and for an additional sum of 10 per cent. on principal as attorney's fee, in case suit should be commenced to enforce payment. There is contained in the mortgage the following provision: "And it is further understood and agreed by and between the parties hereto, that the mortgagor herein has the privilege of renewing or extending this mortgage for one additional year from the expiration of the term hereof."

The complaint alleges in effect that the defendant exercised her option of extending the mortgage for an additional year, and the court so finds; and finds further that the option was exercised and the plaintiff's assignor notified thereof prior to November 26, 1898. The court also finds adversely upon the plea of the statute made by the defendant. Judgment was accordingly entered for the amount due on the note and mortgage, and also for the sum of $350 as attorney's fee. The complaint was filed November 10, 1903: that is to say, not within four years from the maturity of the note according to its original terms, but within four years from the closing date of the extension. The finding of the court as to the defendant's exercise of her option to extend the note for one year is fully supported by the evidence of the plaintiff's assignor and another witness. But the point is made that the extension of the time and the acquiescence therein of the plaintiff's assignor was not in writing, and that the court erred in admitting the testimony. But the position is untenable. The agreement contained in the mortgage does not provide that the option of the mortgagor should be expressed in writing. It constituted, in fact, a written proposition on the part of the mortgagee, which, upon acceptance by the mortgagor, became a valid contract in writing on the part of the mortgagee to extend the time. Nor, though the contrary is suggested by the appellant, can the agreement be construed as applying to the mortgage only, and not to the note. It is inconceivable that such could have been the intention of the parties.

With regard to attorney's fee, there is an apparent discrepancy between the finding of the court that $300 is a reasonable fee and the judgment, which is for $350. But as no explanation is given in the briefs of this discrepancy, or any point made thereon by the appellant, we shall assume that the sum contained in the judgment was regarded by the court as a reasonable fee. If, however, there is any error in regard to the fee, it is merely clerical and can be corrected by the court below, notwithstanding the judgment on the appeal. Nor do we see any error in the judgment of the court in making the attorney's fee a lien upon the property. The note itself provides for the fee, and it thus becomes a part of the sum or sums secured by the mortgage. In the decision cited by appellant the case was otherwise. Irving v. Perry, 119 Cal. 357, 51 Pac. 544, 949; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113. The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

(149 Cal. 60)

McCONNELL v. CORONA CITY WATER CO. (two cases). (L. A. 1,495, 1,496.)

(Supreme Court of California. March 27, 1906. Rehearing Denied July 9, 1906.)

1. CONTRACTS—COMPENSATION—EXTRA WORK.

Where plaintiff contracted to construct a tunnel according to specifications of the engineers of defendant and agreed that the tunnel should be timbered in a thoroughly workmanlike and practical manner to protect it against outward and inward pressure, and defendant furnished the materials, and during the process of the work plaintiff protested that the timber furnished was defective and the specifications insufficient, he was not responsible for the caving in of the tunnel, but was entitled to recover for extra repair work rendered necessary thereby.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1428, 1429.]

2. APPEAL—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.

In an action for work performed under a contract for construction of a tunnel, where the judgment awarded an amount greater than the plaintiff's evidence showed that his expenditures amounted to, the judgment will be modified by deducting the difference.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4498-4501.]

3. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS.

In an action for breach of a contract for the construction of a tunnel, in that the defendant prevented its completion, where the evidence showed that the plaintiff was receiving a profit of a certain amount per foot in the preparing of soil he was working, and the number of feet remaining to be dug, the prospective profits were a proper element of damage for the defendant's breach of contract.

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Actions by A. L. McConnell against the Corona City Water Company. From judgments in favor of the plaintiff, defendant appeals. Modified.

E. W. Freeman (A. D. Laughlin, of counsel), for appellant. J. V. Hannon and Munday & Redd, for respondent.

HENSHAW, J. Plaintiff engaged himself to build for defendant a tunnel "in a good, substantial, and workmanlike manner to completion," as far as the defendant might direct; "it being the intention to construct the said tunnel for the distance of about 1,200 feet to the artesian wells, unless water in sufficient quantities is encountered before reaching that point." It was stipulated "that said tunnel shall be constructed on the grades and according to the specifications of the engineers of the party of the second part in charge of the work. The tunnel will be timbered in a thoroughly workmanlike and practical manner so as to protect against outward and also inward pressure." The defendant agreed to furnish all the lumber needed and required by the plaintiff for the tunnel, the lumber to be delivered on the ground at the shafts where it was to be used. The defendant also agreed to make progress payments during the performance of the work on the first of each and every month of 75 per cent. of the work completed during the previous month at the agreed rate. Work was prosecuted under this contract until some 764 feet of tunnel had been driven, the progress payments being made upon the report of defendant's engineers. At this point of the work the tunnel caved, and repair work upon it became necessary. This work was done by the plaintiff. The case L. A. No. 1,496 is to recover from defendant the value of such work done up to March 20, 1902. The other action (L. A. No. 1,495) is for similar work done after that date, and also for damages for loss of estimated profits occasioned by defendant's failure and refusal to allow plaintiff to proceed and complete the tunnel.

The action L. A. No. 1,496, for convenience, may first be considered. Plaintiff recovered judgment in the sum of $2,000 as the value of such extra work, and the defendant appeals. Its principle contention is that the contract for the construction of the tunnel was entire and indivisible; that under it, notwithstanding the provision for partial payments, as the work progressed, it became the duty of plaintiff to turn over to defendant a completed tunnel, driven and supported in a thoroughly workmanlike manner, in particular, that plaintiff had agreed to timber the tunnel in a thoroughly workmanlike and practical manner so as to protect against outward and inward pressure; that the caving of the tunnel afforded evidence that it was not properly timbered; that it became the duty, therefore, of the plaintiff, at his own cost, to do this repair work; that it was repair work within the terms of the contract for which, treating the contract as indivisible, plaintiff had no cause of action, and the cost of which he should himself have borne. In support of this position, appellant cites many cases such as Cox v. W. P. R. R. Co., 44 Cal. 18; Boyle v. Agawan Canal Co., 33 Am. Dec. 749; Seguin v. Debon, 5 Am. Dec. 735, to the effect that where a contractor agrees to do certain work, as the grading of a certain section of railroad, in the first case, or the construction of a certain part of a canal, as in the second case, even though the contracts may provide for progress payments, such contracts are entire and the provision for progress payments does not make them divisible. The soundness of these cases and of the proposition of law which they enunciate are not to be doubted, and in the case at bar if the question were whether the contract for the construction of this tunnel was entire and indivisible, there would be no hesitation in saying that it was. But this conclusion does not advance us in the determination of the real question in dispute between the parties. That question may be thus stated: Treating the contract as entire, was the extra work necessitated by the caving of the tunnel, work within the contemplation of the contract, for which, therefore, the contractor was entitled to no remuneration, or was it work without the contemplation of the contract, for the doing of which he is entitled to compensation? To answer this question, in addition to the provisions of the contract, resort must be had to the evidence. First, as to the terms of the contract, it will be noted that while the contractor agrees to timber in a thoroughly workmanlike and practical manner, so as to protect against outward and also inward pressure, he is controlled in this by the further provisions that the tunnel is to be constructed according to the specifications of the engineers of the company in charge of the work, and that the material for timbering is to be furnished him by defendant. The evidence shows that the plaintiff did drive the tunnel and timber it under the directions and specifications of the supervising engineers of defendant; that progress payments were made upon the certificate of the engineers of the completion according to the terms of the contract of certain portions of the tunnel; that the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; that he was obliged to use the inferior lumber which was furnished; and that the timbering was done under the directions of and to the satisfaction of defendant's engineers. Under such circumstances, notwithstanding that the contract is indivisible, there can be no hesitation in saying that the contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell, that the responsibility for such action must rest on the defendant, and that, notwithstanding that the contract was entire and indivisible, plaintiff was under no more compulsion to perform the extra work of repairing the cave in the tunnel so occurring than he would have been if it had been occasioned by a willful act of destruction upon the part of the defendant. The work became necessary to enable the contractor to proceed under his contract. It was occasioned by the failure of the defendant to furnish suitable timbers and by the mistake of their engineer as to the strength of the timbering required. As the contractor was doing his work under the directions and specifications of those engineers he cannot be held responsible for their errors or miscalculations.

Appellant further contends that while the court awarded a judgment in the sum of $2,000 for the value of the work and labor so done up to the 20th of March, 1902, the undisputed evidence offered by plaintiff himself shows that only $1,024.60 was actually so expended. To this contention respondent makes no answer, and the record seems to bear out appellant's position in this regard. It is not necessary, however, that a new trial should be ordered. It is sufficient to order, and it is ordered, that the judgment be modified in this regard, with an allowance to plaintiff of the sum of $1,024.60, instead of $2,000, and that, as so modified, it stands affirmed. The appellant will recover his costs upon this appeal.

L. A. No. 1,495. The complaint in this action charged in two counts: The first for the value of the extra labor performed as in L. A. No. 1,496, after March 20, 1902; the second, for the profits of which the contractor was deprived by the refusal of the defendant to allow him to proceed with the construction of the tunnel to its completion as contemplated in their agreement. The court allowed $1,024.60 as the value of such labor, whereas the record discloses that the only testimony in relation thereto was that offered by the plaintiff himself, and his items of expenditure show an aggregate of $898.10. There must be a modification of the judgment in this regard by the difference between $1,024 and $898.10.

The second count sets up a breach of the contract by defendant in refusing and neglecting to furnish the additional lumber needed and required by plaintiff in timbering the tunnel, by which neglect and refusal the defendant rendered it impossible for the plaintiff to perform his part of the contract. The court found, upon sufficient evidence, that the defendant did violate its contract in this regard, and as the furnishing of suitable timber when required by the contractor was a material part of defendant's agreement, the breach justified the plaintiff in treating the contract as at an end. One who has been injured by a breech of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case, the contract would be continued in force for that purpose. 7 Am. & Eng. Ency. of Law (2d Ed.) p. 152; Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 680, 34 Pac. 497. It was the last of these remedies which plaintiff elected to adopt and pursue. But appellant contends that his damages for loss of prospective profit are too speculative and remote to justify the award which the court made, and cites numerous cases where this and other courts have refused to allow prospective profits as an element of damages upon the ground that they were too speculative and remote. Such is the undoubted rule, but it is to be noted that this is not an objection to the inclusion of profits as a proper element of damages, but is a declaration merely that when they are too speculative and remote to be capable of anything like reasonable ascertainment, when they are collateral merely and do not arise directly or by natural consequence out of the tort complained of, they cease to become a proper element in the admeasurement of damages. No one may contest the soundness of this principle, but the converse of it is equally true, that where prospective profits are not too speculative and remote, where they do arise directly and as a natural consequence out of the injury, they are always allowed as an element of damage. Says this court in Shoemaker v. Acker, 116 Cal. 244, 48 Pac. 64: "An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract." And again in Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151, the syllabus, correctly summarizing the views of this court, declares that remote results produced by intermediate sequences of cause are beyond the reach of any just or practical rule or damages, and financial embarrassment and loss of prospective profits are too remote, contingent, speculative, indirect, and uncertain to come within a legal measure of damages for an alleged wrong in refusing to act as a director of a corporation and inducing others not to participate in the organization. An instructive analysis of the question and of the cases is found in Howard v. Stilwell & Bierce Mfg. Co., 139 U. S. 200, 11 Sup. Ct. 500, 35 L. Ed. 147. But where, as in this case, the loss of profit can, with reasonable certainty be shown, both as to the fact and as to the amount, such loss of profits is properly an element of damage. Thus, says this court, in Fountain v. Semi-Tropic L. &. W. Co., 99 Cal. 680, 34 Pac. 498. "If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part * * * he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach, including profits he would have made if the contract had been performed." And says Sutherland (Damages, vol. 1, p. 113): "A party to a contract is entitled to recover, against the other party who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible." And, still further (vol. 1, pp. 117, 118), the same learned author very justly says: "Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at a contract price, and he is prevented from earning this profit by the wrongful act of another party, the loss of this profit is a direct and natural result which the law will presume to follow the breach of the contract; and he is entitled to recover it without special allegations in his declarations. This he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract." Plaintiff showed that, in the character of the soil through which he was tunneling—water-bearing soil—his profit over and above the contract price was $4.40 per foot. The court found upon evidence that there was about 1,422 feet of tunnel yet to be dug, and gave judgment for the profits upon this at the rate of $4.40 per foot. It is true that the character of the soil might have changed in that distance, and with the change in the character of the soil to nonwater-bearing, the profits of the contractor might have been decreased. It is true, also, that water in sufficient quantities might have been encountered before 1,422 feet additional had been driven, in which case, under the contract, the defendant had the right to order a cessation of the work; but as these were matters which could not be determined except by a completion of the contract, which defendant's conduct had prohibited, the court was justified in accepting the evidence, which under the circumstances was the best and most convincing that could be offered.

The judgment in L. A. No. 1,495 is therefore modified by reducing the amount allowed for extra work from $1,024 to $898.10, and in all other respects it stands affirmed. The appellant will recover its costs upon this appeal.

We concur: LORIGAN, J.; McFARLAND, J.

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7 Cal. Unrep. 246

DARLINGTON v. BUTLER (KOHN, Intervener).

(Court of Appeal, Third District, California. March 1, 1906.)

APPEAL—DISMISSAL.

The consideration of a motion to dismiss an appeal by an intervener, on the ground that he is not a party aggrieved, will be postponed, where some of the questions involved in the appeal will have to be considered in determining the motion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3161–3166.]

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Abe Darlington against Sarah Butler; Nathan L. Kohn, intervener. From the judgment rendered, the intervener appeals. Original application to dismiss appeal. Consideration postponed.

Wm. F. Bray, for appellant. Chas. A. Swisler, for respondent.

BUCKLES, J. This is an original application to dismiss the appeal pending in this court, brought here by Nathan L. Kohn, the intervener in the court below. The motion is made by the respondent upon the ground that said intervener is not a party aggrieved by the judgment and order appealed from, and that he has no right to appeal. As some of the questions involved in the appeal would have to be considered in determining this motion, we think the further consideration of the motion should be postponed, and be taken up with the appeal when it is presented.

It is therefore ordered that the determination of the motion to dismiss the appeal be postponed, to be taken up with the appeal when said appeal is presented and determined at that time.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 382

SOUTHERN CALIFORNIA RY. CO. v. O'DONNELL.

(Court of Appeal, Second District, California. April 4, 1906.)

1. Mines and Minerals—Lode Mining Location—Actions — Findings — Construction.

Where, in an action to determine adverse interests in real property, defendant's claim to the property was based solely on a lode mining location, a finding that defendant ever since the spring of 1883 was and had been the owner and in possession of a specific portion of the disputed premises was an implied finding that the mineral location was actually made in 1883, as alleged, that the land was mineral in its character, that the claim was properly monumented, that the annual work was done thereon as provided by law and the mining regulations, and that the claim was not abandoned.

2. Appeal—Findings of Court—Conclusiveness.

Where on an appeal there is evidence in the record tending to support each of certain implied findings of the court, the facts so found are to be considered as established.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3979.]

3. Mines and Minerals—Federal Right of Way Act—Map of Location—Filing—Intervening Rights.

Right of Way Act Cong. March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], provides for the granting of a right of way through the public lands to any railroad company, etc., and in section 4 (18 Stat. 483 [U. S. Comp. St. 1901, p. 1569]) that any railroad desiring to secure the benefits of the act shall, within a certain time, file with the register of the land office for the district where such land is located, a profile of its road, and that, on the approval thereof by the Secretary of the Interior, the same shall be noted on the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject thereto. Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all of the surface included within the lines of their location. *Held*, that prior to the filing of a right of way map of definite location and the approval thereof, as provided in said section 4, the lands covered by the map were free from the right of way and subject to mineral location.

4. Same—Rights of Locators.

The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may by the observation of precedent conditions ripen into the right to a final patent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 66, 68.]

5. Same—Area of Location—Lines.

Where the vein within a mining claim ran in a northerly and southerly direction, and the location was crosswise of the vein, the side lines were really end lines, considering the direction of the lode on the surface, and the rights of the locators were restricted to the area within the side lines 300 feet on each side of the vein or lode.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 76.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Southern California Railway Company against Charles O'Donnell. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

T. J. Norton and U. T. Clotfelter, for appellant. Henry M. Willis, for respondent.

ALLEN, J. Action to determine adverse interests in real property. Findings and judgment in favor of defendant as to certain of the premises described, from which plaintiff appeals, as well as from an order denying a new trial.

The claim of defendant to the property is based solely upon a lode mining location. The finding of the trial court that defendant, ever since the spring of 1883, was and has been the owner of and in possession of a specific portion of the disputed premises can only be taken as impliedly finding that the mineral location was actually made in 1883, as alleged; that the land was mineral in its character; that the claim was properly monumented; that the annual work was done thereon as provided by law and the mining regulations; and that the claim was not abandoned. Trevaskis v. Peard, 111 Cal. 603, 44 Pac. 246. Evidence appears in the record tending to the support of each of such implied findings and to the general finding to the extent of the ground covered by the mineral location; and upon this appeal we must accept those facts as established.

The principal contention of appellant is that, notwithstanding the entry and location of defendant's mine, under the act of Congress known as "the right of way act," approved March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], the lands included in defendant's location were not open to mineral location, but had been previously granted to plaintiff. The first section of the right of way act provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet of each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad. Also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

"Sec. 3. That the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned," etc.

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way. Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Plaintiff corporation came into existence in 1882, a year preceding the mineral location of the defendant. It did not, however, procure an approval of its map of definite location by the Secretary of the Interior until December, 1885, until which date no right to select the premises in question as station grounds existed. Lilienthal v. Southern Cal. Ry. Co. (C. C.) 56 Fed. 703. The language employed in the first section of the right of way act, when used in other acts granting to specified corporations rights of way and other lands, has been uniformly held to be a grant in præsenti; and it is well settled that when the map of definite location is subsequently filed the rights of the grantee attach under the doctrine of relation at the date of the passage of the act and cuts off any and all intervening rights claimed by third parties. A different construction of the right of way act has been announced in Lilienthal v. Southern Cal. Ry. Co., supra, Washington & I. R. Co. v. Osborn, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, and Spokane Falls & N. Ry. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79, and this different construction is made necessary by reason of the provisions of sections 3 and 4 of the right of way act, which are not found in any of the specific grant acts. It will be observed that by section 4 of the right of way act there is reserved to the United States the right to dispose of its public lands free from such right of way until a map of definite location is filed and approved; for it provides that after such filing and approval all of such lands shall be disposed of subject to such right of way. "The intention could only have been to confer the right over such public lands as were not disposed of when the roads were actually located." Radke v. W. & St. P. R. Co. (Minn.) 39 N. W. 624. If, therefore, the lands between the termini of the road as expressed in the articles of association are subject to disposal until the route is approved, it can only be upon the theory that they still remain in part of the public domain. If they, therefore, still remain a part of such public domain, subject to sale, they must of necessity be subject to settlement and to rights of mineral location; for, that land may be open to location, three things are essential; "(1) It must be land containing valuable mineral deposits. (2) It must belong to the United States. It must be a part of the public domain at the time of the location. (3) It must be unoccupied and unappropriated by others under claim of right." Barringer & Adams on the Law of Mines and Mining, p. 197. Rights of mineral locators are possessory rights. Section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425] declares that "the locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all of the surface included within the lines of their location." That the doctrine of relation will not be extended to cut off settlers intermediate the passage of the act and the filing of the articles of association is determined in Washington & I. R. Co. v. Osborn, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, and this upon the theory that Congress would not, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their road at pleasure, regardless of the rights of settlers. The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may, by the observation of precedent conditions, ripen into the right to a final patent. The mere possessory right involved in Doran v. Central Pacific R. Co., 24 Cal. 246, and Southern Pacific Co. v. Burr, 86 Cal. 282, 24 Pac. 1032, was held in Washington & I. R. Co. v. Osborn, supra, to be of such character as under the act of 1875, to establish an equity which would preclude the application of the doctrine of relation in so far as it affected such rights; while in the Ziegler and Lilienthal Cases, before cited, the rights of each of the claimants attached intermediate the filing of the map of definite location and the filing of the articles of association, as in this case.

We are of opinion, therefore, that to the extent of the proper area of defendant's mineral location the court properly found defendant to be the owner and in possession thereof. While, as before stated, we are of opinion that the trial court correctly found that defendant was the owner of the land embraced within his mineral location, yet in its findings and judgment specifying the area of such location the same are excessive. The court finds that the mineral claim of defendant is in the shape of a parallelogram about 1,350 feet in length east and west and 300 feet in width north and south. It is conceded that the vein or lode within defendant's claim runs in a northerly and southerly direction and the location was crosswise of the vein. This being true, the side lines are really end lines, considering the direction of the lode on the surface. Argentine Co. v. Terrible Co., 122 U. S. 485, 7 Sup. Ct. 1356, 30 L. Ed. 1140. The location is valid, but the rights of the locator are restricted to the area within the side lines 300 feet on each side of the vein or lode. It is not possible from the record to determine with sufficient exactness to warrant us in a modification of the decree where the vein or lode is actually situated.

An order will, therefore, be made reversing the judgment of the court and remanding the cause for a new trial.

We concur: GRAY, P. J.; SMITH, J.

Per Curiam. In accordance with the opinion filed in this case, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

CALIFORNIA REPORTER

86 PACIFIC REPORTER

86

(149 Cal. 151)

FOWDEN v. PACIFIC COAST S. S. CO. et al. (S. F. 3,507.)

(Supreme Court of California. April 10, 1906. Rehearing Denied May 10, 1906.)

1. Abatement and Revival — Death of Plaintiff—Action for Tort—Judgment.

The death of the plaintiff in an action for personal injuries after judgment and order denying a motion for a new trial, but prior to an appeal therefrom, did not cause the action to abate.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 346-348.]

2. New Trial—Proceedings.

Proceedings by an unsuccessful party to obtain a new trial are analogous to proceedings on writ of error, or appeal in the nature of a writ of error, and are, in effect, a new action brought to reverse a judgment in the trial court; and if for any reason such proceedings abate, the judgment remains in force as if the proceedings had never been brought.

3. Same—Joint Tort-Feasors — Effect of Order Granting New Trial As to One Party.

Under Code Civ. Proc. § 578, providing that in an action against several tort-feasors verdict and judgment may be given in favor of plaintiff against one defendant and in favor of the other defendant, if the proofs justify the same, where a verdict was rendered against two or more joint tort-feasors, the granting of a new trial as to one of them did not vacate the verdict and judgment as to the other.

4. Torts—Joint Tort-Feasors — Parties — Severance.

The fact that plaintiff elected to sue two joint tort-feasors jointly did not preclude him from subsequently severing and electing to proceed only against one, without the consent of the other.

5. Shipping—Carriage of Passengers—Injuries—Prima Facie Negligence.

Where plaintiff, a passenger on a steamship, was injured by the breaking of a hawser which was being used to dock the vessel, the fact of injury was sufficient to establish a prima facie case of negligence against the shipowner.

6. Appeal — Findings — Conflicting Evidence—Review.

Where, in an action for injuries to a passenger of a steamship by being struck by a broken hawser, plaintiff testified that his head was at no time projected over the rail, and that no warning to stand back was given to him or within his hearing to the others standing about him, while other disinterested passengers, etc., testified to the contrary, there was a substantial conflict in the evidence on the question of plaintiff's contributory negligence, which precluded a reversal of a judgment for plaintiff, though the court on the record might consider the verdict greatly against the weight of the evidence.

Department 1. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by Mark Fowden against the Pacific Coast Steamship Company and others. From so much of an order as denied the motion of the steamship company for a new trial, it appeals. Affirmed.

Geo. W. Towle, Jr., for appellant. James G. Maguire and James L. Gallagher, for respondents.

ANGELLOTTI, J. On May 15, 1898, Mark Fowden, while a passenger on defendant corporation's steamer, Santa Rosa, bound from Port Angeles, Los Angeles county, to the city and county of San Francisco, and while such steamer was docking at Santa Barbara, was severely injured by reason of the parting of a 13-inch hawser used in said docking, which had been attached to a pile on the wharf, and which parted under the strain to which it was subjected, one end thereof recoiling and striking Fowden upon his face and head. Fowden instituted this action for damages resulting from the injuries thus received, against both the steamship company, and Ezekiel Alexander, the captain commanding said steamer at the time of the accident, alleging that the hawser was broken by reason of the excessive strain to which it was subjected through the negligence of defendants in operating the steamer, and also that said hawser was worn, weak, and defective, and wholly incapable of bearing the strain to which it was subjected in the work for which it was used, and that this defective condition was known to defendants. The case was tried by a jury, and a verdict was rendered in favor of plaintiff against both defendants for $6,000, upon which judgment was entered. Both defendants moved for a new trial upon various grounds, and the trial court granted the motion as to defendant Alexander, and denied it as to the steamship company. The defendants appeal from so much of the order as denied the steamship company a new trial. Subsequent to the entry of judgment and the order on motion for a new trial, the plaintiff died, and Frank Fowden, special administrator of his estate, has been substituted herein.

1. It is urged that plaintiff's action being based on negligence resulting in his personal injury, his death abates the action and vacates everything done therein. Defendant thus invokes the application of the common-law rule, "actio personalis moritur cum persona," and it may be conceded that the rule applies to such a cause of action as is stated in the complaint herein, and that no change in the common-law rule material to such a cause of action has been made by statute in this state. See Harker v. Clark, 57 Cal. 245. It must, however, be held that the rule has no application under the circumstances of this case. Here, judgment upon the cause of action alleged was given and entered in favor of the plaintiff prior to his death, and this judgment has not been vacated. The pending proceeding instituted by defendants after judgment for the purpose of obtaining a new trial is, as suggested by appellants, a new statutory proceeding, collateral to the original proceeding, and having no other effect thereon, in the absence of an order granting a new trial, than to stay proceedings on the judgment if a proper stay bond be given, and to keep the action pending until the final disposition of the motion. In other words, the judgment entered is, at most, simply suspended pending the proceeding, and not vacated, and if the motion be finally denied, the judgment already entered will stand as and from the date on which it was given. Under our practice, proceedings by an unsuccessful party to obtain a new trial are analogous to proceedings on writ of error, or an appeal in the nature of a writ of error, and are, in effect, a new action brought to reverse a judgment in the lower court, and if for any reason they abate, the judgment sought to be reversed remains in force as if no such proceedings had ever been brought. The authorities are practically unanimous upon the proposition that although the cause of action is such that it would abate by the death of the plaintiff before judgment, the death of the plaintiff after judgment, and pending disposition of a writ of error or appeal in the nature of a writ of error, will not affect the judgment. As some of the cases say, the original wrong or claim is merged in the judgment, which has all the attributes of a judgment in actions ex contractu. After the giving of the judgment, the controversy is over the judgment, and not over the original wrong. The judgment is not annulled during the pendency of such controversy, but simply suspended. Kelly v. Kelly, 137 Ind. 690, 37 N. E. 545; Carr v. Rischer, 119 N. Y. 117, 23 N. E. 1,000; Kimbrough v. Mitchell, 38 Tenn. 539; Akers v. Akers, 84 Tenn. 7, 57 Am. Rep. 207; Knox v. Knox, 12 N. H. 352; Lewis v. McDaniel, 82 Mo. 577; In re First Nat. Bank (C. C.) 49 Fed. 120; Lewis v. St. Louis, etc., R. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Galveston City Ry. v. Nolan, 53 Tex. 139; 5 Ency. of Pl. & Pr. 794; 1 Cyc. pp. 78, 79. Where the subsequent proceedings are in the nature of what has been called a "broad appeal," having the effect of absolutely annulling the judgment and requiring a judgment de novo in the appellate or reviewing court, a different rule may logically be applied. Such must have been the reason for the decision in Faith v. Carpenter, 33 Ga. 79, where it was held that the death of the party pending appeal abated the action altogether. Of course, if the order denying a new trial be here reversed, the effect of such reversal would be to vacate the judgment, and the case would then stand in the same position as though no judgment had ever been given, in which event defendant might successfully contend that no further proceedings could be had. That however, is not a question for determination here. The case of Gerling v. Baltimore & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, cited by defendants, is not in point. There the verdict and judgment were for defendant, and the plaintiff died during the pendency of the proceedings instituted by him, to obtain a reversal and a new trial.

2. It is claimed that as the verdict was a joint verdict against both, the granting of a new trial as to one vacated the verdict and the judgment entered thereon in toto. We see no force in this contention. The rule contended for by defendants in this respect is not the law in this state. Plaintiff had the right to join as defendants all whom he may have considered participants in the alleged act of negligence, and, therefore, liable as joint tort-feasors. But this did not make his right to recover the resulting damages from one so joined, in any degree dependent upon his success as against the other. Under our Code, verdict and judgment might be given in his favor against one defendant so sued, and in favor of the other, if the proofs justified it. Code Civ. Proc., § 578. A verdict rendered against both is a finding that both participated in the negligent act, and are there-

fore jointly liable to the plaintiff therefor, but the verdict and judgment entered thereon are subject to review, and if on such review, it be determined that the verdict and judgment are for any reason erroneous as to one, they may be vacated as to that one only, and remain in full force as to the other. This was definitely decided by this court in Nichols v. Dunphy, 58 Cal. 605. There, verdict and judgment in an action for damages for negligence had been given against two defendants jointly sued, and one only had appealed, and as to him the judgment had been reversed. It was held that as to the other the judgment remained in full force, the court saying, "As to her, there was a valid judgment, in plaintiff's favor, unappealed from and undisturbed." And an order quashing an execution issued against said such other defendant on such judgment was reversed. This case, which is in accord with the prevailing rule in the United States, has been approvingly cited many times by this court, and completely disposes of the theory that the verdict and judgment against two or more alleged tort-feasors are entire in the sense that if they are vacated as to one, they must also necessarily fall as to the others. It is, of course, immaterial whether the vacating of the verdict as to one defendant be accomplished by a reversal of the judgment on an appeal, or by the granting of a motion for a new trial. See, also, Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Grundel v. Union Iron Works et al., 127 Cal. 438, 59 Pac. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75; Hubbell v. Meigs, 50 N. Y. 480; Martin v. Farrell, 66 App. Div. 179, 72 N. Y. Supp. 934; and 16 Am. & Eng. Ency. of Law, (1st Ed.) p. 676. The case of Rankin v. C. P. R. R. Co., 73 Cal. 93, 15 Pac. 57, does not assist defendants. The appeal there was by the plaintiff from a judgment in his favor against one of two defendants, and in favor of the other defendant, entered upon a verdict which was entirely silent as to such other defendant, and it was simply held that the judgment in favor of such defendant against plaintiff could not stand in the absence of a verdict to support it, and that a verdict which was silent as to a defendant was no verdict at all as to such defendant. Nor is the case of Chetwood v. California National Bank, 113 Cal. 414, 45 Pac. 704, in point. There, the cause of action alleged against three defendants was their joint neglect to perform duties collectively undertaken, as members of the executive committee of a bank, resulting in the loss to said bank of large sums of money, and there was therein no pretense of any claim of a several and separate liability upon the part of each defendant. They were negligent as a body, or not at all. A judgment was given against one defendant only, upon findings which failed to show any negligence on the part of the executive committee, or any member thereof, as such, but only showed that such defendant was individually and separately negligent in the performance of his duties as president of the bank, and it was held that this was a different cause of action from that presented by the pleadings. The case was simply one of a material variance between pleadings and proof. In the case at bar, a verdict and judgment as to one only of the defendants would, as to such defendant, be entirely consistent with the allegations of the complaint which states a complete and separate individual liability on account of the single act complained of, on the part of each defendant, and such a verdict, in the absence of objection by plaintiff as in Rankin v. C. P. R. R. Co., supra, would stand as against such defendant. Defendants apparently claim that where a plaintiff has elected to sue two joint tort-feasors jointly, there can be no subsequent severance without the consent of the defendants, or one of them, as where one moves for a new trial or takes an appeal, and the other does not, as in the case of Nichols v. Dunphy, supra. But, manifestly, this is not so, if the appellate court can, upon the appeal of both, affirm as to one and reverse as to the other, and as to this there can be no question under the authorities. When we consider the nature of the liability of two or more persons jointly engaged in the commission of a tort, it is apparent that any such wrongdoer cannot at any stage of the proceedings insist that any or all of his associates in the act shall bear with him the burden of defending against the claim of the injured party or of compensating him for the injury. There is no right of contribution among them they are all jointly and severally liable, as the injured party may elect. The injured party may sue all or any of them jointly, or each separately, or, having secured a joint judgment against all, enforce such judgment by execution against one only, the only limitation being that he can have but one satisfaction for the injury that he has received. Each of the joint tort-feasors being liable for all the damage, without regard to their different degrees of culpability, when his cause of action is satisfied as to one, it is satisfied as to all. Clearly, the granting of a new trial as to one cannot give to the other any legal ground for complaint. That the liability of defendant Alexander has not been adjudged is entirely immaterial to the steamship company.

3. While a contrary finding would have been sustained, it cannot be held that there was not sufficient evidence to sustain the finding of the jury that the steamship company was guilty of negligence. We see no good reason why the general rule to the effect that the breaking or giving away of an instrumentality being used by and under the control of the carrier, is prima facie proof of the negligence, throwing the burden upon the carrier to show the absence of negligence, is not applicable to a hawser used for the purpose of docking a vessel. Ordinarily, such a hawser, of suitable size, material, and con-

struction, in proper condition and carefully used will sustain the strain to which it is subjected, and thus serve the purpose for which it is used, and under ordinary conditions a parting thereof would reasonably indicate that it was defective or had been negligently subjected by those in charge of the steamer to an unnecessary strain. This affords the basis for the application of the rule. It is true that the conditions produced by high wind and heavy seas are sometimes such that the highest care will not be effectual to prevent such an unusual strain as will part the very best hawser that it is practicable to use, but these are not the ordinary conditions, and it devolves upon the carrier to show that the parting of the hawser was caused by circumstances over which it had no control and against which the highest degree of care would not avail. Whether such a showing was here made was a question for the jury. See McCurrie v. S. P. Co., 122 Cal. 558, 55 Pac. 324; Cody v. Market St. Ry. Co. (Cal. Sup.), 82 Pac. 666, and cases there cited. We see nothing contrary to this view in The Columbia, 109 Fed. 660, 48 C. C. A. 596. While there was some evidence to the effect that the hawser was of the largest practicable size and of the best possible material and construction, it also appeared that the hawser had broken on the second trip on which it was used, under circumstances not disclosed by the testimony, within two or three feet of the second break, and had been spliced, and had been in use for the four or five months preceding the accident without any further or other test than that to which it had been subjected by its ordinary use. As suggested by respondent, there is no evidence whatever of any test or inspection of the hawser by any one from the time it first parted to the time of the accident in question.

4. It is most earnestly contended that the evidence compels the conclusion that Fowden was guilty of negligence contributing to his injury. As already stated, at the time of the accident the steamer was being docked at the wharf at Santa Barbara. The line that parted was known as the spring line, which extended from the main deck through a chock near the bow of the vessel to a pile on the wharf. Its use was to prevent the vessel going ahead, and it was 225 or 230 feet long. Fowden, a first-class passenger, was on the saloon deck, the deck above the main deck, and in a place on the land side thereof given over, under ordinary conditions, to the use of first-class passengers. This deck had a netting bulwark about 3 feet in height, topped by a rail, extending from which to the deck above, a distance of a little over 4 feet, were stanchions about 7 feet apart, the space between said stanchions being open. There were seats about 14 inches wide and 20 inches high running along the net bulwark. Fowden was near the seventh stanchion, and, according to his own testimony, standing upright there, with his hands behind him. The spring line parted somewhere between the sixth and eighth or ninth stanchions, and one end thereof flew up and hit him on the lower part of the head with great force. The claim of defendants was that the hawser in its recoil did not reach the space within the rail at all, but that Fowden at this time was leaning over the rail with his head projected thereover, and that he maintained this position in disregard of the warnings of the servants of the company. The trial court instructed the jury, in effect, that if Fowden was standing with his head projecting over the rail of the steamer, and was warned by the servants of defendants that his position was a dangerous one, and in disregard of such warning maintained such position to the time of the accident, and was there injured, his act in maintaining such position was contributory negligence, and their verdict must be for the defendants. We are satisfied that the evidence was such as to warrant the jury in concluding that Fowden was not guilty of negligence in simply standing near the rail, if he was not warned of the possible danger. The question, then, is as to whether he was leaning over the rail with his head projected thereover, and maintained this position, despite warning to stand back. The jury by their verdict have answered this question in the negative. Was there sufficient evidence to sustain their finding?

According to the record before us, the testimony of the many persons who claimed to be eyewitnesses was contrary to this conclusion of the jury. Several apparently disinterested passengers testified that Fowden's head was projected over the rail, that the passengers were warned by employés of defendant steamship company to stand back and told that there was danger, and some testified that Fowden maintaining his position, and several employés testified to the giving of the warning, some testifying that they personally warned Fowden himself, and that he declined to move. No person testified to the contrary except Fowden himself, but he was very positive in his testimony that his head was at no time projected over the rail, and that no warning was given to him, or within his hearing, to the others to stand back. In the face of this positive testimony on the part of Fowden, can it be said that there was not a substantial conflict in the evidence? While the record produces in our minds the opinion that the verdict of the jury was against the great weight of evidence of the eye witnesses, we are satisfied that this question must be answered in the negative. Leaving out of view, for the moment, the evidence of defendants' witnesses above referred to, there was, under the circumstances of this case, nothing in this testimony of Fowden that was so inherently improbable as to compel the conclusion that it was unworthy of belief. It certainly cannot be held that his injuries were of such a nature that they could have been inflicted only while his head was projected over the rail. Nor can it be held that the end of the hawser could not have recoiled to a place within the rail. Although such a thing was not shown to have happened before in the personal experience of two of the defendant's witnesses, no reason is apparent why it might not so happen, and the evidence of defendants as to the custom of warning passengers back from the rail would indicate an anticipation of just such a contingency. The evidence of two witnesses that the end of the line did not come aboard on this occasion was not such as to legally compel a conclusion to that effect by the jury. The situation, then, is that the evidence of Fowden upon these points can be said to be improbable only because a large number of witnesses testify to the contrary, but this does not reduce such evidence to "a mere semblance or pretense of evidence," insufficient to support a verdict. Taken in connection with the undisputed facts, it was not so inherently improbable as to be unworthy of belief, and to justify the court in ignoring it. As the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason (Code Civ. Proc. § 1844), such evidence is necessarily sufficient to create a substantial conflict, regardless of the number of witnesses who testify to the contrary. The mere number of witnesses on one side or the other is immaterial in this connection. The law requires the jury to be instructed by the court on all proper occasions that they are not bound to decide in conformity with the declarations of any number of witnesses, against a less number or against a presumption of other evidence satisfying their minds. Code Civ. Proc., § 2061, subd. 2. Apparently recognizing this, learned counsel for defendants contends that Fowden was not a witness entitled to full credit within the meaning of section 1844, Code Civ. Proc., by reason of the nature of the injuries he received and the manner in which he was contradicted by other witnesses. But if he was competent to testify as a witness at all, as to which there can be no question, the question as to the amount of credit to which his evidence was entitled was for the jury alone to determine. Under our system, the jury or trial judge sitting in place of a jury, are the exclusive judges of the credibility of a witness. Code Civ. Proc. §§ 1847 and 2061, subd. 1. His interest in the result of a case, his physical and mental conditions for some time immediately following the accident, the strong likelihood of his testimony being incorrect upon the point as to whether other persons were standing near him upon the deck at the time of the accident, and the contradictory evidence, were all to be taken into consideration by the jury in determining the amount of credibility given to his testimony, but the ultimate question as to credibility was exclusively for them. If they determined as a fact that his testimony was entitled to full credit, which they must here be held to have done, that finding is conclusive upon us.

The question in the case of County of Sonoma v. Stofen, 125 Cal. 32-37, 57 Pac. 681, relied on by defendants, was not the question here presented. There, the trial judge had found against the story of a county treasurer, who was alleged to have converted county funds to his own use, and who testified that he had been robbed. There was no direct evidence opposed to this, but the surrounding circumstances were such as to make the story very improbable, and the trial judge found against it. It was in affirming this judgment that this court said "that the evidence of the defendant so situated does not, as a matter of legal compulsion, command this full credit." There, as here, it was for the jury or trial judge to determine what credit should be given the evidence, and if the judgment had been the other way, doubtless it would have been affirmed on appeal. We find nothing in the other cases cited by defendants that is in conflict with the views herein expressed. It may be admitted that in some cases testimony may, in the light of the undisputed facts, be inherently so improbable and impossible of belief as to, in effect, constitute no evidence at all, and that in other cases alleged testimony may consist of only one or two general statements made in such a way as to render it no more than a mere semblance or pretense of evidence. Such, however, is not the situation in the case at bar. It being determined that there was a substantial conflict in the evidence upon the question of contributory negligence, it must be conceded that this court cannot disturb the finding of the jury thereon, and the approval thereof by the trial court, evidenced by its order denying a new trial. It is the firmly settled law of the state that this court will not disturb the ruling of the court below on a motion for a new trial upon the ground of insufficiency of evidence if there be a substantial conflict in the evidence, even though this court may, upon the record, consider the verdict greatly against the weight of the evidence. It is needless to cite authorities to sustain this well-recognized proposition. Where there is a substantial conflict in the evidence, however much the evidence may preponderate against the verdict, the sole remedy of the aggrieved party is his application to the trial judge for a new trial. It is the duty of the trial judge, who has heard the evidence and had ample opportunity to judge as to the amount of credit to be given to the various witnesses, to grant a new trial when he is of the opinion that the verdict is clearly against the weight of evidence, notwithstanding that there is a substantial conflict therein. No such power exists in this court. It may be that trial courts are sometimes too reluctant to exercise their power of granting a new trial in a proper case, and too much inclined to acquiesce in the verdicts which are clearly against the weight of evidence. See Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337. This, however, cannot give the power to this court in a case where there is a substantial conflict in the evidence. The final responsibility must rest where it is placed by the well-settled law, viz., with the trial court.

5. There is no other point requiring discussion. The verdict cannot be held to be in violation of any instruction given by the court to the jury. There was no error as to defendant steamship company in the instructions given to the jury. Upon the facts shown by the record, we cannot say that the damages awarded were excessive. We see no legal ground upon which the action of the court below in denying a new trial as to the steamship company can be disturbed.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

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151 Cal. 318

In re DAVIS' ESTATE. (S. F. 4,316.)

(Supreme Court of California. May 21, 1906.)

1. Wills — Probate — Collateral Attack— Nature of Proceedings.

An answer and petition in response to a petition for the distribution of an estate, accompanying the final account of the administrator, which alleges that the will under which distribution is demanded is a forgery, and that the probate of the same was fraudulently procured, collaterally attacks the judgment admitting the will to probate.

[Ed. Note—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 904–906.]

2. Judgment—Collateral Attack—Matters Available.

In a collateral attack on a judgment of a court of general jurisdiction, the judgment can be impeached only for a want of jurisdiction appearing on the face of the judgment roll.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 924; vol. 48, Cent. Dig. Wills, § 907.]

3. Wills—Probate—Collateral Attack.

Code Civ. Proc. § 1306, provides for the hearing of testimony in proof of a will sought to be probated at the time appointed for the hearing or the time to which the hearing may have been postponed. The record in proceedings for the probate of a will showed that a petition for probate was filed; that the clerk's notice fixed a specified date as the time for proving the will, which notice was published as required by law; that subsequently the court made an order, which, after reciting that the petition came on regularly for hearing and that it had been proved that notice had been given as required by law, admitted the will to probate. It did not affirmatively appear from the recitals that the hearing had been continued by the court; neither did it appear that it had not been. *Held*, that in a collateral attack on the judgment it would be presumed that orders continuing the hearing had been regularly made.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 906.]

4. Constitutional Law—Due Process of Law.

Code Civ. Proc. § 1303, providing that a will may be probated on 10 days' notice, is not unconstitutional as depriving one of his property without due process of law, when applied to a nonresident so situated as not to receive notice in time to enable him to appear and oppose the probate on the day set for the hearing.

5. Judgment—Collateral Attack — Fraud in Selection of Jury.

In a collateral attack on a judgment, the judgment cannot be set aside for fraud in the procuring of a jury; the alleged fraud not appearing on the face of the judgment roll.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 951–954.]

6. Constitutional Law—Due Process of Law—Course of Trial.

A person filing an answer and petition in response to a petition for the distribution of an estate pursuant to the terms of a will duly admitted to probate, praying for the setting aside of the judgment of probate, is not deprived of a hearing by striking out the answer and petition after a hearing on a motion therefor.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Jacob Z. Davis, deceased. From a judgment striking out the answer and petition of Laura E. Tracy and others, made in response to a petition for distribution accompanying the final account of the administrator, Laura E. Tracy and others appeal. Affirmed.

Wm. T. Baggett, F. H. Gould, and Horace W. Philbrook, for appellants. Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

SLOSS, J. Appeal from decree of settlement of final account and final distribution. Jacob Z. Davis died on October 28, 1896. On November 16, 1896, Lizzie Muir and Belle Curtis presented to the superior court of the city and county of San Francisco a paper purporting to be the olographic will of said Davis, and filed a petition praying for its admission to probate. The document bore date October 1, 1896, and by its terms purported to give and bequeath all of Davis' property to the petitioners, Lizzie Muir and Belle Curtis. On the filing of the petition, the clerk fixed Monday, the 30th day of November, 1896, and the courtroom of said superior court as the time and place for proving the will, and for hearing the application for letters. The notice was duly published as required by section 1303, Code Civ. Proc. On November 30, 1896, Joseph P. Wilson and Catherine Stead, claiming to be heirs of said decedent, appeared and filed an opposition to the probate of the alleged will on various grounds. On May 15, 1897, Elizabeth Wilson, also claiming to be an heir, filed her opposition to the probate. The petitioners filed answers to both oppositions. While other grounds of opposition were pleaded, the real point raised by those opposing the probate was that the alleged will was a forgery. A trial was had before a jury, which on August 16, 1897, returned a verdict in favor of the genuineness of the document, and thereupon an order was made by the court admitting the said paper to probate, and directing the issuance to Lizzie Muir and Belle Curtis of letters of administration with the will annexed. On April 8, 1898, the superior court made a decree of partial distribution, distributing to Lizzie Muir and Belle Curtis the sum of $15,000. On June 23, 1898, the order admitting the will to probate and the decree of partial distribution, appeals from which had been taken, were by this court affirmed. On the same day a petition to revoke the probate filed by Catherine Stead, Joseph P. Wilson, Elizabeth V. Wilson and her four children, were dismissed and denied. The affirmances of the order and decree appealed from and the dismissal of the contest were made by the consent of all parties who had then appeared, a compromise having been effected as between them. On September 7, 1900, Laura E. Tracy, claiming to be a niece of the decedent, filed a contest and petition for revocation of the probate of the will. She had not been a party to the oppositions and contests above mentioned, and had in no way theretofore appeared in the proceedings relating to the probate of the administration of the estate. Her petition alleged, in substance, that at the time of Davis' death, October 28, 1896, she (the petitioner) was living in the republic of Hawaii, then a foreign country, and had no knowledge of the fact that her uncle had been residing in San Francisco, or of his death, or of the probate proceedings, until after September 15, 1899; that soon thereafter she discovered these facts, and, further, that the document admitted to probate was not the will of Davis, but was a forgery, executed by some person or persons pursuant to a conspiracy entered into between Lizzie Muir, Belle Curtis and others for the purpose of gaining possession of Davis' estate. She further alleged that in execution of this conspiracy the paper was offered for probate, and that upon the trial of the oppositions filed by Joseph P. and Elizabeth Wilson and Catherine Stead, the conspirators fraudulently procured names of three persons not regularly drawn to be included in the panel of jurors selected for the trial of the oppositions; that these three persons, so chosen by themselves, were accepted and served as members of the jury, and that by their efforts, and in consequence of perjured testimony offered on behalf of the proponents, a verdict was returned by nine of the jurors including the three fraudulently serving, finding the paper to have been entirely written, signed and dated by the hand of Jacob Z. Davis. Upon demurrer by the administratrices and beneficiaries, the petition was dismissed. Laura E. Tracy, the petitioner, appealed from the order dismissing her contest, and on June 20, 1902, this court affirmed the order appealed from. Estate of Davis, 136 Cal. 590, 69 Pac. 412. On April 20, 1904, the administratrices filed their final account, accompanied by a petition for distribution. Upon the hearing of the petition Laura E. Tracy, and the parties to the contest of June 22, 1898 (comprising all the parties who had originally opposed the probate of the will or contested it after probate) appeared and filed an answer to the petition, and a petition for distribution to themselves. In their pleading, in addition to allegations showing them to be heirs of the decedent, they repeated substantially the allegations of the petition of Laura E. Tracy for revocation of probate. The administratrices moved that the answer and petition be stricken from the files of the court upon the ground that a will had been admitted to probate under which they were sole legatees and devisees. The court, taking judicial notice of and considering the prior proceedings in the estate, as above enumerated, granted the motion, and, declining to permit the said alleged heirs to be heard or to participate in the proceedings, made its decree settling the final account and distributing the residue of the estate remaining in the hands of the administratrices to Lizzie Muir and Belle Curtis. It is from this decree that the present appeal is taken.

It is plain that if the probate of the alleged will of Jacob Z. Davis was regular, and if such probate was conclusive upon the appellants, the respondents are the only parties entitled to share in the distribution of the estate, and the appellants have no interest in such estate. The position of the appellants is therefore that the attempted admission to probate of the paper (which, as they allege, was a forgery) was fraudulent; that, apart from any fraud, the order admitting the will to probate was without jurisdiction and void for want of notice to the appellant Tracy, and that they are entitled to raise these objections on this proceeding for distribution. It may be well at this point to consider the nature of the attack so made on the probate of the will. Is it direct or collateral? The proceeding for probate had terminated some six years before, in an order admitting the alleged will to probate. The attack now under discussion was made in response to a petition for distribution, a proceeding not having for its purpose the probate of the will, but entirely distinct in its scope. It is true that both proceedings, the petition for probate and the petition for distribution, related to the same estate. But the procedure of this state contemplates, in the administration of the estates of deceased persons, a series of different proceedings, each of which is, as to the matters embraced within its purview, separate. And an adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. Thus, an order appointing an administrator may be appealed from (Code Civ. Proc. § 963), or may be revoked on petition in certain instances (Code Civ. Proc. § 1383). But it cannot be said that an attack on an order appointing an administrator should, after the lapse of the time for appeal, be termed direct merely because made in some proceeding connected with the administration of the same estate, for example, on the settlement of an account, or an application for confirmation of a sale of real estate. So with other proceedings in the course of the administration of an estate, where the order or judgment made is appealable, such as orders admitting wills to probate, orders settling accounts of administrators or executors, or the like. Each can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by bill in equity, but an attack made in a different proceeding in the same estate would clearly be collateral. Thus, in Estate of Devincenzi, 119 Cal. 498, 51 Pac. 845, it was held that an objection to a confirmation of sale of real estate on the ground that the administrator's petition for the order of sale was defective, was a collateral attack upon the order of sale. In principle, the present case does not differ from the one cited. While the opposition of appellants contained a prayer that the order admitting the will to probate be annulled and set aside, this was a mere incident of the relief sought in the proceeding for distribution, and the attack on the probate cannot be regarded as direct. The cases cited by appellants, in which this court held that a motion to set aside a judgment as void was a direct, and not a collateral, attack (People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448; People v. Pearson, 76 Cal. 400, 18 Pac. 424; Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52), were all cases where the motion was made in the case in which the judgment had been rendered by a party appearing for that purpose, not, as here, where the setting aside of the judgment complained of was merely a part of the relief sought in a different proceeding. In the case at bar the distinction between direct and collateral attack is important in view of the settled rule that in a collateral attack upon a judgment of a court of general jurisdiction, the judgment can be impeached only for a want of jurisdiction appearing upon the face of the judgment roll; or, as sometimes stated, on collateral attack only a judgment which is void on its face may be set aside. People v. Thomas, 101 Cal. 571, 36 Pac. 9; In re Eichoff's Estate, 101 Cal. 600, 36 Pac. 11.

This brings us to a consideration of the objections urged against the order in question.

First. It is claimed that the order admitting the will to probate was void as to the appellant Tracy, who had not appeared, for the reason that the hearing was not had on the day specified in the original notice, and the record does not show any order or orders continuing the hearing to the time, some eight months later, when the alleged will actually came up for proof. Section 1306, Code Civ. Proc., provides for the hearing of testimony in proof of the will "at the time appointed for the hearing, or the time to which the hearing may have been postponed." It is argued that if the proof be not heard at the time specified in the notice, and no order is made continuing the hearing to some other time, a discontinuance results, and a new notice must be given in order to vest the court with jurisdiction to entertain the petition. This court has held in Estate of Warfield, 22 Cal. 51, 83 Am. Dec. 49, that, where a notice of time and place of probating a will was given, the failure to adjourn the hearing from the time fixed in the notice to a later day, when the matter was in fact taken up, was, "at most, an irregularity, occurring after jurisdiction had been acquired." We see no reason for departing from the rule so declared, but even if the defect complained of were to be regarded as jurisdictional, we could, on this collateral attack, look only to the record, which does not show affirmatively that the hearing was not regularly considered by the superior court when dealing with probate matters, is to be considered a court of general jurisdiction, and the same presumptions attach to its acts, as in any other action or proceeding over which it has jurisdiction. Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458. The record here shows that a petition for probate of will was filed, that the clerk's notice fixing November 30, 1896, as the time for proving the will was published as required by law, that on August 17, 1897, the court made an order which, after reciting that the petition came on regularly for hearing, and that it had been proved that notice had been given as required by law, admitted the will to probate. It does not appear affirmatively, apart from these recitals, that the hearing was continued from March 30, 1896, by the court; neither does it appear that it was not. The presumption is that everything was done that was necessary to sustain the action of the court. "The rule in this respect is that where the record recites that which was done nothing to the contrary may be presumed; but where the record is silent the presumption is that that was done which was requisite to sustain the jurisdiction." Estate of Twombley, 120 Cal. 350, 52 Pac. 815. We find no provision in our statutes indicating that any orders continuing the hearing form a necessary part of the judgment roll, or "technical record." But even if they do, their absence would not invalidate the order admitting the will to probate. At most, the record is silent on the question of whether such orders were made, and in the case of a court of general jurisdiction, when a judgment "comes in question collaterally, service will be presumed when the record is silent." (Vanfleet Coll. Att. § 830.) If, as contended by appellants, such orders form a part of the notice to which parties interested are entitled, the recitals in the order admitting the will to probate, that the petition came on regularly for hearing, and that notice had been given "as required by law," are sufficient to justify the presumption that such orders were made, where the contrary does not affirmatively appear from the record. People v. Davis, 143 Cal. 673, 77 Pac. 651; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138. This case does not come within the rule that, where a service appearing in the record is insufficient, it will not be presumed that any different and other service was made. This rule "has no application where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done." Sacramento Bank v. Montgomery, supra.

Second. It is urged that inasmuch as Laura E. Tracy was at the time of Davis' death domiciled in the republic of Hawaii, and as the then existing means of communication between said republic and this state rendered it impossible for her to have seen the published notice in time to enable her to appear and oppose the probate on the day set for the hearing, there was in fact no notice to her, and the statute fixing the time for publication (Code Civ. Proc. § 1303) is, as to nonresident heirs so situated, unconstitutional in that it deprives them of their property without due process of law. The same proposition was urged by the appellant Tracy on her appeal from the order dismissing her petition to revoke the probate of the will. In affirming the order this court said (136 Cal. 596, 69 Pac. 414): "It is next asserted that the statute providing for constructive notice is unconstitutional in this, that the 10 days herein provided is too short to serve as constructive notice to the world, and that the period of time being so short therefore the statute is unreasonable, and consequently void. As before suggested, the proceeding as to the probate of a will is essentially one in rem, and in the very nature of things the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the res. It would be an exceptional case where a court would declare a statute void, as depriving a party of his property without due process of law, the proceeding being strictly in rem, and the res within the state, upon the ground that the constructive notice prescribed by the statute was unreasonably short. It would seem that very few cases of that kind could be found in the books. Certainly this is not one of them. Public policy demands that a will shall have a speedy probate, and the Legislature, recognizing that fact, has given the heir, by express enactment, one year after probate has been decreed within which time he may attack the will. His rights are in no way concluded by the dercee of probate. He has an entire year thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases. It is thus apparent that in such a case as the one presented here due process of law was in no degree denied Laura Tracy upon the hearing." We have no disposition to depart from the rule there laid down. The point was elaborately argued and carefully considered. Whether or not this be a proper case for applying the doctrine of "res adjudicata" or that of the "law of the case," we are satisfied with the conclusion reached, and adhere to it.

Third. The contention that the order should be set aside for fraud in the procuring of a jury may be answered briefly in view of our determination that the attack is collateral. It is well settled, as hereinbefore stated, that upon such attack only the jurisdiction of the court can be inquired into, and, as to jurisdiction, only such defects as appear on the face of the judgment roll. Of course, the alleged fraud does not so appear. Whether the appellants could avail themselves of this ground of attack in a suit in equity to set aside the probate is another question (see State v. McGlynn, 20 Cal. 234, 81 Am. Dec. 118; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814) which need not be decided here, since this does not purport to be such a proceeding. It follows that the trial court rightly held that, on this petition for distribution, the probate of the will was conclusive on all parties. Necessarily, then, the persons claiming to be heirs had no interest in the proceeding, since they were not beneficiaries under the will. It is claimed that they were deprived of a hearing by the striking out of their pleading. But they were heard on the question of whether or not their pleading should be stricken out, and this involved the essential point in controversy; i. e., whether, assuming the truth of all facts alleged by them, they were in a position to attack the probate of the will. If they were not in such position, they had no standing to oppose the distribution sought, and were not injured by the striking out of their opposition and petition for distribution to themselves. The effect of the order was the same as that of an order sustaining a demurrer, without leave to amend. We do not think the case comes within the principle of Windsor v. McVeigh, 93 U. S. 280, 23 L. Ed. 914, and McVeigh v. U. S., 11 Wall. (U. S.) 266, 20 L. Ed. 80, cited by appellants. There a defendant's answer had been stricken out and his default entered for some reason collateral to the merits of the action. Here the pleading is stricken out because, on the face of the record, it appears that the appellants are not parties entitled to resist respondents' petition, and are not, on their own showing, entitled to have any affirmative relief on their own petition. It cannot be said that the appellants were, in any substantial sense, denied a hearing, when they were fully heard on the only question involved, viz., their interest in the estate. The language of the court in Grigg v. Dalsheimer, 88 Va. 508, 13 S. E. 993, is applicable, viz.: "They, however, had their day in court, and they were not arbitrarily put out of court, and denied an opportunity to make defense, as was the defendant in the celebrated McVeigh Case."

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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149 Cal. 253

PEOPLE v. MAUGHS (Cr. 1,297.)

(Supreme Court of California. May 18, 1906.)

1. Homicide—Self-Defense—Evidence—Instructions.

Where, on a trial for homicide, the testimony of the state showed that defendant shot decedent under no more provocation than that excited by words of personal abuse, and the testimony of defendant showed that he in self-defense shot decedent, a young and vigorous man, his physical superior, who was making a deadly assault upon him with a deadly weapon, an instruction that no man has a right to kill another in self-defense, unless the same is real or apparently necessary for such defense, and that, before a person can justify taking the life of another, he must, when attacked, employ all reasonable means within his power consistent with his safety to avoid the danger and avert the necessity for the killing, was erroneous, as failing to state the right of defendant to stand his ground as against his duty to retreat.

[Ed. Note.—For cases in joint, see vol. 26, Cent. Dig. Homicide, §§ 627–630.]

2. Criminal Law — Instructions — Contradictory Instructions.

An erroneous instruction in a criminal case is not cured by the giving of a correct instruction; the result serving to confuse the jury and to render it impossible to determine whether they followed the correct or incorrect instruction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1994.]

3. Same—Applicability to Evidence.

Where, on a trial for homicide, there was no evidence touching pursuit or any struggle or combat in which either decedent or accused sought to retreat, instructions that one may pursue and slay his adversary where the pursuit is not for revenge, nor after the necessity for the defense had ceased, but must be prosecuted in good faith to the end of winning his safety, and that it must appear that accused, if he were the aggressor, not only in good faith endeavored to decline any further struggle and to escape from his assailant before the fatal blow was given, etc., was erroneous, because leading the jury to believe that the court found evidence of pursuit or of a declination to engage in further combat.

4. Same—Presumption of Innocence—Instructions.

An instruction that, for the purpose of the trial and before any evidence is heard, a presumption of the innocence of the accused arises, and that, independent of evidence, accused is presumed to be innocent, which presumption attends him throughout the trial, does not comply with Pen. Code, § 1096, declaring that a defendant in a criminal case is presumed to be innocent until the contrary is proved.

[Ed. Note.—For case in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1846–1849.]

5. Homicide—Murder in Second Degree—Instructions.

An instruction on a trial for homicide, defining murder in the second degree, is sufficiently explicit when it adopts the definition given in Pen. Code, § 189.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 638, 642, 643.]

6. Criminal Law — Instructions — Weight of Evidence.

An instruction that, where defendant offers himself as a witness, in determining his credibility, it is proper to consider the consequences and temptations which would ordinarily influence a person in his situation, is reversible error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1896.]

7. Homicide—Murder—Instructions.

An instruction, on a trial for homicide, that it is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree, is erroneous, as the killing must be the result of the concurrence of will, deliberation, and premeditation.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 586–591.]

8. Same—Manslaughter—Instructions.

An instruction defining manslaughter should follow the language of Pen. Code, § 192, defining manslaughter, and an instruction defining manslaughter as a voluntary killing upon sudden quarrel and heat of passion, is erroneous as calling for the concurrence of sudden quarrel and heat of passion.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 649–656.]

9. Criminal Law — Trial — Instructions — Reading of Information.

It is not error to read the information in the opening of the instructions.

10. Same—Evidence—Evidence of Models.

On a trial for homicide, a structure built as nearly as might be in duplicate of a porch on which decedent was standing when shot was erected in the courtroom, visible to the jury during its impanelment, and afterwards admitted in evidence. *Held* not prejudicial to accused, for, under Pen. Code, § 1102, providing that the rules of evidence in civil actions shall be applicable to criminal actions, the structure was admissible in evidence.

11. SAME—CUSTODY OF JURY.

Where, on a trial for homicide, the court had exercised the discretion conferred by Pen. Code, § 1121, by ordering the jury to remain in the custody of the sheriff during the trial, it was error to permit the jurors to separate during the progress of the trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2039–2045.]

12. SAME — EVIDENCE — PHOTOGRAPHS — ADMISSIBILITY.

On a trial for homicide, the court admitted a picture of the porch on which decedent was standing at the time he was killed, with a man lying in the assumed position in which decedent's body was found. It was not a photograph of decedent's body when found, and neither the man who took the photograph nor the man who represented the dead body ever saw the body of decedent on the porch. *Held*, that the admission of the photograph was erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 893.]

13. SAME—ADMONITION TO JURY—RECORD.

The record in a criminal case should disclose the fact that the court at each adjournment admonished the jury, as required by Pen. Code, § 1122.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Richard B. Maughs was convicted of murder, and he appeals. Reversed and remanded.

J. W. Knox and B. F. Fowler, for appellant. U. S. Webb, Atty. Gen., for the People.

HENSHAW, J. Defendant, charged with the murder of one Charles Zander, was found guilty and the death penalty imposed. He appeals from the judgment and from the order denying his motion for a new trial.

Zander and B. E. Cole were working a ranch in partnership. Defendant, a man between 55 and 60 years of age, was in their employ as a "handy man" to cook, take care of the chickens, mend fences, and do other "odd jobs." The two partners, upon the morning of the homicide, had ridden out from the ranch to look after and repair the fences, leaving defendant alone at the ranch house. At about 11 o'clock in the morning Cole returned, and with him came one Edward Gallagher, a wood chopper, who lived about a mile from the ranch house. Cole had come back for a hammer and some staples with which to repair a broken fence, and went away immediately, leaving Gallagher with the defendant. Cole joined Zander, and while the two were repairing a piece of broken fence, Leo Green, a neighbor, rode up and said that he had told Maughs about that break in the fence two or three days before, and Zander replied, "The lazy damn son of a bitch, why didn't he fix it up?" About noon Zander and Cole returned to the house. They put their horses in the stable. and Zander then walked rapidly up to the house and entered it, while Cole remained in the vacant lot near the barn. Zander was flushed and irritated. He asked the defendant why he had not fixed the fence that Leo Green had told him about days before, and defendant replied that he had fixed it. He asked him why in the devil he did not get those cattle out of the horse pasture, and, at the end of defendant's explanations and denials, said: "You ain't doing a damn thing around here. You ain't doing any work at all like you ought to. The best thing I can do with you is to break your damn neck." He turned away down the walk which led to the gate and went half way there and turned and said: "Maughs, the best thing you can do, is to roll your blankets and get off this ranch," to which the defendant replied, "All right, I can do that." Defendant then (according to his own account), worrying over the excited and angry tone and manner of the deceased and fearful of bodily harm at his hands (for the deceased was a very strong, vigorous young man weighing about 165 pounds, while the defendant was a much older man and partially crippled), went into the room, where were many rifles and other weapons, and put his own pistol in his pocket. Deceased, who had gone over to the smokehouse a short distance away, soon returned to the house and renewed his altercation with defendant (this is still the defendant's account), abusing him, charging him with remissness in his work, and with general worthlessness, ending up by saying, "You are a damn Missouri lying son of a bitch," to which defendant replied: "Now cut that part out; that 'lying son of a bitch' part. Just cut that part out, for it is a damn lie. You can accuse me of being trifling, but I am not a son of a bitch." The deceased then walked out of the sitting room into the kitchen, near where the defendant was at work getting dinner, with a knife in his hand, and said to defendant: "I ought to cut your God damn throat." Defendant made no reply to this, and deceased, continuing his abuse, walked out upon the rear porch. The defendant, not hearing him, supposed that he had gone to the smokehouse again. Picking up some potato peelings, he started to the door to throw them into the slop bucket. Reaching the door, he took one step down onto the porch, which was about six inches lower than the kitchen floor, and then saw the deceased at the sink, which was on the porch, about five feet from the doorway. As defendant took this step to the porch, deceased turned toward him with his knife in his hand, gritted his teeth, and said to defendant, "You damn son of a bitch," to which defendant answered, "I told you a while ago that was a lie." Deceased replied, "I will cut your damn throat," and with that rushed at the defendant with the knife in his left hand and his right hand raised. Defendant tried to get back, but stumbled, and as the deceased was upon him, drew his pistol and fired without taking aim. The shot struck the deceased under the right eye, going through the jawbone upward to the back part of the head. He fell back on the porch, and death was instantaneous.

Such is defendant's account of the fatal affray. At the time of the shooting, and at the time the deceased returned to the house for the last time, Cole and Gallagher were sitting in the outer lot on a wagon tongue, about 110 feet distant. Between them and the back porch where the shooting occurred were two chicken fences. Part of the side of the porch intervening between where Cole and Gallagher were sitting and the place of the shooting was covered with trellis work, and a thick vine extended from the floor to the top of the porch. Cole and Gallagher were sitting about 40 feet to the right of the porch and upon an incline which was some 3 or 4 feet lower than the ground at the house. The fences were 6 feet high, and the pickets were close together, made so as to keep the chickens out of the garden. Cole was sitting upon the wagon tongue about 3 feet from where Gallagher was sitting and more directly facing the house. Gallagher says that he was paying no particular attention, and could not see nor hear what was going on at the house, and that his attention was first drawn to the house by the pistol shot. Cole says that he was interested in what was going on at the house and could see and hear from where he sat. Cole's account is that there was a pump on the porch by the sink; that Zander had gone onto the porch, went to the pump, and took hold of the handle of it and worked it up and down; that there is no doubt but what the two men were angry, and from the tone of Zander's voice he was very much irritated: that he heard Maughs go into the kitchen from the sitting room, and before he got to the door he said he was getting damn tired of this noise, he had heard enough of it, "and he says, 'Let this be your last words,' and shot." Zander was then telling him that he didn't see why he couldn't find a hole in the fence that had taken him but two minutes to find after he had got there, but he didn't quite finish that sentence until he was killed. "I could see Zander standing on the porch. I could not see his legs, but saw him from the waist up. I noticed the position of his hands while he was there at the pump. I saw him put the cup to his mouth with his right hand, and had the pump handle in his left. Zander's position when he was shot was he turned around facing, or not exactly facing Maughs, but he was looking in the door. His body was not quite turned square with the door. I should judge he was about 3½ or 4 feet from the door, something like that. I did not see him make any move to the door or raise either hand, and I suppose I would have seen him if he had done so. After the first shot was fired I heard Zander hit the door. I did not see him fall, as I had just dropped my eyes off of him; but as soon as the shot was fired I raised my eyes and he was not there, and in the interim though I heard him fall." After hearing this shot Cole promptly went to the barn, mounted his horse, and rode off. The testimony of Gallagher serves in some respect to discredit that of Cole. Cole says that he was an actual eyewitness, saw the defendant murder Zander, saw the shot fired, and heard Zander's body fall. Gallagher who was also an employé on the ranch, says that, sitting upon the wagon tongue, he was talking to Cole; that he heard the men talking at the house, but did not understand or try to understand what was going on. Pretty soon he heard a pistol shot, "and Cole jumped off the tongue and told him to run to the house and see if he shot him, and he would go to French's." It is a little surprising, if Cole had actually seen what he testifies to, that he should have sent Gallagher to the house to see what occurred. Cole admits to differences and a prejudice against the defendant antedating the shooting. There had, however, been no difficulty between the defendant and Zander prior to the day of the homicide. Cole hastily mounted his horse and left the ranch, in manifest fear of the defendant, and it is in evidence that he said he had told Zander that neither of them "had better bother or crowd Maughs too much, or egg him on; that he might shoot." As Cole turned to go to the barn, Gallagher walked toward the house and stopped and stood when within 80 feet of it. He could hear nothing. He then turned back to the wagon and stood there a little while, when he heard two shots in quick succession, and, looking up, saw Maughs standing on the step of the porch. Maughs spoke to Gallagher, asking him if he had seen a hawk; that one had flown that way. Gallagher replied, "No," and walked away from the house up on a neighboring hillside. He remained there about 10 minutes, when he saw Maughs leaving the house. Maughs went to the barn and took a horse, rode off, and surrendered himself to the peace officer. Gallagher then returned to the house and found the dead body of Zander lying on the porch, with its head against the wall under the sink, and an open pocketknife with a large blade about four inches from his left hand. On the ground, about two feet from the edge of the porch, was lying a drinking cup. This drinking cup, however, Gallagher had not noticed until after several other witnesses had arrived, and one of them had pointed it out. The two shots, which both Gallagher and Cole heard fired in quick succession, were explained by the defendant. He says that after having shot Zander he feared an attack from Cole, went into the gunroom, took down a repeating rifle with which to defend himself, and in the haste and excitement of loading it was twice accidently discharged, the shots piercing the ceiling of the room. Such was undoubtedly the truth, as the two new bullet holes were there discovered.

It has been necessary thus to set forth at length the conflicting stories of the defendant and of the prosecution's chief witness for the proper understanding of the rulings of the court, and also as showing the importance to the defendant of correct instructions upon the law of self-defense, and his right to have the jury properly charged thereon. By the testimony of Cole, the defendant shot down Zander under no more provocation than that excited by a wordy wrangle and words of personal abuse. By the testimony of the defendant he shot, in self-defense, a young and vigorous man, his physical superior, who was making a deadly assault upon him with a lethal weapon. The court instructed the jury as follows: "No man has a right to kill another in self-defense unless such killing is real or apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self-defense he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing." This instruction is taken from Sackett's Instructions to Juries (2d Ed.) p. 707. In support of it is cited Judge v. State, 58 Ala. 406, 413, 29 Am. Rep. 757. There the Supreme Court of Alabama says: "We are pleased to observe that in this case the old, sound, and much disregarded doctrine that no man stands excused for the taking of human life, if with safety to his own person he could have avoided or retired from the combat, has been given in the charge and must have been acted upon by the jury." In People v. Hecker, 109 Cal. 467, 42 Pac. 307, 30 L. R. A. 403, this court had occasion to consider the right of a defendant to stand his ground, as against his duty to retreat, and it was there said that there was a contrariety of opinion upon the part of writers of common law upon this subject, and that this difference had found its way into the decisions of our states; that some, as Alabama, hold to the rule of retreat, and others, including our own state, declare strongly for the opposite doctrine. It was also said that it was not stating it too strongly to say that the trend of later judicial decisions was in favor of the rule as laid down in this state, and it was further added that the right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense. This was no new declaration upon the part of this court. The same principle had been enunciated in People v. Ye Park, 62 Cal. 208, and has since been consistently followed in People v. Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167, and People v. Newcomer, 118 Cal. 263, 50 Pac. 405. No exposition is necessary to show that the giving of this instruction, which imposed upon the defendant the duty of right, and forbade him the right to stand his ground, was error of such gravity as to demand a reversal of the case. But, in exposition of the fact, as stated in People v. Hecker, that the trend of modern decision is in favor of the rule as laid down in this state, the following quotation from the Supreme Court of Missouri in State v. Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756, is apposite. The Supreme Court of Missouri, in receding from the earlier rule, which demanded retreat (State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31), declares: "It is true, human life is sacred; but so is human liberty. One is as dear in the eyes of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent acts of one man shall not abolish, or even temporarily suspend, the legal and constitutional rights of his neighbor. And this idea of the nonnecessity of retreating from any locality where one has a right to be is growing in favor, as all doctrines based upon sound reason inevitably will."

Nor is it any answer to this objection that the court elsewhere gave a correct instruction upon the subject. The result served but to confuse the jury and to render it impossible to determine whether in their deliberations they followed the law as correctly or as incorrectly set before them. People v. Campbell, 30 Cal. 312; People v. Anderson, 44 Cal. 65; People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; People v. Messersmith, 57 Cal. 575; People v. Thomson, 92 Cal. 506, 28 Pac. 589; People v. Pearne, 118 Cal. 154, 50 Pac. 376. The court in giving instructions upon the law of self-defense, charged the jury as follows: "So, too, under such circumstances, he may pursue and slay his adversary, but the pursuit must not be in revenge, nor after the necessity for the defense has ceased, but must be prosecuted in good faith to the end of winning his safety and securing his life." And again he charged the jury: "It must appear that the defendant, if he were the aggressor, not only really and in good faith endeavored to decline any further struggle, and to escape from his assailant before the fatal blow was given," etc. In point of law these instructions are unimpeachable, but they are wholly without the evidence in the case and impertinent to any theory based upon that evidence. There is no word of testimony, either by the prosecution or the defense, touching pursuit, nor touching any struggle or combat in which either party sought to retreat. These instructions, too, could only have served to mislead the jury into the belief that the court in some manner found evidence of pursuit, or of a declination to engage in further combat, which prompted the giving of these instructions. People v. Sanchez, 24 Cal. 28; People v. Devine, 95 Cal. 227, 30 Pac. 378; People v. Bird, 60 Cal. 7; People v. Smith, 105 Cal. 676, 39 Pac. 38.

The court instructed the jury as follows: "For the purpose of this trial and before you had heard any evidence a presumption of the innocence of the accused arose. Independent of evidence he was presumed by you to be innocent. This presumption of innocence, arising at the outset, attends him throughout the trial and until you have finally determined upon your verdict. You are not to forget it in weighing the testimony." The language of the Penal Code (section 1096) is brief and clear. "A defendant in a criminal action is presumed to be innocent until the contrary is proved." This, as over and over declared, means that a defendant has the unquestioned right to have the jury which is trying him for crime instructed that they must presume him to be innocent until his guilt is shown beyond a reasonable doubt. The instruction given by the court by no means filled the measure of the defendant's right in this regard. "Independent of evidence," says the court, "he was presumed by you to be innocent." What the jurors may have understood by this language we cannot say; but it is certainly open to the construction that if they were disposed to presume him innocent they could do so, and if they were not they need not. Nothing can be gained and much may be sacrificed by such uncalled-for departures from the plain letter of the statute, and from the oft-repeated and oft-approved language in construing it. It is not the same thing to say to a jury, "This defendant was presumed by you to be innocent," as it is to say, "The law clothes the defendant with the presumption of innocence, and therefore you must presume him to be innocent until the contrary is shown."

People's instruction No. 27 contained a most faulty definition of murder in the second degree. It should not have been given. Section 189, Pen. Code, is sufficiently explicit on the subject.

The court gave an instruction as to the inadvisability of giving which trial courts have been repeatedly cautioned. The instruction is the one copied from People v. Cronin, 34 Cal. 195, which declares: "Where the defendant offers himself as a witness, in determining his credibility, it is proper to take into consideration the consequences, inducements and temptations which would ordinarily influence a person in his situation." The giving of this instruction has always been discountenanced by this court. It has been said that justice would be more surely accomplished if no such instruction were given. It has been said that it is difficult, logically, to attribute the giving of such an instruction to anything other than a purpose to expressly disparage the defendant—"the very thing that a court has no authority to do, in view of our constitutional provision." Trial courts have been commended by this court when they have refused to give this instruction. People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; People v. Winters, 125 Cal. 329, 57 Pac. 1067; People v. Boren, 139 Cal. 215, 72 Pac. 899. And after all this admonition, after all these cautions, the conclusion is forced upon us that when a trial judge does give this instruction to a jury, it can be with no other purpose than to throw his judicial weight into the scales against the defendant on trial before his court. For this reason, therefore, we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him.

The court, in instructing the jury that there need be no appreciable space of time between the formation of the intent to kill and the act of killing, said: "It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree," etc. This instruction is drafted upon the instruction approved in People v. Morine, 61 Cal. 369, but omits the necessary qualifying words given in that instruction, which there reads, and should read, as follows: "It is only necessary that the act of killing be preceded by and *the result of* a concurrence of will," etc. The omission of these words would make a killing which was not the result of deliberation and premeditation, but which had at any time been preceded by it, murder in the first degree. Such, of course, is not the law. The killing itself must be the result of the concurrence of will, deliberation, and premeditation.

The court, in attempting to define manslaughter in the language of the Code, declared that it was: "First, voluntary upon a sudden quarrel and heat of passion." It cannot be perceived how the defendant was injured by the court calling for the concurrence of two conditions, when the law requires but one; but lest, by our silence, it may be assumed that the court has approved this instruction, it should be said that the language of the Code should be strictly followed. Pen. Code, § 192.

We perceive no force in appellant's objection that the court was not warranted in reading the information to the jury, as it did, in the opening of its instructions. The regular procedure in the trial of a criminal case calls for the reading of the indictment or the information after the impanelment of the jury, and that the court should repeat its contents to point the instructions of law which it was about to give, is in no sense error.

There was erected in the courtroom, visible to the jury during its impanelment, and afterward admitted in evidence, a structure built as nearly as might be in duplicate of the porch upon which Zander was standing when shot. In this we perceive nothing prejudicial to the rights of defendant. The rules of evidence in civil actions are applicable to criminal actions (Pen. Code, § 1102), and, under proper restrictions of proof, models, facsimiles, and photographs are admissible in criminal as well as in civil cases.

After the jury had been impaneled and sworn, and had been placed in charge of the sheriff, and the sheriff had been sworn to take charge of the jury, under section 1121 of the Penal Code, the court allowed eight of the jurors to separate and go to their homes, while the remaining four were retained in the sheriff's custody. While the commission of the jury to the custody of the sheriff during the trial of a criminal case is discretionary with the court, when the court has once exercised that discretion the law contemplates that it is exercised quite as much for the rights of the defendant as for the rights of the people. If the jury is liable to be subject to improper influences, if there is danger of this, which is the ground calling for the exercise of this judicial discretion, in the purview of the law those influences may as likely be exercised against the defendant as in his favor. There is absolutely no warrant in the law for the course the jury adopted, and the order permitting the jury to separate was error; indeed, error of such nature that the brief of the state offers no word in extenuation or justification of it.

It was error for the court to have admitted People's Exhibit 12 over defendant's objection. This exhibit was a wood cut taken from a photograph by a newspaper man at Los Banos and published in his newspaper. It was a picture of the porch with a man lying in the assumed position in which Zander's body was found. It was not a photograph of Zander's body when found. Neither the man who took the photograph, nor the man who represented the dead body, ever saw the body of the dead man on the porch.

The record fails to show that the court gave the statutory admonition to the jury upon many of its recesses and adjournments as required by section 1122 of the Penal Code. This admonition should, of course, be given, and the record of the case should disclose the fact of its having been given. People v. Thompson, 84 Cal. 598, 24 Pac. 384.

Other alleged errors touching the misconduct of the jury do not call for particular attention, as it is improbable that there will be a repetition of them upon a second trial.

For the reasons above given, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; LORIGAN, J.; McFARLAND, J.

ANGELLOTTI, J. I concur in the judgment of reversal upon the ground that there was prejudicial error in the giving of the following instruction: "(27) 'Heat of passion' as used in these instructions, means a condition of quick anger or sudden injury, engendered by real or supposed grievance suffered at the time. And in order to reduce a crime of murder in the first degree to murder in the second degree, the killing must be done upon the instant provocation is given, or so soon thereafter that the blood has not had time to cool and reason resume its sway, before the mind has had time to consider the character and gravity of the act about to be done, and not from hatred or pre-existing revenge." The evidence in the case, as shown by the majority opinion, was such as to make it exceedingly important to the defendant that the distinction between murder in the first degree and murder in the second degree should be clearly and precisely made known to the jury. The homicide was apparently the result of a quarrel commenced on that very day; the evidence indicating that the relations between the parties had been very friendly up to that time. The instruction set forth above is not a correct statement of the law in this regard. To reduce a crime from murder in the first degree to murder in the second degree, it is not essential that the killing should be done upon the instant that provocation is given, or so soon thereafter that the blood has not had time to cool. If, as a matter of fact, a killing is done without deliberation and premeditation, except in special cases mentioned in the Code, of which this is not one, it is only murder in the second degree. The statements contained in this instruction would have been material in determining as between murder and manslaughter, but as between the two degrees of murder they had no place, and we are unable to say that they did not mislead the jury to the prejudice of defendant.

Under the circumstances of this case, as shown by the record, I find no other prejudicial error.

We concur: SHAW, J.; SLOSS, J.

149 Cal. 195

SANTA ROSA BANK v. PAXTON et al.

(Supreme Court of California. April 11, 1906.)

1. BILLS AND NOTES — COMPLAINT — SUFFICIENCY.

The allegation in a complaint in an action on a note that defendant made, signed, and delivered the note states a cause of action, and permits the introduction of evidence that the note was signed and delivered by an attorney in fact appointed by defendant.

2. PLEADING — PLEADING WRITTEN INSTRUMENT.

The written instrument on which a cause of action is founded may be pleaded, either by setting forth its substance according to its legal effect, or by incorporating a copy in the body of the complaint, or by attaching thereto by a proper reference a copy of such instrument.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 53-57.]

3. BILLS AND NOTES — COMPLAINT — SUFFICIENCY.

A complaint in an action on a note alleged that the maker made, executed, and delivered the note to plaintiff; that the maker executed a power of attorney whereby the grantee therein was empowered to appear and act for the maker in her business transactions, which power of attorney was annexed to and made a part of the complaint. The power of attorney was sufficient to empower the grantee therein to execute the note sued on. *Held* that, conceding that any reference to the power of attorney was necessary, the allegation as to the authority of the grantee in a power of attorney to execute the note was at most defective in form only, which was removed by the reference to the power of attorney attached as an exhibit.

4. PLEADING—DEFECTS—WAIVER.

A party consenting to the overruling of his demurrer to a pleading consents to a withdrawal of the demurrer.

5. SAME.

Where a party withdrew his demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, he could present the point on appeal only by reason of the rule that such an objection is not waived by a failure to demurrer; but where by his answer he raises the issues which he claims were not well pleaded in the petition, and the case is tried on the merits, the objection is waived.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by the Santa Rosa Bank against B. W. Paxton and another, as executors of Hannah H. Paxton, deceased. From a judgment for plaintiff, defendant Charles E. Paxton appeals. Affirmed.

Bishop, Wheeler & Hoefler (William Rix, of counsel), for appellant. J. R. Leppo, for respondent. James W. Oates and A. B. Ware, for defendant executor.

SHAW, J. This appeal is taken from the judgment by the defendant Charles E. Paxton, and is presented upon the judgment roll alone. The appellant has no apparent interest in the case, except as one of the executors of the will of Hannah H. Paxton, deceased. His appeal purports to be taken by him in his individual capacity; but, as the respondent makes no objection on the ground of want of interest in the appellant, we have considered the appeal as if it were taken by him as executor.

The complaint states a cause of action to recover judgment upon four promissory notes, executed to the plaintiff by the deceased in her lifetime, and to foreclose a lien upon certain personal property pledged as security for the payment of the notes. Each note is copied in full in the body of the complaint, and it is alleged, with respect to each, that the deceased "by and through her attorney in fact, B. W. Paxton, made, executed, and delivered to the said plaintiff herein" the said note. Concerning the authority of the attorney in fact to execute the notes it is alleged that the deceased "made, executed, and delivered to B. W. Paxton an instrument and power of attorney whereby the said Hannah H. Paxton authorized and empowered the said B. W. Paxton as her attorney in fact, and to appear and act as and for the said Hannah H. Paxton in her affairs and business transactions, in accordance with the terms and conditions set forth and the authority given by said instrument and power of attorney, * * * which said instrument and power of attorney is hereunto annexed and referred to and marked 'Exhibit A,' and made a part of this complaint." The power of attorney is annexed to the complaint as stated. It is not ambiguous in its terms, and is in all respects sufficient to empower B. W. Paxton, for and in the name, place, and stead of Hannah H. Paxton to execute the notes sued on. The only objection now offered to the complaint is that there is no allegation therein that B. W. Paxton was authorized to execute, as the attorney in fact of Hannah H. Paxton, the notes sued upon. The point urged is that in such a case the allegation of authority must be made in the body of the complaint, and cannot be made by a reference to an exhibit attached thereto and made a part thereof.

The purpose of a pleading is to inform the opposite party of the facts on which the pleader will rely as constituting his action or defense. It is difficult to perceive how the defendant could be given more explicit and satisfactory information on that subject than by the method adopted by the plaintiff in this case. If it deserves criticism at all, it is upon the ground that it commits the fault of pleading the evidence, rather than the facts. The simple allegation that the defendant made, signed, and delivered the notes would have served to state a cause of action, so far as that fact is concerned, and to let in evidence showing that the signing and delivery was by an attorney in fact thereunto duly authorized. By the method adopted the defendants were not only apprised of the facts alleged against them, but also of the nature of the evidence by which such facts would be proven. The plaintiff has more than performed its duty to the defendant in this regard. The rule that a written instrument upon which a cause of action is founded may be pleaded either by setting forth its substance according to its legal effect, or by incorporating a copy in the body of the complaint, or by attaching thereto, by a proper reference, a copy of such instrument, as the pleader may choose, is thoroughly established in this state. Stoddard v. Treadwell, 26 Cal. 303; Murdock v. Brooks, 38 Cal. 603; Joseph v. Holt, 37 Cal. 253; Hallock v. Jaudin, 34 Cal. 175; Lambert v. Haskell, 80 Cal. 613, 22 Pac. 327; Ward v. Clay, 82 Cal. 505, 23 Pac. 50, 227; Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382; Savings Bank v. Burns, 104 Cal. 476, 38 Pac. 102; Georges v. Kessler, 131 Cal. 185, 63 Pac. 466; Estate of Cook, 137 Cal. 191, 69 Pac. 968.

It may be that this rule is not so well settled with respect to instruments which are made a part of the complaint by reference and attached as exhibits, but which do not constitute the contract upon which the complaint is founded. With respect to such instruments, however, the rule is said to be that "if the allegation be defective it may be aided by an express reference to an exhibit for that avowed purpose." Estate of Cook, supra. This case comes precisely within the rule. Conceding that any reference to the power of attorney was necessary at all in view of the allegation that the notes were executed, the most that could be claimed with respect to the allegation as to the authority of the agent to execute them is that it is defective in form. This defect was absolutely removed by the reference to the power of attorney which was attached as an exhibit, and which showed beyond controversy that the maker of the notes did thereby authorize B. W. Paxton to execute the same as her agent. The appellant relies on the two cases of Los Angeles v. Signoret, 50 Cal. 298, and Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. These decisions do not sustain his contention. The decision in Los Angeles v. Signoret was fully explained and distinguished in Ward v. Clay, supra, and Lambert v. Haskell, supra. In Burkett v. Griffith, supra, which was a case of slander, certain leases were attached to the complaint and were referred to therein only for the purpose of identifying certain land by the descriptions therein contained. It was held that these exhibits could not be used to supply the place of a proper allegation in the body of the complaint concerning the terms of the covenants contained in the leases. They were not made a part of the complaint for that purpose. Here the exact contrary appears. The power of attorney was made a part of the complaint for the express purpose of aiding the allegation in so far as it failed to state the legal effect of the instrument, and it comes clearly within the rule as stated in Estate of Cook, supra.

We cannot discover in the record any occasion for this appeal. The appellant filed a separate demurrer to the complaint, based on the ground that the complaint did not express facts sufficient to constitute a cause of action. This, of course, presented there the point now contended for here. He, however, consented that this demurrer should be overruled, and it was done accordingly. This was equivalent to a withdrawal of the demurrer, and he can present the point now only by reason of the rule of law that such an objection is not waived by a failure to demur. He thereupon filed a separate answer, denying the execution of the notes by the deceased, either through the attorney in fact or at all, and alleging that they were executed in her name by said B. W. Paxton without any authority from her so to do. He thus himself put in issue the precise fact which he now contends was not well pleaded. Upon this as the sole issue in the case he went to trial, and after the evidence thereon was introduced he waived findings without preserving the evidence in the record by bill of exception or otherwise. Thereupon he waited until all but four days of the six months allowed for appeal had expired, and then instituted this appeal upon the bare judgment roll. Upon the trial he had the opportunity to present upon its merits his claim that the notes were executed without authority, and we must presume that he did so, and that the court correctly decided against him on that point. It appears, therefore, not only that his objection to the pleading he did not properly present, that he himself presented the same issue in his answer, that it has been decided against him, and that he virtually concedes that this decision was correct upon the evidence. The respondent should be put to no expense by an appeal so fruitless and devoid of substantial grounds. Whitby v. Rowell, supra.

The judgment is affirmed, with costs and $100 damages.

We concur: SLOSS, J.; ANGELLOTTI, J.

3 Cal. App. 448

DARLINGTON v. BUTLER (KOHN, Intervener.)

(Court of Appeals, Third District, California. April 18, 1906.)

1. JUDGMENT—FINAL JUDGMENT—SUCCESSIVE RECORD ENTRIES.

A contest between applicants to purchase land was referred to the court, and on motion by an interpleader to dismiss the proceedings an entry was made stating that, the motion to dismiss having come on to be heard and the court having rendered its decision, it was ordered that the action be dismissed. It was the practice of the judge who presided in the case to announce his decision to the clerk and to require the clerk to make an entry in the minute book, and the clerk testified that he remembered the decision of the court in the case, and that he received a copy, which he supposed went into the minute book, and that he furnished a copy of the decision to one of the attorneys. Two days later another order was entered in practically the same terms, also dismissing the cause. *Held*, that the order first entered was the final judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 361.]

2. Public Lands—School Land—Application to Purchase—Reference of Contest—Subsequent Applications.

After a contest between applicants for the purchase of school lands has been referred to the court, the surveyor general has no power to receive the application of a third person to purchase the land involved in the contest.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Abe Darlington against Sarah Butler. From a judgment for plaintiff, Nathan I. Kohn, intervener, appeals. Affirmed.

For former opinion, see 85 Pac. 931.

William F. Bray, for appellant. Abe Darlington and Charles A. Swisler, for respondent.

CHIPMAN, P. J. This is an action to determine the respective rights of the parties to certain school land situated in El Dorado county. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, intervener, Kohn, appeals.

The record presents the following facts: In 1888 defendant Butler filed her application in the state land office to purchase the land. Thereafter one Graham filed therein a similar application, and on demand and protest of Graham the surveyor general referred the conflicting claims of Graham and Butler to the superior court for adjudication. On May 4, 1889, a complaint was filed by Graham in said court in the action entitled "Graham v. Butler," and summons issued, but no return was made thereon. On May 7, 1903, appellant, intervener Kohn, "presented his application to purchase and protest to the surveyor general, who refused to file the same on the ground that the matter had been referred to the superior court of El Dorado county, and until judgment was had they (sic) had no jurisdiction to receive the same." On May 22, 1903, Kohn, by leave of court, filed his complaint in intervention, and an alias summons issued thereon, and on August 19, 1904, "was duly certified and returned" to the court, and on the same day Graham filed his answer to said complaint in intervention, "disclaiming any interest in the land therein described or in the cause of action, and the default of said Sarah Butler for not appearing in answer to said summons was duly entered." On July 16, 1903, Darlington, plaintiff herein, filed his complaint in intervention, in which he alleged that he had made application to purchase the land from the state on April 11, 1903, which presumably was refused as Kohn's had been. On January 3, 1905, the court "dismissed the proceedings of Graham v. Butler, on motion of said intervener Darlington, upon the ground that summons in said action had not been served and return thereon made within three years after the commencement of said action." It appears from a statement made by the judge, Hon. N. D. Arnot, presiding in the case, as follows: "It was the practice of the presiding judge in this case * * * to announce his decision to the clerk and require the clerk to make an entry in the minute book, and that has been his practice since he became judge of the superior court of El Dorado county. * * * When the judge presiding made his order in the case of Graham v. Butler dismissing the case, he followed the practice he had hitherto pursued." The deputy clerk of the court testified that he remembered the decision of the court in Graham v. Butler, a copy of which the court gave to the clerk, and the directions the court gave him, and he supposed it went into the minute book, and that the court told him as the attorneys came in to give them a copy of the decision; that Darlington came to the clerk's office about closing time, and the clerk gave him a copy, but did not remember to have given Kohn's attorney a copy. The latter testified that he did not know of the judgment dismissing the case until January 5, 1903, on which day a second judgment of dismissal was entered. The judgment of January 3d is as follows (title of court and cause entered in full): "In this action the motion of intervener, Abe Darlington, that said action be dismissed having come on regularly to be heard, and the court having rendered its decision and order that said action be dismissed, wherefore, by reason of the law and decision and order aforesaid, it is ordered, adjudged, and decreed that the said above-entitled action be, and the same is, hereby dismissed. Judgment rendered January 3, A. D. 1905." There apppears in the record a judgment to like effect, signed by the judge and dated January 5, 1905. It is not necessary to set out this judgment fully. It recites the proceedings leading up to it more fully than the judgment of January 3d, and differs from that judgment only in form. It directs that the action be dismissed and the matter referred to the surveyor general for such further proceedings as may be proper in the premises, and that a copy be filed in the office of the surveyor general. The court found, among the facts, that the judgment of January 3d "was never vacated nor set aside and at all times after its said entry was and is in full force and effect." Among its conclusions of law the court found that the judgment of this court made and entered on the 3d day of January, 1905, was and is the final judgment in the action of J. S. Graham v. Sarah Butler, and that the judgment made and entered on the 5th day of January, 1905, was unauthorized, and was not and is not the final judgment therein." It appears that the judgment of January 3d was entered "on page 598 of Judgment Book B, records of the superior court of El Dorado county, in words and figures as follows."

Then follows copy as above given. The judgment of January 5th was introduced as having been "made and entered by this court on the 5th day of January, 1905, and forming part of the judgment roll in the case," but it does not appear where it was entered. On Minute Book J of the court is an entry as follows: "January 3, 1905. Present: Hon. N. D. Arnot, Judge. J. S. Graham v. Sarah Butler. The motion to dismiss is granted." The court found that on January 4, 1905, plaintiff filed in the office the surveyor general a certified copy of the judgment of January 3, 1905, "and on said 4th day of January, 1905, and after the filing of said copy of said judgment, he filed in the office of the surveyor general his application, in due form, for the purchase of the land described in his complaint, and a duly verified protest against the allowance or approval of the application of said Sarah Butler, and demanded that the contest arising thereon be referred to this court for adjudication"; that "thereafter, to wit, on the 5th day of January, A. D. 1905, the surveyor general, in compliance with said protest and demand of plaintiffs, made and entered in the record books of his office an order, which recites the fact of said application made by defendant in his office for the land aforesaid, and of the application made and filed by plaintiff as aforesaid, and the said protest and demand of plaintiff filed therewith, and orders and directs that the contest, as set forth between the parties herein, be referred to the superior court * * * for adjudication." On January 6, 1905, Kohn, intervener, presented to the surveyor general a certified copy of the said judgment of January 5th, and at the same time presented his application and demand to purchase said land, and was refused, "on the ground that he had issued his profert to this court to determine the conflicting claims of said Abe Darlington and said Sarah Butler, and hence was without authority to receive any further application." Thereupon Kohn, by leave of court, intervened in this action. The cause was tried, and judgment passed in favor of plaintiff and against both the defendant and the intervener.

The appellant makes the point that the judgment of January 3d was not final, was not intended so to be, and that the clerk was unauthorized to enter it as the judgment of the court; that the judgment of January 5th was the only final judgment in the case; that plaintiff's application to purchase and demand for a reference to the court were premature and without authority, and hence intervener's application was first in time and should have been received and filed. It is beyond dispute that the judgment of January 3d was entered in the judgment book by the clerk on that day, and was so entered by direction of and in accordance with the order of the court. The clerk testified that the judge gave him a copy of his decision, and that the order was entered on the minute book, which, as the court stated, was in accordance with the practice of the court. The finding of the court was that the judgment of the 3d of January was the final judgment, and that the judgment of January 5th was unauthorized, and was not and is not the final judgment. It may be that the court could not by its findings change the effect of its former judgments, but the finding goes to show what its intention was. The court had the right to dismiss the action of Graham v. Butler on its own motion, even though Darlington was not then an interested party as intervener. Code Civ. Proc. § 581, subd. 7. The court pronounced its judgment of dismissal, or in other words rendered its judgment of dismissal, on January 3d, when it so declared in open court and directed the clerk to enter the order. The order entered in the minute book was in effect the final judgment of dismissal. Marks v. Keenan, 140 Cal. 33, 73 Pac. 751; Pacific Paving Company v. Vizelich, 141 Cal. 4, 74 Pac. 352; Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172. There is no statute requiring the judge to sign the judgment. See subject discussed in Estate of Cook, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267. The surveyor general was authorized to act upon the judgment of January 3d in making his order for reference of the applications of Darlington and Butler. After the reference of the contest between Darlington and Butler the surveyor general had no power or right to receive the application of another person to purchase the land involved in the contest, as we understand the decision in Youle v. Thomas, 146 Cal. 537, 80 Pac. 714.

It is claimed that intervention of Kohn was improperly allowed; that he was not in privity with the state, and could not be heard to question the sale, whether already made or about to be made (Id.); that he was in no position to obtain in the action a valid or effectual judgment with respect to his rights (Id.); and that, as was said in Youle v. Thomas, "the conclusion necessarily follows that the intervener has not been aggrieved by the judgment and order from which he appeals," and the appeal might very properly be dismissed. Whether the foregoing is a correct interpretation of the case cited, is immaterial in this case.

Appellant contends that the evidence shows that respondent was not a purchaser in good faith and for his own benefit and not for the benefit of another. This contention is based upon the evidence tending to support the allegations of the complaint in intervention that the plaintiff was, at the time he made application to purchase, in such financial stress as to be unable to pay for the land if awarded to him. Plaintiff objected to the testimony upon this issue as irrelevant and immaterial; but the court allowed it, and much testimony was taken touching the property interests and outstanding indebtedness of plaintiff. We very much doubt the correctness of the court's ruling upon this point. Possibly the evidence might have had some bearing upon the claim that plaintiff's application was for the benefit of some other person if there had been any evidence pointing in that direction, but there was none. However, the court found against intervener on the issue, and there was sufficient evidence to support the finding.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

149 Cal. 224

BLACK v. BLACK. (S. F. 3,584.)

(Supreme Court of California. May 16, 1906.)

1. APPEAL — JUDICIAL DISCRETION—MODIFICATION OF DECREE IN DIVORCE.

Applications for the modification of a decree in divorce are addressed to the sound discretion of the lower court and its conclusions will not be disturbed on appeal unless the record presents a clear abuse of that discretion.

2. DIVORCE—POWER OF COURT—DISPOSITION OF CHILDREN.

Under Civ. Code 1903, § 138, providing that, in an action for divorce, the court may, before or after judgment, give such direction for the custody, care, and education of the children as may seem necessary, and may at any time vacate or modify the same, the power of the court to subsequently modify the decree is not abridged because of it having adopted the agreement of the parties as to the disposition to be made of the children.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 793.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action for divorce by Minette D. Black against Lewis C. Black. From a modified decree, plaintiff appeals. Affirmed.

J. R. Welch, for appellant. Henry Ach, for respondent.

LORIGAN, J.* In this action, which was for a divorce, the parties having entered into an agreement to that effect, the court, in its original decree in favor of plaintiff, entered in March, 1900, awarded the custody and control of the minor son of the parties to the defendant, with leave to plaintiff to visit said child at reasonable times and to have the child visit at her home six months in the year. In February, 1903, the court, on application of plaintiff for a modification of said original decree so as to award the custody and control of said child to her, and after hearing, at which evidence was presented on both sides, modified said decree and awarded the care, education, and control of said child (then 7 years of age) to plaintiff, with leave to defendant to visit the child at reasonable times and to have him spend his vacations with him. It is from this modified decree that this appeal is taken.

While it is insisted that the modification of the decree was not justified by the evidence, we do not think the point calls for any special notice, or that it is necessary to review the evidence presented in the bill of exceptions. All applications of the character here involved are addressed to the sound discretion of the lower court, and the conclusion it reaches will not be disturbed unless the record presents a clear abuse of that discretion. We perceive no such abuse. There was no question raised as to the morals of either parent; in fact, it was conceded that they were both persons of moral worth. But, upon all other matters affecting the best interests of the child, particularly as to its physical necessities and comforts and the ability of either parent to best provide for them, the evidence, which was presented solely upon affidavits, was radically conflicting. If that presented on behalf of the mother was accepted by the lower court, and it undoubtedly was, that tribunal, having in view the welfare of the child as the controlling factor in directing its custody, was warranted in making the order and we may not disturb it.

It is also insisted by appellant that the provision in the original decree awarding the custody of the child to defendant, being made in pursuance of a stipulation of the parties in the nature of a contract, the court had no power, upon application of the plaintiff, to modify it, and refers to Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931, as sustaining his claim. This case, however, has no application. The contract there under consideration was one relative to the custody of the minor child provided for in the articles of separation executed by the parents pursuant to section 159 of the Civil Code, 1903, which contract the court held binding and obligatory until avoided by the mutual resumption of marital duties, or the divorce of the parties, the court further declaring, however, that "in the event of a divorce being granted * * * the question of the custody of the minor would be left at large for the disposition of the court, the same as if the contract had not existed." The power of the court to vary or modify its decree in divorce proceedings as to the custody, care, and education of the minor children whenever it may seem to it necessary or proper is provided for by section 138 of the Civil Code, 1903, and we are not aware of any authority which holds that the power of the court to subsequently modify such decree is abridged because it adopts the agreement of the parties as to the present disposition to be made of the children. A decree based upon such an agreement as to custody is simply provisional. The court is not required to award the custody of the children in conformity to it. It does so only because the parents, in view of a judicial separation and solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them in the future, and an agreement prompted by these considerations is generally approved and adopted by the court, and made part of the decree. The decree, however, made in pursuance to the agreement is subject to the power of modification authorized by the statute. The children are not parties to the action for divorce, and the jurisdiction which the statute confers on the court, to be exercised, from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties made pending the divorce litigation which the decree follows, or by the action of the court in originally approving and adopting it.

The judgment appealed from is affirmed.

We concur: HENESHAW, J; McFARLAND, J.

(149 Cal. 222)

EPHRAIM v. PACIFIC BANK et al.

(S. F. 3,583.)

(Supreme Court of California. April 14, 1906. Rehearing Denied May 14, 1906.)

1. APPEAL—FINDINGS—EVIDENCE—REVIEW.

On appeal, the question is whether there was substantial evidence to support the findings of the trial court, and not whether there was a preponderance of evidence on the side thereof.

2. ATTORNEY AND CLIENT—POWER TO BIND CLIENT—CONTRACTS.

Code Civ. Proc. 1903, § 283, providing that an attorney has authority to bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk or entered on the minutes of the court, does not apply to a contract made by an attorney for his client before commencement of an action thereon.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 140, 141.]

3. SAME—CONTRACTS—RATIFICATION.

Where defendant bank ratified a contract whereby plaintiff was to be appointed receiver in a certain action for a consideration, by procuring the appointment of plaintiff as such receiver, the contract became, on the part of the bank, an executed contract, although the same was made by the bank's attorney and was not in writing and filed with the clerk of court, etc., as provided by Code Civ. Proc. 1903, § 283.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by S. Ephraim against the Pacific Bank and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

A. Everett Ball, for appellant. Roger Johnson and Gavin McNab, for respondents.

McFARLAND, J. Plaintiff brought this action to recover of defendants, the Pacific Bank and its directors, etc., quite a large sum of money for services, etc., rendered by plaintiff as receiver of certain lands and premises in a certain action instituted by said Pacific Bank, entitled "Pacific Bank et al. v. Madera Fruit & Land Company et al." The findings and judgment were for defendants, and plaintiff appeals from the judgment and from an order denying his motion for a new trial. The defense set up in the answer is, briefly, that plaintiff importuned the bank to be appointed receiver in said action of Pacific Bank v. Madera Fruit & Land Company, and promised and agreed that if he should be so appointed he would look solely to the crops of fruit which the land would produce for compensation for his services and expenses as such receiver, and "waived all claim and demand against said Pacific Bank for any liability to him therefor," and "would under no circumstances make any claim against said bank for his services or expenses as such receiver." The court found the above averments in the answer to be true, and found as a conclusion of law that there was no liability of defendants to plaintiff for any sum of money whatever.

The main question in the case is whether the above findings were warranted by the evidence, and we think that they clearly were. Appellant argues that there was not a preponderance of evidence on the side of the findings; but we need not discuss that question, for the question is: Was there substantial evidence to support the findings? And that there was such evidence is beyond doubt. The witness Grant testified that he made the alleged contract on the part of the bank with appellant, and there was considerable other testimony corroborating that of Grant. Appellant testified that no such contract was made, and there was some other testimony which probably tends to support him; but this made, at best, only a case of conflicting evidence.

Appellant contends that the contract as testified to by Grant was not binding on the bank, and therefore not binding on appellant, because Grant made it as the bank's attorney, and it was not in writing, filed with the clerk of the court or entered upon the minutes of the court, as provided in section 283, Code Civ. Proc. 1903. But this contention is not tenable. That section refers only to "steps of an action" after it has been instituted, and pertaining to its conduct; but in the case at bar the contract was made before the commencement of the action. Moreover, the bank ratified the contract by procuring the appointment of appellant as receiver; and, as by procuring such appointment it did all it was required to do under the contract, by that act the contract became on the part of the bank an executed contract. See Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

Appellant has some exceptions to rulings on the admissibility of evidence; but none of them, even if well founded, would be of sufficient importance to warrant a reversal.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(149 Cal. 163)

PIERCY v. PIERCY. (S. F. 4,385.)

(Supreme Court of California. April 10, 1906. Rehearing Denied May 10, 1906.)

1. APPEAL—QUESTIONS REVIEWABLE—GROUNDS FOR NEW TRIAL.

The action of the trial court in specifying in an order granting a new trial the ground upon which it was granted did not restrict the court on appeal to the ground so specified in its examination of the record for the purpose of ascertaining whether a new trial should be granted.

2. NEW TRIAL—GROUNDS—MISCONDUCT OF PARTY.

Code Civ. Proc. § 657, subd. 1, authorizes a new trial for irregularity in the proceedings of the court, jury, or adverse party, whereby either party was prevented from having a fair trial. In a suit to set aside a conveyance as procured from plaintiff in fraud of her rights, she moved for a new trial on the ground that through the wrongful procurement of defendant the action had been tried as a mere formal matter, without any complete presentation of plaintiff's case, with the understanding on the part of those representing plaintiff that the object of the trial was to dispose of any question as to the validity of the deed, whereby material evidence in support of plaintiff's claim was not presented. *Held*, that such conduct on the part of defendant was sufficient ground for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 42.]

3. Appeal—Review—Trial Court's Discretion—Ruling on Motion for New Trial.

The finding of the trial court, on motion for new trial, that the misconduct of defendant had affected the substantial rights of plaintiff, was conclusive on appeal, as it was a matter within the discretion of the trial court.

4. Same — Questions of Fact—Conflicting Evidence.

The decision of the trial court, based on conflicting evidence on a motion for a new trial, cannot be disturbed on appeal.

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Andrew J. Piercy, as administrator of the estate of Mary Piercy, deceased, against Edward M. Piercy. From an order granting a new trial, defendant appeals. Affirmed.

Jackson Hatch and W. F. Williamson, for appellant. H. V. Morehouse and J. E. Alexander, for respondent.

ANGELLOTTI, J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial. The action was instituted by the deceased, Mary Piercy, to set aside a deed purporting to convey valuable real property in Santa Clara county to defendant, on the ground that the same had been obtained from her by defendant by means of undue influence, and ignorance on her part as to the contents of the deed. The conveyance was dated March 13, 1901, and this action was instituted September 13, 1901. Findings and judgment were in favor of defendant, and Mary Piercy subsequently dying, and the administrator of her estate having been substituted as plaintiff, notice of intention to move for a new trial on various grounds was given. The motion was subsequently heard on a bill of exceptions and affidavits, and the trial court made its order granting said motion on "the sole ground of irregularity in the proceedings of the defendant, by which the plaintiff was prevented from having a fair trial of the action; the irregularity here referred to being that which is shown by the affidavit of R. M. F. Soto, verified on April 7, 1904, and filed herein on April 9, 1904." While the action of the court below in specifying in its order the ground upon which it granted the new trial could not have restricted this court to the ground so specified, in its examination of the record for the purpose of ascertaining whether or not a new trial should be granted, except upon the single question as to the sufficiency of the evidence where it was conflicting (see Weisser v. Southern Pacific Co. [Cal. Sup.] 83 Pac. 439, and cases there cited), the respondent in his brief advances no other reason than the one specified in the order, in support of the action of the trial court. It will therefore be assumed that no other valid ground for a new trial exists.

The irregularity shown by the affidavit of Mr. Soto may be fairly said to be substantially that, through the wrongful procurement of defendant, the action was, so far as the plaintiff's side thereof was concerned, practically tried as a mere formal matter, without any full and complete presentation of her case, and with the understanding on the part of those representing her at the trial (viz., a guardian ad litem appointed for her as an incompetent person, more than 1½ years after the commencement of the action, and his attorney), both that the transaction between the parties was entirely regular and valid, and that the real object of the trial was to dispose of any question as to the validity of the deed, and confirm the title of defendant to the land described therein, such representatives being without knowledge as to material evidence which could have been produced in support of the cause of action stated in the complaint. We have carefully examined the affidavits and bill of exceptions used on the hearing of the motion, together with the judgment roll, and find nothing that would justify us in reversing the order appealed from. It can serve no useful purpose to here set forth the statements made by various affiants, which, in the light of the facts shown by the bill of exceptions and judgment roll, were, in our opinion, sufficient to sustain the conclusion of the trial court. Our law provides that a new trial may be granted, on the application of the party aggrieved, for "irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." Code Civ. Proc. § 657, subd. 1. It is settled that any misconduct of a party to an action, by which a full presentation to the court or jury of evidence material to the other party's cause is prevented, is an irregularity for which a new trial may be granted, if thereby a fair trial of the issues has been prevented. See Hayne on New Trial and Appeal, §§ 25, 46, 49; Spelling's New Trial and App. Pro. §§ 80, 86. The evidence here was sufficient to sustain a finding of such misconduct on the part of defendant. It is true that there was a conflict of evidence, but upon such a motion it is for the trial court to determine the true facts, and we cannot interfere with such determination where there is substantial evidence to support the conclusion reached.

It is, of course, true, as contended by counsel for defendant, that a mere irregularity which does not affect the substantial rights of the other party or prevent him from having a fair trial does not justify the granting of a new trial. The affidavit of Mr. Soto, however, was clear as to the the direct effect of the irregularity in this case, showing that as a result thereof certain material evidence in support of plaintiff's claim was not presented. The question as to whether this materially affected the substantial rights of plaintiff and prevented her from having a fair trial, was peculiarly one which was addressed to the discretion of the trial court, for the same reasons that a motion for a new trial upon the ground of newly discovered evidence is so addressed, as has been repeatedly held. The trial court, having heard and seen the witnesses on the trial, and having knowledge as to those circumstances of a case which cannot be reproduced in the printed record, is in a better position than is the appellate court to determine as to the effect of the shown irregularity upon the result of the trial. It is certainly enough to justify the affirmance of an order granting a new trial upon such ground that the irregularity found, upon sufficient evidence, by the trial court, to have existed, was of such a nature, that it may, under the circumstances of the cases, as shown by the record, have affected the substantial rights of the aggrieved party and prevented a fair trial. Under such circumstances the conclusion of the trial court that it did have such an effect should be held absolutely binding upon the appellate court.

The order granting a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

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2 Cal. App. 672

BIRD v. UTICA GOLD MINING CO. et al.

(Court of Appeal, First District, California. Jan. 18, 1906.)

1. Appeal—Change of Venue—Convenience of Witnesses—Discretion.

The denial of a motion for a change of venue on the ground of convenience of witnesses and that the ends of justice would be promoted will not be reversed on appeal, unless it appears that the trial court abused its discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3836.]

2. Venue — Change — Convenience of Witnesses.

Where it was shown that plaintiff was in destitute circumstances and could not procure the attendance at the trial of some of his important witnesses if a change of venue should be granted, and plaintiff and six of his witnesses resided in the county where the action was brought, it was not an abuse of discretion to deny the defendant's motion for a change to another county for convenience of its witnesses, 17 of whom resided in the county to which the change was desired.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 76, 77.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Antone Bird against the Utica Gold Mining Company and another. From an order denying defendants' motion for a change of the place of trial, they appeal. Affirmed.

See 84 Pac. 256.

Page, McCutchen, Harding & Knight, for appellants. Martin Stevens, for respondent.

HALL, J. This is an appeal from an order denying defendants' motion for a change of the place of trial from the city and county of San Francisco to Calaveras county. The motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by such change. The action has since been tried, as appears by the appeal from the judgment now pending in this court. 84 Pac. 256.

The refusing or granting of a motion for a change of venue upon the ground that the convenience of witnesses and the ends of justice would be promoted thereby lies in the sound legal discretion of the trial court. Hanchett v. Finch, 47 Cal. 192; Reavis v. Cowell, 56 Cal. 588; Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676; Stockton v. Houser, 103 Cal. 377, 37 Pac. 179. The mere preponderance in the number of witnesses does not necessarily control the matter; and unless it appears that the trial court has abused its discretion the appellate court will not interfere with the action of the lower court. From a careful examination of the record on this appeal we cannot say that the trial court abused its discretion in denying appellants' motion. It is true that the witnesses for appellants 17 in number, resided in Calaveras county; but it is also true that the plaintiff and his witnesses, six in number, resided in San Francisco. It was also shown that plaintiff was in destitute circumstances, and could not procure the attendance at the trial of some of his important witnesses, especially the physician that treated him for his injuries, if the trial should be transferred to Calaveras county.

The order is affirmed.

We concur: HARRISON, P. J., COOPER, J.

(149 Cal. 269)

JERSEY ISLAND DREDGING CO. v. WHITNEY.*

(Court of Appeal, First District, California. July 7, 1905. On Rehearing, Aug. 9, 1905.)

Evidence — Parol Evidence — Contract of Compromise—What Constitutes.

Where defendant disputed complainant's bill for $721.35, whereupon a compromise was effected, and plaintiff's president wrote across the bill the words, "Paid $650 in full satisfaction of all claims and guaranteed against liens," which bill he delivered to defendant, the indorsement was not a mere receipt, but an unambiguous contract of settlement, which could not be varied by parol.

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*Rehearing granted by Supreme Court. See 86 Pac. 691.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1756–1765.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge

Action by the Jersey Island Dredging Company against Arthur L. Whitney. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Myrick & Deering, for appellant. Walter H. Linforth, for respondent.

HARRISON, P. J. The plaintiff, under an agreement with the defendant therefor, did certain dredging work at a rate per diem agreed upon between the parties on the defendant's ranch in Sonoma county, at the head of San Pablo Bay, on account of which the defendant paid to it $1,000 about September 1, 1900, leaving a balance of $97.75 unpaid upon the amount then claimed to be due. September 17th, the plaintiff presented a bill for $721.35 (including said unpaid amount of the former bill), which it claimed to be then due to it. The defendant objected to this bill on the ground of the unsatisfactory character of the work, and also disputed his liability for one item of $168.60 in the bill; but after a few days the dispute was compromised, and the plaintiff agreed to accept $650. The defendant thereupon paid it that amount of money on September 25th, and the plaintiff gave the defendant the following receipt, which was indorsed across the face of the bill and signed by its president: "Paid $650 in full satisfaction of all claims and guaranteed against liens." The work was not completed at that date, and after its completion the plaintiff brought the present action to recover the sum of $550.45 claimed by it to be due for work done "between the 19th and 30th days of September." In his answer the defendant denied any liability to the plaintiff, and alleged that all claims in its favor on account of any dredging work had been fully compromised, satisfied, and discharged. Judgment was rendered in favor of the plaintiff, from which, and from an order denying a new trial, the defendant has appealed.

At the trial the defendant read in evidence the aforesaid bill of September 17th, together with the indorsement of the plaintiff thereon, and gave his testimony of the circumstances under which it was made. The plaintiff's president was a witness in its behalf, and, when upon the stand, was asked the following questions: "Mr. Wright, at the time of that conversation between Mr. Whitney and yourself, that you have just referred to, was any bill or claim under discussion or consideration other than that shown on this exhibit?" To which he answered, "No, there was nothing else except that bill." "When you took this $650, what claims were you settling?" to which he answered, "That bill." "Were you settling anything else?" to which he answered, "No, sir." Objections to each of these questions were duly made by the defendant upon the ground of incompetency, in that the plaintiff sought thereby to contradict the terms of a written instrument by parol evidence. The court overruled the objections, and the defendant duly excepted thereto. The appellant contends, in support of his appeal, that the court erred in these rulings and that for this reason the judgment should be reversed. On the other hand, the respondent contends that the evidence was properly received, under the rule that the terms of a receipt may be always explained or contradicted by parol evidence.

The rule is universal that a simple receipt for money or for property paid or delivered is not conclusive thereof, but is merely prima facie evidence of the fact. Such a receipt is only an acknowledgement or admission by the party giving it that he has received the money or property therein named, and, like any other admission or recital, may be controverted or explained by extrinsic evidence. Greenl. on Ev. § 305; 2 Pars. on Con. *555; Comptoir d'Escomptes v. Dresbach, 78 Cal. 15, 20 Pac. 28. The same rule obtains, even though the receipt purports to be "in full," or "in full payment," of an admitted or undisputed liability or indebtedness. A creditor does not discharge his debtor from all liability upon an admitted obligation for $2,000 by receiving from him only $1,000, even though he give him a receipt "in full" for his claim. Such an agreement is without any consideration to support it. Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; American Bridge Co. v. Murphy, 13 Kan. 35; Morris v. St. Paul, etc., Co., 21 Minn. 91; Price v. Treat, 29 Neb. 543, 45 N. W. 790. An exception to this rule prevails in Connecticut, the courts of that state having at an early day (Fuller v. Crittenden, 9 Conn. 401, 23 Am. Dec. 364), following the rule then prevailing in England, held that such a receipt had the effect to discharge the claim, and that parol evidence could not be received to contradict its terms. A receipt "in full of all demands" is held in Illinois (Waldrath v. Norton, 5 Gilman, 437) and in Missouri (Ireland v. Spickard, 95 Mo. App. 53, 68 S. W. 748) to be subject to explanation by parol evidence; while in Indiana (Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354), New York (Vedder v. Vedder, 1 Denio, 257), Wisconsin (Conant v. Kimball, 95 Wis. 550, 70 N. W. 74), and other states, it is held otherwise. So, too, a receipt of that character joined with a receipt for the amount of a particular demand will be limited to the matter particularly expressed. See Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Randall v. Reynolds, 52

N. Y. Super. Ct. 145; Civ. Code, § 1648. A receipt may, however, be accompanied with a contract, as, for example, where the money for which it purports to be given is paid in discharge of an unliquidated claim for damages, or upon a compromise or settlement of a contractual liability, when the amount claimed therefor is disputed, and the receipt purports to be in full payment or satisfaction of such claim. In such cases the transaction is regarded as an accord and satisfaction, and the instrument will have the same effect as a release from the claim. Such an instrument may be contradicted as to any facts which it erroneously recites, and evidence will also be received for the purpose of showing that it was given by reason of some fraud or mistake sufficient in equity to set it aside; but in the absence of such evidence it is to be construed in accordance with the rules for interpreting written contracts. A claim or demand about which there is a bona fide dispute, either as to the amount claimed or as to the existence of any liability therefor, is an unliquidated claim, and the acceptance of a part thereof upon a compromise of a dispute will be a sufficient consideration for an agreement on the part of the creditor to discharge the entire claim. Tuttle v. Tuttle, 12 Metc. 551, 46 Am. Dec. 701; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. A receipt given upon such compromise, which purports to be in full satisfaction of the claim, will operate as a contract by the creditor for the discharge of the debtor, and, like any other written contract, is not subject to be varied or explained by parol evidence. Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Komp v. Raymond, 42 App. Div. 32, 58 N. Y. Supp. 909; Hills v. Sommer, 53 Hun, 392, 6 N. Y. Supp. 469; Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; Conant v. Kimball, 95 Wis. 550, 70 N. W. 74; Stapleton v. King, 33 Iowa, 28, 11 Am. Rep. 109; Babcock v. Hawkins, 23 Vt. 561; Hilliard v. Noyes, 58 N. H. 312; Goodwin v. Goodwin, 59 N. H. 548.

Under these rules the indorsement of the plaintiff upon the bill paid by the appellant, "Paid $650 in full satisfaction of all claims," is not only an admission that that amount of money was paid, but it also operated as a contract of the plaintiff for the release of the defendant from its claim. The testimony of both the appellant and the president of the plaintiff show that the defendant disputed the correctness of the bill, and that in consequence of such dispute the latter agreed to receive $650 therefor, and signed the above indorsement. The term "satisfaction" has a distinctive significance in legal phraseology, and imports a release and discharge of the obligation in reference to which it is given; and the statement in the indorsement that the money paid was in satisfaction of "all" claims is without any ambiguity in its terms, and includes, not only the claim on which it was written, but every other claim which the plaintiff then had against the defendant. It was therefore error for the court to receive testimony for the purpose of explaining the terms of the indorsement, or seeking to place a limitation upon the meaning of the words employed. Especially was it error to permit the witness to testify as to his understanding of the claims he was settling. Squires v. Amherst, 145 Mass. 192, 13 N. E. 609; Baker v. Baird, 79 Mich. 255, 44 N. W. 604; Solary v. Webster, 35 Fla. 363, 17 South. 646.

Whether the agreement thus indorsed upon the bill had the effect to discharge the defendant from liability for the work done for the plaintiff after September 25th cannot be determined upon the record before us. Such discharge was alleged by him in his answer, and upon the trial he gave testimony to the effect that the $650 was paid to the plaintiff upon an agreement between them that it should cover, not only the work already done, but all work thereafter to be done by the plaintiff under their previous agreement. At the trial this defense was presented in two branches: One, by the above indorsement, which by its terms is limited to claims existing at the date it was given; the other, by this verbal agreement. The finding of the court that the allegations of the answer constituting this defense are "untrue," in so far as it refers to the claims covered by the indorsement, is, as we have seen, not sustained by the evidence; but the failure to make a finding upon that portion of the defense which the defendant sought to sustain by the testimony respecting the verbal agreement, notwithstanding such testimony was denied by the plaintiff, necessitates a new trial.

The payment to the plaintiff by the Beet Sugar Company is not available to the defendant as a defense to the plaintiff's claim. Aside from the objection that such defense is not alleged in the answer, there was no evidence that the payment was made for or on account of the defendant.

The judgment and order denying a new trial are reversed.

We concur: COOPER, J.; HALL, J.

On Rehearing.

PER CURIAM. Rehearing denied.

COOPER, J. I dissent from the order denying a rehearing in this case. The contract provides that the work of dredging shall be paid for at the rate of $70 per day of 22 hours. The bill presented to the defendant, dated September 17, 1900, was for a total to date of $721.35. In this bill was an item of $168.60 for time while the dredger was aground. There was a dispute about the bill, and on September 25, 1900, it was agreed that the plaintiff would accept $650 in payment thereof. The amount was paid, and on the bill was indorsed "Paid $650 in full satisfaction of all claims and guaranteed against liens. Jersey Island Dredging Co., per W. H. Wright, Pres't." The amount claimed here, and for which recovery was had, is for labor performed by plaintiff after the date of the bill. In fact it includes 20 hours work on September 25th, 21 hours on the 26th, 23 hours on the 27th, 12 hours on the 28th, 12 hours on the 29th of the same month, and 12 hours on October 1st, all of which work was done after the receipt was given. Now there was no contract except for work by the day, and no agreement to do the entire work for any sum. The defendant testified that he could not say as to the day the discussion commenced over the bill, but that he knew in a general way what had been done. He further testified: "When I paid the $650 September 25th I figured down how much would be proper to pay on this bill. I don't remember now what amount I arrived at." The defendant was also allowed to testify to the effect that he understood when he paid the $650 it was a payment of everything.

I think parol evidence was admissible for the purpose of showing that the receipt referred to the bill upon which it was indorsed, and was for all claims included in the bill, and nothing more. In any event, I think it was competent for plaintiff to show by parol evidence as to what was intended to be covered by the receipt. Defendant had testified as to his understanding in regard to the matter, and it was clearly right to allow plaintiff also to state his understanding. As the claim upon which the action is brought is all for work performed after the date of the bill upon which the receipt was indorsed, and much of it after the date of the receipt, it would seem unjust not to allow any evidence as to what was intended to be paid by the $650. If the receipt was intended to be a contract and to include future work, it could easily have been so written. Parol evidence as to a receipt, for the purpose of explaining it, where it is not a contract, is clearly admissible. Hawley v. Bader, 15 Cal. 45; 1 Greenl. on Ev. § 305; Dolan v. Freiberg, 4 W. Va. 101.

HALL, J. On the authority of Hawley v. Bader, 15 Cal. 45 (a case not referred to in the opinion heretofore filed in this case), I am of the opinion that the petition for a rehearing should be granted.

149 Cal. 381

HOYT v. ZUMWALT. (Sac. 1,273.)

(Supreme Court of California. June 28, 1906.)

1. EVIDENCE—DECLARATIONS.

Declarations of a wife, made during her husband's life, impeaching his title to land, are not admissible against her in an action for the the land; her title depending on his having had title.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 953.]

2. TRIAL—RECEPTION OF EVIDENCE—EXCLUSION—EFFECT ON ADMISSIBILITY FOR DIFFERENT PURPOSE.

Exclusion of declarations of a person, when offered as substantive evidence, is no bar to their admission to impeach such person, when afterwards testifying as a witness.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 130.]

3. ADVERSE POSSESSION—POSSESSION.

Where one gives his son money to pay for land on condition that he be provided with a home there, his subsequent residence on the premises as a member of the family is not possession, adverse or otherwise.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 138.]

4. JUDGES—BIAS—EVIDENCE.

On a hearing of a motion to call in another judge to preside on the ground of bias of the sitting judge, which motion is considered by such judge, his own affidavit stating the facts may be used in opposition to the motion.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 228, 229.]

5. SAME.

A motion to call in another judge to preside, on the ground of bias, is properly denied, there being nothing to support it, except the bare circumstances that 16 years before he, as district attorney, prosecuted and convicted defendant, his father, and a confederate, for an aggravated case of battery, and had then, in his official capacity, laid the facts before the Governor for his information on passing on a petition for a pardon.

In Bank. Appeal from Superior Court, El Dorado County, M. P. Bennett, Judge.

Action by Rose H. Hoyt, administratrix of George M. Zumwalt, deceased, against C. T. Zumwalt. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. F. Bray, for appellant. Chas. A. Swisler and Abe Darlington, for respondent.

BEATTY, C. J. This is an action in the nature of ejectment, prosecuted by the widow and administratrix of George M. Zumwalt, deceased. The demanded premises consist of four acres of land, upon which are a dwelling house and other improvements. In May, 1897, Mrs. Larkin, who was then the owner of the land, executed and delivered her deed purporting to grant it to said George M. Zumwalt, and if that deed took effect according to its terms, the plaintiff at the commencement of the action was the owner and entitled to the possession of the premises. The adverse claim of the defendant, who is a brother of plaintiff's intestate, and who ousted the plaintiff in October, 1900, is based upon a deed of that date from their father, Isaiah Zumwalt, purporting to grant the premises to him and to another brother; and he defends the action upon the allegation that his brother George took and held the bare legal title to the land under the conveyance from Mrs. Larkin in trust for his father, who, he claims, purchased it for his own use, paid the full purchase price from his own funds, and personally received Mrs. Larkin's deed when it was delivered; his sole purpose in having his son named as the grantee being to screen the property against any possible claim of his wife, from whom he had been separated, whether by divorce or agreement does not appear. The cause was tried in the superior court without a jury, and the findings were in favor of the plaintiff and against the defendant as to every material issue. With respect to the equitable defense of a resulting trust in favor of Isaiah Zumwalt and his grantees, they were, in effect, that the land was purchased from Mrs. Larkin by George M. Zumwalt and the deed delivered to him; that the purchase money ($150) was given to him by his father as an advancement in furtherance of his proposed marriage to the plaintiff, and upon an understanding that after the marriage the old man was to have his home with them during the remainder of his life; that when the dwelling erected on the land was ready for occupancy the marriage took place, and from that time until June, 1900, the father, son, and daughter-in-law resided there together. Towards the close of this period dissension arose between the father and the young people, and on the 7th of June he shot and killed his wife and son, and his son's infant child, and seriously wounded the plaintiff. Afterwards, while in jail, he executed the deed under which defendant claims title, and in pursuance of which he took possession of the premises in the absence of the plaintiff. Upon these and other findings judgment was entered in favor of the plaintiff for restitution of the demanded premises and for mesne profits. The defendant appeals from the judgment and from an order denying a new trial, alleging errors in certain rulings of the court, and contending that the evidence does not support the findings of fact.

As to the evidence, we think it is abundantly sufficient to sustain the findings, without regard to the testimony of the plaintiff herself; and as to her testimony we do not think it involves any such inconsistencies or contradictions of statements made elsewhere as to have required the court to disregard it. In all material particulars it is entirely consistent with itself, and it is strongly corroborated by the testimony of apparently respectable and wholly disinterested witnesses. There was no error—certainly no prejudicial error—in the rulings of the court upon objections to evidence. To sustain his equitable defense of a resulting trust the defendant offered to prove that the plaintiff during the lifetime of her husband had made certain declarations or admissions favorable to his claim. Upon plaintiff's objection to the competency of her declarations or admissions to impeach her husband's title to the land, the evidence was excluded, and we think properly so. Her husband's estate could not be bound by her admissions. And, besides, the plaintiff was afterwards examined as a witness and testified fully as to all these matters. If defendant had desired, he could then have offered all this rejected evidence to impeach her; for there was nothing in the previous rulings of the court to prevent him from making this legitimate use of the evidence, which was all contained in the depositions of two of his sisters then on file in the case.

The defendant, by his answer, also asserted a prescriptive title to the premises by adverse possession for more than five years, but under the findings of the court as to his claim of constructive trust, there is no support for this defense. If Isaiah Zumwalt gave his son the money to pay for the land upon the sole condition that he should be provided with a home there, his subsequent residence on the premises as a member of the family did not constitute possession, and certainly there was nothing to give it the character of an exclusive or adverse possession. Defendant's adverse possession commenced in October, 1900, and the action was commenced in February, 1903.

The only remaining question in the case arises out of the ruling of the court denying the motion of the defendant to call in another judge to preside at the trial. The motion was based upon the alleged bias of the judge (Code Civ. Proc. § 170, par. 4), and was supported by the defendant's affidavit averring his belief that he could not have a fair and impartial trial before Hon. M. P. Bennett, the judge of the superior court of El Dorado county, by reason of the prejudice and bias of said judge, and alleging as grounds of his belief, the following facts: "That at a trial of this affiant in the justice's court of Mud Springs township, in said county, the said Hon. M. P. Bennett, who was then district attorney of said El Dorado county, declared that if he had known as much about the case just tried before it had been tried as he knew at the end of the trial he would have dismissed the charge of battery, and have taken me up on his own responsibility for assault to murder, and sent me across the bay where I belonged, meaning thereby that he would endeavor to send me to the state penitentiary; that said declaration by said Hon. M. P. Bennett was the expression of a malevolent desire on his part to injure this affiant, and that there was no just ground for such remark, as the case was a mere petty quarrel, and that upon conviction of affiant upon the charge of battery a sentence of six months in the county jail or $250 fine was imposed upon affiant; that thereupon every public officer in the city of Placerville, except Judge Bennett, and all the merchants and business men of Placerville, petitioned the Governor of the state to interpose his executive clemency to relieve affiant from what they considered to be a grossly unjust and severe sentence, and that said Hon. M. P. Bennett went personally to the Governor and protested so forcibly against any action on his part that the Governor declined to interfere; that said Judge Bennett has ever since regarded affiant with hostility, and that at the trial of a certain criminal cause entitled 'People v. Isaiah Zumwalt' in the month of September, 1900, in which the plaintiff in this present action, Mrs. Rose H. Zumwalt, was the prosecuting witness, and affiant was diligently aiding the defense, the foregoing facts were set out by affiant in an affidavit filed by the defendant in said criminal proceeding in support of a motion made by the defendant in that case for a change of judge, which affidavit has since disappeared from the records of said El Dorado county and cannot now be found; that said motion was heard by Hon. J. H. Hughes, superior judge of Sacramento county, Cal., who determined that upon the facts alleged the said Judge Bennett was disqualified from trying the said original cause of People v. Isaiah Zumwalt, by reason of his prejudice and bias against the said defendant therein and this affiant, and said cause was thereupon tried before Hon. F. T. Nilon, superior judge of Nevada county; that in this present case the plaintiff, Rose H. Hoyt, is the same person who was the prosecuting witness in the said criminal cause, and that the testimony necessary to be offered and used on the trial of this present action will include a part of the matters testified to on the trial of said criminal proceeding, and that the same reasons that disqualified the said Hon. M. P. Bennett on the trial of the said criminal proceeding also disqualify him to try the present action; that affiant requested his counsel to suggest these matters to the superior court of El Dorado county in the hope and belief that said Hon. M. P. Bennett would, on such suggestion, of his own motion declare his disqualification, ad request another judge to sit in his place on the trial of this action, and that affiant is informed by his said counsel and verily believes, and on such information and belief avers the fact to be, that said Hon. M. P. Bennett refused to make any request to any other judge to try this action and declared that he is not disqualified, and if any affidavit as to facts showing his prejudice and bias against affiant were filed, he, the said Judge

Bennett, would cause counter affidavits to be filed, and would unless affiant would put up the money to pay another judge to come here and try said action, refuse to allow any other judge to try said cause, but if affiant would put up the money to pay another judge to come to this county, he, the said Judge Bennett, would then call in some other judge to try this case; that affiant is advised by said counsel that for affiant to furnish money, or to offer to furnish money, to pay another judge to come to this county to try said cause, would be contrary to the law and a contempt of court, and contrary to public policy. C. T. Zumwalt."

The plaintiff, in opposition to the motion, filed the affidavit of the judge, and of a witness, who, as constable, was present throughout the trial referred to by the defendant in his affidavit, and who deposes that he heard no such language used by Judge Bennett—then district attorney of El Dorado county—as alleged by defendant. The affidavit of the judge shows that the trial referred to was had in 1887, 16 years before the trial of this cause; that he attended the trial of the defendant, his father, and one Brown, jointly charged with the crime of battery, at the request of the justice of the peace of the township, and in obedience to his official duty; that the defendants were entire strangers to him; that on the evidence produced they were all three convicted and sentenced to pay a fine of $250; that the judgment was just, and erred, if at all, on the side of leniency; that he did not at any time use the language attributed to him, and that if he said anything at all resembling it he did so in the argument addressed to the court in commenting upon the evidence; that subsequently a petition for the pardon of the defendants was circulated in the county containing a misstatement of the facts of the case; that he refused to sign it, and to prevent the Governor from being misled in the matter, he, in the performance of his official duty, sent him a written communication—a copy of which is set out in his affidavit—containing a correct summary of the evidence adduced at the trial; that he did not go personally to the Governor to oppose the granting of the pardon; that after his official connection with the battery case ended he thought no more of the parties, and had never entertained any sentiment of personal hostility to them or either of them. His affidavit further shows that the objection to his presiding at the trial of Isaiah Zumwalt for murder was submitted to Judge Hughes upon the uncontradicted affidavit of this defendant, the same in substance as his affidavit in this case, except as to those proceedings. He admits that he expressed his willingness to invite another judge to preside at the trial if defendant would pay the expense of his attendance, but says that, deeming himself not disqualified, he was unwilling to subject the county to the expense involved in calling another judge.

The court did not err in refusing the request of the defendant that he should call in another judge to hear and determine the motion and did not err in denying it on the showing made. The amendment constituting subdivision 4 of section 170 of the Code of Civil Procedure, was considered and construed in People v. Compton, 123 Cal. 412, 56 Pac. 44, and in Talbot v. Pirkey, 139 Cal. 326, 73 Pac. 858, in both of which cases it was held that the judge whose bias is alleged must himself decide the motion, but that he must decide it upon the facts averred in the affidavits without reference to his state of mind. It was therefore the right—if not the imperative duty—of Judge Bennett to decide the motion, and it was also his privilege to contradict special averments of defendant's affidavits as to any matters of fact from which bias might be inferred. He had a right, for instance, to deny the use of the language which the defendant charged him with having used at the trial for battery, though he might have found it a delicate matter to decide the question if he had not been corroborated by a disinterested witness. He had a right also to show—what the affidavit of the defendant did not show—that 16 years had elapsed since the trial of the battery case, that he had not gone to Sacramento to make a personal appeal to the Governor to refuse a pardon, that he had merely reported the facts of the case in writing, as his official duty required, and, although he could not base his decision upon his consciousness that he was free from bias, it was not improper for him to state that fact. Our view in regard to this matter is that an affidavit which merely avers the belief of a party that a judge is so biased against him that he cannot have a fair and impartial trial of his cause amounts to nothing. To support the motion facts must be stated from which it may be reasonably inferred that such bias exists. When such facts are averred the belief or the affidavit of the judge that he is not biased is no ground for denying the motion; but as to specific facts, which uncontradicted might justify the inference of bias, the judge is as competent a witness as any other, and, if the facts happen to be exclusively or peculiarly within his own knowledge, it is entirely proper that he should state them. In opposition to this view it is urged that the judge will necessarily find the fact as he has averred it, and that this would be to make him a judge in his own cause. But the proposition is entirely unfounded. The cause is not his. He has no interest pecuniary or otherwise in trying it—if he had he would be disqualified on other grounds—and where he has no interest in the cause he has a right to consider probative facts within his own knowlegde, if put in the form of an affidavit, in determining the ultimate fact of bias or indifference.

In this case, upon all the facts shown by the affidavits, there was nothing to support the motion of defendant except the bare circumstance that Judge Bennett, 16 years before the motion was made, had, in the discharge of his duty as district attorney, prosecuted and convicted the defendant, his father, and a confederate of an aggravated case of battery, and had then in his official capacity laid the facts before the governor for his information in passing upon a petition for a pardon. From such facts no just inference arises that he could not try the cause with perfect impartiality.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.

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149 Cal. 178

BURNETT v. PIERCY et al. (three cases). (S. F. 4,390, 4,411, 4,412.)

(Supreme Court of California. April 10, 1906. Rehearing Denied May 10, 1906.)

1. Appeal—Parties to Appeal—Effect of Failure to Give Notice.

Where, in partition, it was decided that plaintiff and two of the defendants each owned a one-third interest, and that another defendant had a lien on the interest of one of the parties, and defendant on appeal failed to give such fourth party notice of the appeal, it was not ground for dismissal, as the court might decide the case as to the parties before it without injury to the fourth party's interests.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2173.]

2. Same—Notice of Appeal—Admission of Service.

Where notices of appeal were not addressed to a party nor to his attorney, the admission of service by such attorney, who was also attorney for another party, limited by a statement following the attorney's signature to an admission to the latter party only, did not constitute an admission of service as to the other party.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2165.]

3. Same—Waiver of Failure to Give Notice.

A stipulation filed on appeal by the attorney of record for a party and signed by him as attorney for such party, stipulating that the appeal had been "perfected," waived any failure to serve notice of appeal on such party.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2169.]

4. Deed—Construction—Repugnant Clauses.

Civ. Code, § 711, provides that conditions in a deed restraining alienation, where repugnant to the granting clause, are void. Section 1642 provides that several contracts between the same parties as to the same matters are to be taken together. Section 1641 provides that the whole of a contract is to be taken together, and section 1636 provides that a contract must be so interpreted as to give effect to the mutual intent of the parties. *Held*, that when, on a fair consideration of all the parts of a deed and of the contemporaneous instruments constituting parts of the same transaction, it appears that it was the intent of the parties by other expressions in the deed to limit the effect of the granting clause so that it should not transfer the entire estate, but only a limited estate, the rule that repugnant conditions restraining alienation are void, does not apply unless the conditions refer to the limited estate actually granted.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 479, 451.]

5. Powers—Construction—Joint Execution.

A husband and wife, the owners of certain land, conveyed it in trust, with a provision for the reconveyance by the trustee to the grantors according to the terms in a deed "already prepared to be executed." The reconveyance by the trustee was executed contemporaneously to the grantor and his wife, and gave the wife the exclusive control, with the right to the income during her life, she not to convey or incumber the land except by the joint deed of herself and husband, with the intent that, on her death, if the property had not been disposed of by such an instrument, it was to vest in the children then living and the lawful issue of those who had died. The survivor of the two grantors was to retain the right to control the property and receive the rents during his or her natural life, and at the death of the survivor it was to vest in the children. *Held*, that the power to dispose of the fee by a joint act of the grantees ceased to exist on the death of one of them.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Powers, §§ 87, 88.]

6. Deed—Nature of Estate—Life Estate.

Land was conveyed to a husband and wife, the wife having the right to control the property and receive the income during her life, but without power to convey, except by the joint deed of herself and husband, it being the intent of the deed that on her death, if the property had not been disposed of by a joint instrument, it was to vest in the children of the grantees then living or the lawful issue of such as had died, the survivor to retain the right to control the property and receive the income during his life, and at his death it was to vest in the children. *Held* that on the death of the husband the wife had only an estate for life.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 361.]

7. Partition—Answer — Sufficiency as Predicate for Accounting.

In partition, an answer of a defendant to the effect that another defendant had received rents for which he had not accounted, and praying for an accounting, was a sufficient foundation on which to base an accounting.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 223.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Three separate actions for partition by Viola Piercy Burnett against Edward M. Piercy and others, in each of which Edward M. Piercy appeals from an interlocutory judgment of partition and by stipulation the appeals were heard together. The parts of the judgment in each of the cases declaring the interests of the parties and directing partition affirmed and remanded for further proceedings, but reversed in so far as they require appellant to render an account.

Jackson Hatch and W. F. Williamson, for appellant. H. V. Morehouse, J. E. Alexander, J. H. Meredith, Lloyd & Wood, and Thomas F. Barry, for respondents.

SHAW, J. In three separate actions for partition, entitled as above, interlocutory judgments of partition were entered, from each of which the defendant Edward M. Piercy appeals. By stipulation between all the respective parties it has been agreed that the three appeals shall be heard and determined together, upon a single transcript. It appears from the stipulation that the decision of all of the cases depends on the same facts and affects the same parties. The respondents present a motion to dismiss the appeals, the ground of the motion being that in each case there was a failure to serve the notice of appeal upon Christopher C. Rivers, one of the respondents, that he is a necessary party to any disposition of the case, and hence, that this court has no jurisdiction of the appeals.

By the interlocutory judgment it was declared that Viola Piercy Burnett, Edward M. Piercy, and Andrew J. Piercy were each the owner of an undivided one-third interest in the real property, and that the defendants Thomas W. Rivers and Christopher C. Rivers had a lien and charge against the interest of Andrew J. Piercy for $10,500, which was secured by a deed of trust of said lands theretofore executed by him to them. In his answer Edward M. Piercy alleged that he is the owner of the whole of the property, and that neither of the other parties had any interest therein, and this is his contention upon the appeals. It is apparent, therefore, that, so far as the lien of Christopher C. Rivers, or his interest in the joint lien of himself and Thomas W. Rivers, is concerned, the court can make no valid disposition of the cases on appeal, unless it has in some way obtained jurisdiction of the cases as to him. The court can, however, notwithstanding such failure to secure jurisdiction as to Christopher C. Rivers, decide the cases with respect to the interests of the other parties, so far as it may be done without injuriously affecting his interests. If the appeals result in an affirmance of the judgments, of course his interests will not be disturbed. If they result in a reversal, the cases must be remanded for new trial, or with directions to enter judgments in favor of Edward M. Piercy and dismissing the actions. In either of the latter contingencies, if jurisdiction does not exist as to Christopher C. Rivers, the former judgments will be final as to him, notwithstanding the reversal as to the others, and the result will be that the estate of Edward M. Piercy, as to the undivided one-third of the land claimed by Andrew J. Piercy, will be subject to the interest of said Rivers under the trust deed, and to his interest in the lien secured thereby. No persons will be affected by this lien, except the appellant himself and the respondent James Gould, Jr., who claims a lien for $6,000 and interest, secured by a mortgage executed by Edward M. Piercy purporting to mortgage the whole estate in said lands, and who was, by the judgments, declared to have a lien by virtue thereof upon a one-third interest only. The appellant cannot justly complain; for he will have himself brought the appeals to this court without making said Rivers a party thereto. He does not complain, and is not only content, but is insisting upon having his appeals decided, so far as it can be done with the parties before the court who are properly served. Gould cannot be injured by the appeals. He has not himself appealed, and he is satisfied with his lien as given by the interlocutory judgments, confining it to the undivided one-third of the land. The only effect upon him of successful appeals by the present appellant, will be that his security will be extended to two-thirds with a second lien upon the remaining third, whereas, if the appeals are dismissed he will have a lien upon one-third only. The appeals could, therefore, be decided by giving to the parties thereto such relief as the record warrants, and providing in the judgments of this court on the appeals that they shall not in any wise affect the right or interest of Christopher C. Rivers. Under such circumstances an appeal will not be dismissed. The court, having jurisdiction of the parties properly before it, will hold the appeal in order to determine the rights of such parties with respect to each other. Williams v. S. C. Mining Ass'n, 66 Cal. 195, 5 Pac. 85.

We are further of the opinion that this court has jurisdiction of the appeals as to Christopher C. Rivers. It may be conceded, as claimed by the respondents, that there was no service upon him of the notice of the appeals. The notices were not addressed to him, nor to his attorney, that is to say, neither his name nor that of his attorney appears in the list of persons given in the introductory clause as those to whom notice is given thereby. The admission of service by Mr. Barry, who was attorney of record for him and also for Thomas W. Rivers, was limited, by the statement following the signature, to an admission for Thomas W. Rivers only. Under the principle of the decision in Estate of Pendergast, 143 Cal. 138, 76 Pac. 962, and the cases there cited, this does not constitute an admission of service by or for Christopher C. Rivers, and hence the notices were ineffectual as to him. But it has been said that "the notice of appeal by which the adverse party is brought before this court corresponds to the summons by which he is bought before the superior court. * * * The notice itself, like the issuance of a summons, may be waived. A voluntary appearance will be equivalent to a personal service of the notice, but the mere waiver of the service is insufficient. There must, in addition, be given a notice of appearance, either in person or by attorney." In the cases at bar there is a stipulation on file signed by "Thos. F. Barry, attorney for defendants and respondents, Thomas W. Rivers and Christopher C. Rivers." This stipulation recites that "said Edward M. Piercy has duly perfected an appeal to the Supreme Court of the state of California from the interlocutory judgment" in one of the cases, particularly describing it, and "has also perfected an appeal" from each of the other two judgments, describing them, that all of them were made upon the same facts and evidence, and "are to be presented to said Supreme Court for review upon said appeals upon records presenting precisely the same issues * * * and upon precisely the same briefs * * * and oral arguments." It was thereupon agreed therein that the appellant should file his record on appeal in one of the cases, and need not file any record on appeal in the other two cases, and that the appeals in the other two cases "may be heard and determined in the Supreme Court upon the transcript so to be filed" by the appellant in the first-mentioned case; that the briefs and oral arguments in the said first-mentioned case should be considered by all the parties to the other two actions, and by the Supreme Court, as briefs and arguments in the other two cases, and that "whatever order or judgment the Supreme Court shall make in said actions, in which said printed transcript is to be filed, shall be made in the other two of said actions." This stipulation was filed in this court in each of the three appeals, and in two of them constitutes the only record on appeal. In Valley Lumber Co. v. Struck, 146 Cal. 268, 80 Pac. 405, there was a similar stipulation and a similar objection that one of the respondents had not been served with notice of appeal. It was held that the stipulation constituted an appearance to the appeal, sufficient to give the Supreme Court jurisdiction thereof. In Carey v. Brown, 58 Cal. 180, there was a stipulation that "the appeal was duly perfected," and it was held that this was an admission that the notice of appeal had been filed, and that it could not be contradicted for the purpose of dismissing the appeal. In this case the stipulation of Christopher C. Rivers is that the appeals have been "perfected." This could not be true unless a notice of appeal had been duly served on him. Following Carey v. Brown, supra, we hold that this is an admission of the due service of a properly addressed notice of appeal upon all the parties signing the stipulation. On the authority of Valley Lumber Co. v. Struck, supra, we may also say that the stipulation constitutes an appearance to each appeal by all the respondents, and precludes a dismissal thereof for want of service of notice upon either of them. We are of the opinion that this court has jurisdiction of the appeals as to Christopher C. Rivers, and that the appeals should not be dismissed.

We now come to the merits of the case. In November, 1867, the title to the lands in controversy was vested in John C. Piercy and Mary Piercy, his wife. The title of the respective parties to this action depends on the construction and legal effect of two deeds for said lands, executed on November 16, 1867, one made by John C. Piercy and Mary Piercy to Joseph B. Crockett, and the other a reconveyance by Crockett to John C. and Mary Piercy. The deed to Crockett was in the usual form of a grant, bargain, and sale deed, except that it contained the following clause: "In trust, nevertheless, and for the purpose only, of conveying the above described premises by a deed bearing even date herewith, and to be executed immediately by said party of the second part to said John C. Piercy and Mary Piercy, according to the terms, conditions and limitations in said deed contained, which deed is already prepared to be executed." No other consideration was stated in the deed. The reconveyance by Crockett to the Piercys, referred to in the foregoing trust clause, was executed contemporaneously with the first deed, and in execution of the trust therein declared. It styled Crockett as party of the first part, John C. Piercy as party of the second part, and Mary Piercy as the party of the third part. For convenience we will designate them by name. The material parts of this reconveyance, omitting the description of lands, were as follows:

"The said [Crockett] for and in consideration of his friendship for the said [John C. and Mary Piercy], doth by these presents give, grant, convey and confirm unto John C. Piercy, his heirs and assigns, on the terms and subject to the conditions and limitations hereinafter expressed, the following described real estate. [Here follow descriptions of four tracts of land not here involved.] And the said [Crockett] in consideration of his friendship for the said Mary Piercy, does hereby give, grant, convey and confirm unto the said Mary Piercy, her heirs and assigns for her sole and separate use, free from the debts or control of her husband. [Here are inserted descriptions of three parcels of land, being the lands in controversy.] Each of the said parties of the second and third parts, being entitled respectively under this conveyance to the property heretofore conveyed to them severally as his or her separate property, and not as common property of the marriage, and the premises hereby conveyed to the said Mary Piercy to be her sole and separate estate free from the debts or control of her husband, except as herein otherwise provided. And this conveyance is upon the further condition that the said parties of the second and third parts respectively shall each have the exclusive right for and during his or her natural lifetime to manage and control and to receive the rents, profits, and income from the property hereinbefore conveyed to them severally, that is to say, each shall manage, control and receive the rents, profits and income from the property herein conveyed to him or her severally, and neither shall interfere with the other in the management, control or enjoyment of the property hereby conveyed to the other, nor in the receipt or disposition of the rents, profits or income therefrom, except as herein otherwise provided, and out of the said rents, incomes and profits, each of the said parties respectively shall pay all taxes and assessments, which shall be levied on the property herein conveyed to him or her severally, and shall keep said property in repair. [Here follow provisions requiring John C. Piercy to pay certain sums to Mary Piercy within certain periods.] And this conveyance is upon the further condition that neither one of the said parties of the second or third parts shall sell, convey, mortgage or in any wise encumber, during their joint lives, the said property or any part thereof, or erect any new buildings thereon, without the consent in writing of the other. But nothing herein contained shall be so construed as to prohibit or prevent the said parties of the second and third parts from at any time conveying, mortgaging or otherwise disposing of the said property or any part thereof by an instrument or instruments in writing, duly executed, acknowledged and delivered by them jointly, nor from building upon and improving said property or any part thereof, provided they both consent in writing thereto. But if the said parties of the second and third parts shall not by an instrument or instruments in writing duly executed, acknowledged and delivered by them jointly during their joint lives, convey or dispose of the said real property, such parts or portions thereof as shall on the death of either of said parties not have been thus conveyed or disposed of, shall vest in and become the property in fee simple of the children of the marriage of the said parties of the second and third parts and the lawful issue of such of the said children as shall have died in the meantime, such issue taking per stirpes and not per capita, it being the true intent and meaning of this instrument that nothing herein contained shall restrict or limit or impair the right of the said parties of the second and third parts to convey, mortgage, encumber or dispose of the said property or any part thereof, by an instrument or instruments in writing duly executed, acknowledged and delivered by them jointly, nor shall anything herein contained be construed to restrict, limit or impair the right of each of said parties of the second and third parts to manage, control and receive the rents and income from the property herein conveyed to him or her respectively during his or her lifetime, notwithstanding the death of the other, it being the true intent and meaning hereof, that on the death of either of said parties such portion of the property hereby conveyed to the person so dying as shall not before then have been conveyed or disposed of by their joint act as hereinbefore provided shall vest in the children of their said marriage as hereinbefore stated, the survivor retaining the right to manage, control and to receive the rents and income from the property hereby conveyed to such survivor during his or her natural life, and at his or her death to vest in the children of said marriage as hereinbefore provided."

Upon this deed the following writing, signed by John C. and Mary Piercy, was indorsed, and the execution thereof duly acknowledged before a notary public: "The foregoing deed has been executed and delivered in pursuance of the trust created in a deed from us to said J. B. Crockett of even date, and is the same deed which is therein referred to as then prepared to be executed Nov. 16, 1867." John C. Piercy died in 1885. Mary Piercy died intestate on June 9, 1903. At the date of her death the only surviving children of the marriage were the two defendants, Edward M. and Andrew J. Piercy. The plaintiff was the daughter of Samuel W. Piercy, a deceased son of the marriage, and these three were the only surviving descendants. John C. and Mary Piercy did not jointly convey or otherwise dispose of any of the property. After the death of John C. Piercy, Mary Piercy executed to Edward M. Piercy a deed purporting to convey to him all of her right, title, and interest in the land. It is conceded that if the effect of the deed from Crockett was to vest in Mary Piercy an estate for her life only in the lands, with the remainder to the children of the marriage living at her death, and the descendants of such as were then deceased, and with no power in her to dispose of such remainder except by the joint conveyance of herself and John C. Piercy, then the deed made by her to Edward M. Piercy was of no effect after her death, and the judgment of the superior court, holding that Edward M. Piercy, Andrew J. Piercy and Viola Piercy Burnett were each entitled to a one-third interest in the land was correct. We are of the opinion that this was the true legal effect of the transaction in question.

The contention of the appellant is that, as the Crockett deed was made in 1867, prior to the adoption of the Codes it must be interpreted according to the rules of the common law and the statutes then in force, and that the rules of interpretation established by the Civil Code are not applicable, except so far as they restate those of the common law; that the rule which must control the effect of this deed is that of the common law, re-enacted in section 711 of the Civil Code, to the effect that conditions restraining alienation, where repugnant to the interest created by the granting clause, are void; that the grant "to Mary Piercy, her heirs and assigns," as expressed in the deed, created in her an estate in fee, including the absolute power of alienation, and that the conditions and limitations restricting her power to convey the land are repugnant to the existence in her of a title in fee; that by the operation of this rule they must be considered void and the deed construed to vest in her an unqualified estate in fee simple, and that her deed transferred the same to Edward M. Piercy. Examples of the application of this rule occur in Murray v. Green, 64 Cal. 363, 28 Pac. 118, where, after words constituting a grant in fee simple, a condition was inserted that the grantee should not convey the lands without the consent of the grantor, and the condition was held void, and also in Eldridge v. See Yup Co., 17 Cal. 51, where a limitation upon the use was held not to be effective as against a fee conveyed by the previous granting clause. It may be freely conceded that in proper cases, this rule existed in California in 1867. But it is not correct to say that the rules for the interpretation of contracts, laid down in the Civil Code, are innovations upon the common law and are not applicable to deeds executed before the adoption of that Code. That deeds are to be construed according to the laws in force at the time they were executed is true. But these rules of the Civil Code, for the most part, are parts of the common law previously existing, and are applicable to deeds and other contracts executed prior to the adoption of the Codes as fully as to those executed since. We do not think the rule stated in section 711 of the Civil Code controls the construction of the instrument in question. There are other rules which control the effect of the transaction involved here and prevent the operation of the rule stated in that section. Where two or more written instruments are executed contemporaneously, with reference to each other, for the purpose of attaining a preconceived object, they must all be construed together and effect given, if possible, to the purpose intended to be accomplished. Civ. Code, § 1642; 13 Cyc. 1642; 2 Devlin on Deeds, § 845. All parts of a deed must be applied so as to give effect and meaning to every part, if possible, each clause being considered separately and being governed by the intent deducible from a fair consideration of the entire instrument. Civ. Code, § 1641; 13 Cyc. pp. 604, 605; 2 Devlin on Deeds, §§ 836, 840. The primary object of all interpretation is to ascertain and carry out the intention of the parties. Civ. Code, § 1636; Walsh v. Hill, 38 Cal. 487; 2 Devlin on Deeds, § 835; 13 Cyc. p. 601. All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument. 2 Devlin on Deeds, § 840. There are qualifications to the effect that the intention of the parties must be lawful, and that the construction must not be contrary to some positive rule of law. 2 Devlin on Deeds, § 836; 13 Cyc. p. 602; Civ. Code, § 1636.

It is a necessary conclusion from these principles of construction that when, upon a fair consideration of all the parts of a deed, and of the contemporaneous instruments constituting parts of the same transaction, it appears that it was the intention, by other expressions in the deed, to limit and qualify the effect and meaning of the granting clause, so that it should not operate to transfer the entire estate, but only a limited estate, the rule that repugnant conditions restraining alienation are void, does not apply, unless the conditions refer to the limited estate actually granted. In such cases the other provisions in the deed operate on and affect its true meaning, the granting clause is to be taken in the limited sense which the entire instrument shows it was intended to have, and the limitations and conditions relating to the fee are not to be considered as repugnant to the grant, but as descriptive of the estate conveyed, and in harmony with the grant when truly interpreted. Thus, in Morrison v. Wilson, 30 Cal. 347, the granting clause, purporting to grant, bargain, and sell, and thereby showing an intention "to convey in full property," was held to be modified and explained by a subsequent clause declaring the intention to make a quitclaim only. And in Montgomery v. Sturdivant, 41 Cal. 295, the granting clause alone would have conveyed a fee simple, but it was held to be explained and modified by the language of the habendum, to such an extent that the effect of the entire deed was to convey a life estate only. This rule prevailed at common law (13 Cyc. pp. 643, 669; 1 Devlin on Deeds, §§ 214, 215, 215a), and it is also made a part of the Code. Civ. Code, § 1105. It was applied in Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. In that case a grant purporting to convey a fee was held to be limited to a life estate by the language of the habendum. The case arose after the enactment of the Civil Code, but we do not understand that it was decided on the theory that the Code establishes a rule on this subject different from that which prevailed before its adoption. Morrison v. Wilson and Montgomery v. Sturdivant, supra, were each decided upon the law as it stood prior to the Code and apply substantially the same doctrine. These cases are not antagonistic to the principle of Murray v. Green, supra, and section 711 of the Civil Code. Where, as in that case, from the whole of the instrument the intent is clear to convey an unqualified fee the attempt to put restrictions upon its alienation will be held void under the rule of that case and that section. See 4 Pac. Coast Law J. 215, for a full statement of the terms of that deed. But conditions which would be void as restrictions upon the alienation of a fee conveyed by the deed may contain expressions which show that no such fee is granted, and, in construing a deed, such language must be given due weight. Where the intent to be gathered from the deed as a whole, including the otherwise void conditions, is that a lesser estate was to be conveyed, then such intention must prevail, and, as the effect will be that no fee is conveyed by the deed, there will be nothing upon which the restrictions upon the alienation of the fee can operate.

Coming now to the deed in question, we find it to constitute one part of an entire transaction comprised in three separate writings relating to the same matters between the same parties, all of which must be considered and given due weight in determining the intent and effect of the deed. The trust clause in the deed from the Piercys to Crockett shows that, although Crockett was given a fee, yet that he received it upon a certain trust to convey, and consequently that he was powerless to convey, except in accordance with the terms of the trust. Such trusts were, at that time, permitted by law. By this trust clause the deed to be executed by Crockett was referred to, and all its conditions and limitations were thereby incorporated into, and made parts of, the terms of the trust upon which Crockett held the land. Any attempt by him to convey a fee, contrary to the terms of the trust, would, therefore, have been ineffectual and void to the extent of such conflict. By the writing indorsed upon the Crockett deed and signed by them, the Piercys affirmed that deed as a performance of the trust, and again signified their intention that the estate thereby conveyed to them was limited and qualified as stated in the provisions of the deed. In view of these circumstances showing the importance attached to the limitations following the granting clause, it is obvious that, whatever would be the effect of the rule contended for by the appellant upon such limitations in ordinary cases, it has no just application to this case, where the contemporaneous instruments and the language of the deed itself show that the chief purpose of the transaction was to vest an estate in the grantors subject to and qualified by those conditions and limitations. In order to carry out the manifest intention of the parties, it is necessary that the conditions and limitations should prevail over and qualify the granting clause. When these qualifying clauses are considered, the intention to vest in Mary Piercy a life estate only, with a limited power of disposition, and nothing more, over the remainder in fee, is made plain. She was to have the exclusive right during her lifetime to manage, control, and receive the income from the property; she was to pay all accruing taxes and make repairs out of such income; she was not to convey or incumber it, except by the joint writing of herself and John C. Piercy; and, finally, it was declared to be the true intent and meaning of the deed that, upon her death, if the property had not been previously disposed of by their joint instrument, as provided in the power of disposition therein given, then it was to vest in the children of their marriage then living, and the lawful issue of such of said children as had died in the meantime, and the survivor of the two grantees was to retain "the right to manage, control, and receive the rents and income from the property hereby conveyed to such survivor, during his or her natural life, and at his or her death to vest in the children of said marriage," as above stated. These provisions all refer to the character of the estate to be vested in Mary Piercy by the deed. They accurately describe an estate for her life, and are inconsistent with the idea that she was to have a fee. It is not an essential requisite to the giving of a life estate, that it be expressly declared to be such, nor that the term "life estate" shall be used. The intention can as well be manifested by other words, referring to the estate conveyed and describing its characteristics, and if, by that means, the intention to vest a life estate only is shown, it will be as effectual as if it were expressly so stated. The intention of the parties as manifested by these instruments, that she should have nothing more than the enjoyment of the use of the property during her life, if the joint power was not exercised, is too plain for controversy. To give the deeds a contrary effect by declaring these provisions void, would produce a result which the parties manifestly intended to prevent and give the deed exactly the opposite effect to that intended. Such forced constructions should not be indulged in, unless made necessary by some positive rule of law. It is not necessary to do so here. The intention declared by the language of the parts of the deeds following the description are descriptive of the estate conveyed and must prevail over the general language of the granting clause and the estate granted is to be limited according to the effect of these conditions and limitations.

It is apparent from these special provisions that Mary Piercy had no power over the fee after the death of John C. Piercy. The power to dispose of the fee by their joint act ceased to exist upon the death of one, and thereafter the survivor was possessed of a simple life estate, without further power of disposition of the fee. The deed of Mary Piercy, made after the death of John C. Piercy, whereby she conveyed all her right, title, and interest to Edward M. Piercy, was therefore ineffectual upon the remainder, and conveyed to him only an estate during her life. Edward M. Piercy therefore stands in the same class with the other descendants and takes only his pro rata share of the land, that is to say, an undivided one-third thereof. Section 2 of the act of 1855 (St. 1855, p. 171, c. 140), which was in force when this deed was executed, provided that every conveyance of real property should "pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant." It is contended that the word "grant" as here used refers to the words used in the granting clause of the deed, and that when the intent to convey a less estate cannot be implied from the granting clause, the other portions of the deed cannot be resorted to for the purpose of qualifying its meaning. We do not think the word "grant" in that statute was used in the narrow sense here claimed. It refers not to the granting clause alone but to the entire instrument by which the grant is effected, and, consequently, the whole deed may be looked to in order to ascertain whether or not the intent to convey to any party thereto an estate less than the fee is "necessarily implied from the terms of the grant."

The objection that the Crockett deed could not be operative to convey the entire estate, unless it is construed to vest the fee in Mary Piercy, and that to construe it otherwise would leave the remainder in abeyance, or still vested in Crockett, is not maintainable. We do not consider it important to determine whether the estate in remainder thus disposed of by the deed was vested or contingent during the life of Mary Piercy. Whether the one or the other, it was, under the common law, a legal conveyance of a future estate. Gray on Perpetuities, §§ 108–110, 112, 113. The intent is clear that the estate in remainder after her death was to vest in the children of the marriage living at her death, and the issue of such children as should have died in the meantime taking per stirpes and not per capita, subject to defeat by the exercise of the joint power of disposition. Inasmuch as the question bears only upon the construction of the deed, and as the events upon which this remainder was to vest and by which the persons in whom it was to vest were to be determined have all happened, so that the estate is now safely vested, the precise place where this fee in remainder has been resting in the meantime need not concern us. There is no merit in the proposition that it is necessary that the fee should be conveyed to Mary Piercy in order that she should be enabled, with the concurrence of John C. Piercy, to convey a fee. The vesting of a fee in the person to whom such a power of disposition of a remainder in fee is given, is not necessary to an effectual exercise of the power. 2 Wash. on Real Prop. (6th Ed.) §§ 1659, 1661; 22 Am. & Eng. Ency. of Law, 1095, 1097. "A power to dispose of the land in fee may be and often is given to a tenant for life." Sedgwick v. Laflin, 92 Mass. 432. Such powers can be created by deed as well as by will. 2 Wash. on Real Prop. (6th Ed.) § 1678.

There is a finding that Edward M. Piercy has heretofore collected rents of the property and has not accounted for the same, and there is a clause in the interlocutory decree requiring him to render an account. The appellant insists that the finding is not supported by any evidence, and that in consequence thereof the judgment must be, to that extent, reversed. This contention is well founded. The answers of Andrew J. Piercy allege that Edward M. Piercy has received rents from the property for which he has not accounted, and pray that he be required to render an account. In an action for partition all the parties owning an interest in the property are actors, and this allegation is a sufficient foundation upon which to base a finding and judgment for an accounting. The bill of exceptions recites that it contains all the evidence, and upon examination we find no evidence whatever to the effect that Edward M. Piercy has received any rents from the property, or that he has been in possession of more than his undivided interest, as declared in the interlocutory judgment. The findings and judgments for an accounting are therefore unsupported by the evidence. It is not necessary, however, that the entire judgment be reversed in each case, nor that there be new trials upon the other issues. The findings and judgments of the court below defining the interests of the parties and directing a partition and a sale need not be disturbed. If, in the several cases, applications had been made to the court below for new trials or modifications of the judgments by striking out the parts relating to an accounting, doubtless they would have been granted. This feature of the cases is unimportant and obviously was not the occasion of the appeals. We think the appellant should not recover the costs of his appeals on account of these partial reversals.

The part of the judgment in each of the cases directing Edward M. Piercy to render an account is reversed, without costs to respondents, and the causes are remanded for a new trial of the issues relating to such accounting. The remaining parts of the judgment in each of the cases, declaring the interests of the respective parties and directing a partition and sale of the property are affirmed, and each cause is remanded for further proceedings to carry out the partition in accordance with the interlocutory judgment.

We concur: ANGELLOTTI, J.; SLOSS, J.

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3 Cal. App. 498

PRINCE v. KENNEDY.

(Court of Appeal, Second District, California. May 11, 1906. Rehearing Denied by Supreme Court July 9, 1906.)

1. Attorney and Client—Action for Services—Pleading—Issues.

In an action by an assignee for attorneys' services, a defense that plaintiff ought not to recover because his assignors advised defendant to enter into an illegal transaction, by which defendant deceived his principal with a view to making a secret profit, and thereafter revealed the facts to defendant's principal, was unavailable, where it was not pleaded.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 366.]

2. APPEAL — FINDINGS — CONFLICTING EVIDENCE—REVIEW.

A finding by the court based on conflicting evidence, and which there is substantial evidence to support, will not be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3979.]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by George H. Prince against H. Kennedy, doing business under the name of H. Kennedy & Co. From an order denying defendant's motion for a new trial, he appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Taylor & Forgy and Stutsman & Stutsman, for respondent.

GRAY, P. J. This is an action to recover $750 for services rendered by plaintiff's assignors as attorneys at law. The finding and judgment were in plaintiff's favor for the sum of $500 and costs. The appeal now before us is by the defendant from an order denying him a new trial. An appeal from the judgment in the same case has already been disposed of, and reference is had to that decision for a statement of the issues necessary to an understanding of this decision. See Prince v. Kennedy (No. 152; decided by this court April 7, 1906) 85 Pac. 859.

1. It is urged by appellant that plaintiff ought not to have recovered, because his assignors advised defendant to enter into an illegal transaction, by which the defendant deceived his principal, whose land he was selling, with the view of making a secret profit on such sale, and that thereafter and before the secret profits had been realized they revealed the facts as to the secret profits to defendant's principal, who instituted suit against defendant and forced a division of the secret profits between defendant and his said principal. The trouble with this contention is of a twofold character: First, it is not directed at any specific finding of the court as to the facts in the case; and, second, the whole matter relates to something entirely outside the issues made by the pleadings and having no relation whatever thereto. It was the duty of the defendant, if he had any defense of this character, to have at least shadowed it forth in his pleadings; and, of course, it is of no efficacy to argue in a court of review that the evidence is defective upon a matter not in issue and as to which no findings were either required or made. Moreover, if it be conceded that the sufficiency of the evidence as to this question can be now raised, still the evidence is in conflict concerning the matter. Taylor's testimony shows that there was no bad faith or deception practiced by his client, the defendant, or himself as attorney, in relation to the secret profits. Daneri was the owner of the property that defendant sold, and Mr. Winder was Daneri's attorney; and as to the transaction Taylor testifies: "That after lunch of the same day, Judge Winder and Mr. Daneri came to witness' office, and with paper and pencil in hand Judge Winder said, 'What is your proposition?' That witness said, 'We will give you $19,750,' and witness repeated the terms just given, which Judge Winder took down, and, after rehearsing the same to Mr. Daneri, replied, 'We accept the offer.' That witness said to Mr. Daneri, 'You understand, Mr. Daneri, that you are to get $19,750 for your place, pay the first half of the taxes, and all over and above that Mr. Kennedy is to get for his commission and the expenses of making the sale.' That Mr. Daneri nodded his head and said, 'I understand.' That witness further said, 'And you understand that you do not care, and it is none of your business, how much Mr. Kennedy got from the purchaser, over and above $19,750.' That Mr. Daneri said, 'I understand that.' And Judge Winder said, 'We understand that thoroughly.'" If it be conceded, then, that the decision and judgment of the court against defendant is equivalent to or implies a finding against the defendant as to this matter, it can still be said that there was substantial evidence to support such a finding, and therefore it is not to be interfered with.

2. That the services were performed is admitted in the answer by failure to deny the same. The only issues raised by the answer relate to the value of the services It is urged that the finding that the value of the services is $500 is not supported by the evidence. The testimony of at least two witnesses tended strongly to show that the services were worth this exact sum. Consequently we cannot disturb the finding, even though this be contradicted by other evidence.

The other points urged by appellant are disposed of on the former appeal. There is no merit in this appeal.

The order is affirmed.

We concur: SMITH, J.; ALLEN, J.

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3 Cal. App. 554

DAVIS v. TRACHSLER et al.

(Court of Appeal, Third District. California. May 15, 1906.)

PRINCIPAL AND AGENT—EXCEEDING AUTHORITY—LIABILITY OF PRINCIPAL.

One who purchases land of another, knowing that he is acting as agent, is bound to learn the extent of his authority, which Civ. Code, § 1624, subd. 6, requires to be in writing, and having purchased 10 acres only, when the writing gave no authority to sell in less quantity than 20-acre lots, he acquires no right in the land, as against the owner, on account of payments made to the agent, but not received by the owner.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 529, 574–582.]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by John T. Davis against Josephine Trachsler and others. From an order denying a motion for new trial, defendants Trachsler appeal. Affirmed.

Edw. J. Hill, for appellants. A. E. Ball, for respondent.

BUCKLES, J. This is an action to quiet title, commenced January 21, 1903. There was no demurrer. Defendants Josephine Trachsler and Frank Trachsler answered and set up their claim of interest in the land. The record does not disclose that either of the other defendants appeared at all. The judgment was against all of the defendants. Frank Trachsler and Josephine Trachsler moved for a new trial, which motion was denied, and they appeal from the order denying them a new trial. The appeal comes here on a bill of exceptions.

On July 13, 1896, the respondent was the owner of 2,500 acres of land in Stanislaus county, and on that day entered into a written contract with one George W. Hopkins, whereby he appointed said Hopkins his agent for the sale of said lands upon the following considerations: "Second party is authorized to sell the said lands in parcels of twenty and forty acres each as indicated on the plat hereto attached, at the minimum prices noted on said plat, and upon the following terms, to wit: Ten (10) per cent. of the purchase price payable at time of sale, and the balance payable in eight equal semiannual installments, with interest on deferred payments at the rate of six (6) per cent. per annum. Contracts of purchase and sale shall be executed by said first party and the purchaser, and, when any purchaser shall have paid one-half of the purchase price of the land purchased by him, he shall be entitled to receive from said first party a grant, bargain, and sale deed of the same, and the purchaser shall execute a mortgage to said first party for the amount due thereon, payable in accordance with the terms named in the contract. Said second party's compensation for managing the sale of said lands shall be ten (10) per cent. of the purchase price payable out of the first payments received on account of the purchase price. The said second party shall furnish said first party full reports of quarterly of sales effected and payments made and pay over to said first party all sums received by said second party, in excess of his commissions as above provided." On December 14, 1897, respondent indorsed upon said contract, "This day the within contract is canceled. J. T. Davis." And at the same time the said George W. Hopkins indorsed on said contract, under the indorsement of cancellation: "Except as to sales already made. Geo. W. Hopkins."

The answer and cross-complaint of Frank Trachsler avers that he purchased 10 acres of said land on May 24, 1897, for which he was to pay in installments the sum of $350, and entered into a written contract with plaintiff in relation to such sale, and that he made payments thereon to the amount of $276.80, which was paid at the time and in the amounts as follows, to wit: On May 24, 1897, the sum of $35.50; March 1, 1897, the sum of $39.40; June 18, 1898, the sum of $18.90; September 1, 1898, the sum of $39.40; January, 1899, the sum of $39.40; June 21, 1899, the sum of $39.40; August 18, 1899, the sum of $39.40; May 20, 1900, the sum of $18.90; and April 6, 1900, the sum of $6.50—making a total of $276.80. The first and second payments, amounting to $74.90, were made before the agency of Hopkins was canceled. George W. Hopkins testified that he made sale of the 10 acres to the said Frank Trachsler on March 24, 1897, for $367.87, and received thereon on that day the sum of $35.40, and received the balance of said $367.87 in different sums at different times, and that he gave to said purchaser the following receipt and agreement: "San Francisco, May 24, 1897. Received this day of Frank Trachsler the sum of thirty-five (35) dollars, in consideration of which I agree to sell to said Frank Trachsler at any time before March 1, 1898, that certain real property situated in Stanislaus county, California, more particularly described as the east ½ of the west ½ of lot No. one hundred and sixteen (116) of Elmwood Colony lands, the same containing about ten (10) acres of land, at the price and upon the terms and conditions hereinafter provided, the price thereof to be three hundred and fifteen (315) dollars, payable as follows, to wit: The sum of thirty-nine (39) dollars and forty (40) cents, payable on the first day of March, and an equal amount each six months thereafter, until the said sum of three hundred and fifteen (315) dollars shall have been fully paid, together with interest on all deferred payments at the rate of six (6) per cent. per annum, interest payable annually. In event that said Frank Trachsler shall on, or before March 1, 1898, cause to be planted in fruit trees, not less than five (5) acres of said land, then the payments herein provided to be made may at the option of said Frank Trachsler become due and payable twelve months after the dates herein above provided. The said land to be subject to a twenty (20) foot strip of land lying along the northerly line thereof for road purposes, also to right of way for necessary irrigating ditches. Time is of the essence hereof. Executed in duplicate. Geo. W. Hopkins, Gen'l Agt. for J. T. Davis. Frank Trachsler. Witness: F. McCracken."

The answer and cross-complaint of Josephine Trachsler avers that she claims some interest in a part of said land, and alleges that on the 10th day of April the plaintiff agreed in writing to sell her 10 acres thereof for the sum of $375, and that she agreed to purchase, and that she had paid $280.69 thereof. The contract made with this purchaser was not introduced in evidence, but the following receipt was admitted: "San Francisco, March 1st, 1899. $42.50. Received from Josephine Trachsler forty-two & $^{50}/_{100}$ dollars, being payment due this day on account of purchase price of the west half of the west half of lot No. 116 Elmwood Colony Lands, per contract of date Apl. 10, 1898. [Exhibit 12 in same form as Defendants' Exhibit 2.] Geo. W. Hopkins, Gen'l Agt. for J. T. Davis."

According to the testimony of Hopkins this sale was made March 28, 1898, and according to the above receipt it was made April 10, 1898; but, whether made March 28th or April 10th, he had no power to make this sale, because his indorsement on the original power is equivalent to his consenting thereto, excepting the sales made up to that date, December 14, 1897. Therefore the motion for new trial was properly denied as to her.

On further examination the witness Hopkins said he did not remember when he signed the indorsement, "Except as to sales already made," but he knew that it was signed by him after he had sold all the land he sold to the defendants in the action. This, however, cannot be reconciled with his written receipt that it was April 10, 1898, and his other statement that it was March 28, 1898. He would not swear that the cancellation was not signed at the time it bears date; says he went with McCracken to Davis with all the contracts, and asked him to sign them, but he refused, because no money had been paid to him. The defendants knew Davis had refused to sign these contracts, and this was prior to the cancellation. The respondent J. T. Davis testified that he at no time dealt with the defendants, and at no time did he receive any money from them, had no contracts with any of them, and recognized no rights they had in the land. McCracken and Frank Thrachsler came to him and wanted him to sign some contracts for the sale of the land. He said that until the money was paid him he would have nothing to do with them, and would sign no contracts made with Hopkins. This was October 27, 1897. On cross-examination he said: "The bringing of this action was the first time I notified defendants that I would not carry out the terms of the deal they made with Hopkins." He says he at no time refunded defendants the money they claimed to have paid him. He further testified in rebuttal as follows: "I told Hopkins I knew of no sales, and I repudiated all contracts at that time, for the reason that no money had been paid to me or anybody for the land. I never received any money from any of these defendants or Hopkins. The cancellation of the contract with Hopkins was signed by Hopkins and myself at the time it was dated." This is the substance of all the testimony given in the case so far as relates to the appellants. In his cross-complaint appellant Frank Trachsler accepts the "rescission" of the contract and demands the respondent repay to him the money he alleges to have paid for the land alleged to have been purchased by him, and demands a lien on said lands to secure payment of the amount of the payments made and that said lien be foreclosed. The answer of respondent to said cross-complaint denies any and all obligation to defendant, denies receiving anything from him, and pleads the statute of limitations as to the demand on him for the return of the money paid Hopkins. There is no conflict in the evidence as to the time when respondent refused to make the contract with appellant, and that such refusal was made prior to December 14, 1897, which was over five years before the action was commenced. Appellant kept on making his payments to Hopkins up to April 6, 1900; this last payment being made 2 years 9 months and 17 days before the action was commenced. If he had any cause of action to compel performance, it arose when appellant refused to contract with him, and the the statute of limitations (period of 4 years) would have run against such action. The court found all the allegations of plaintiff's complaint to be true, and that defendants have no interest in the land, are not entitled to a lien thereon; that they have no contract of purchase with plaintiff; that plaintiff never received any money from any of them; that defendants have no cause of action against plaintiff; and that if they had any claim against plaintiff the same is barred by the statute of limitations.

The question first to be determined by this court is, was the sale made by G. W. Hopkins to Frank Trachsler on March 24, 1897, within the scope of Hopkins' authority under the appointment of July 13, 1896? Authority to an agent to sell real estate must be in writing (subdivision 6, § 1624, Civ. Code), and his actual authority is only such as the principal intentionally confers or intentionally allows the agent to think he possesses. Section 2316, Civ. Code. There is no testimony tending to show the instrument by which Hopkins was appointed was recorded. But it was known by appellant that he was holding himself out to be the agent of Davis. The receipt and contract of May 24, 1897, was signed as agent. The appellant having actual notice of the agency, it was incumbent on him to ascertain the scope of authority possessed by Hopkins (Solari v. Snow, 101 Cal. 387, 35 Pac. 1004), and whether he had any right to make contracts of sale and especially the kind he made with appellant. Mudgett v, Day, 12 Cal. 139; Hayes v. Campbell, 63 Cal. 143; Stetson v. Briggs, 114 Cal. 514, 46 Pac. 603. An agent can only bind his principal when he acts within the scope of his authority. The agency of Hopkins was a special agency, with all his powers fixed and determined in the instrument appointing him, and on which the appellant himself relies. No power was given to sell the land in less quantity than 20-acre lots, yet he sold a 10-acre lot to appellant. He had no power to stipulate with the purchaser for any terms other than those named in his appointment, yet he contracted with appellant that should he plant half of said 10 acres in fruit trees on or before March 1, 1896, then, at the option of appellant, the payments would be extended to 12 months. This he had no power to do. He made no provision in his contract for procuring a deed when one-half of the purchase price was paid, and for the purchaser giving a mortgage for the balance of the purchase price, as in his appointment provided. His plain duty was that, when he had found a purchaser who was willing to purchase a 20 or a 40 acre lot on the terms and conditions mentioned in the instrument by which he was appointed, to bring such person to his principal, when it would have been the duty of the principal to make a contract of purchase, if satisfactory to him, with such purchaser on the terms named. Of course, the agent had the right to collect the first installment, which must be 10 per cent. of the was such a sale as he had power to make, purchase price, when the sale made by him and not otherwise. There is nothing in the bill of exceptions to indicate that appellant ever went into the possession of the 10 acres. He does not appear to have been a witness at the trial. We think the sale to appellant was one made entirely outside the power of the agent Hopkins to make, and, not having been sanctioned or in any way ratified by Davis, is void as to him.

Neither the question of rescission nor forfeiture is involved in this case. The agent, through no fault of the respondent, exceeded his authority in dealing with the appellant, and the appellant, knowing the scope of authority of Hopkins, or it being his duty to know, must look to Hopkins for the redress of whatever wrong he may have suffered.

The order denying the motion for a new trial is sustained.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 514

PEOPLE v. GRILL.

(Court of Appeal, Third District, California. May 15, 1906. Rehearing Denied by Supreme Court July 5, 1906.)

1. Criminal Law—Homicide—Corpus Delicti—Evidence.

Evidence in a homicide case *held* sufficient to prove the corpus delicti, so as to allow of admission of defendant's statements.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1225, 1226.]

2. Same—Intention—Instruction.

The instruction in a homicide case, in which defendant testified that he killed deceased by accident, that when an unlawful act is proven the law presumes it to have been intended, unless otherwise shown by the evidence, and, if defendant killed deceased, the law presumes he intended to kill him, and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless, is erroneous, in taking away from the jury the question of accidental killing.

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

A. J. Grill was convicted of murder, and appeals. Reversed and remanded.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., for the People.

BUCKLES, J. The defendant was informed against by the district attorney of the county of Sonoma for the crime of murder in killing one W. S. Pearce. He was tried and convicted of murder in the first degree, and sentenced to the state prison for life. From the judgment of conviction, and the order overruling his motion for a new trial, he prosecutes this appeal.

The deceased lived with his 16 year old daughter in the country. The defendant had been stopping there for some time, working at times for others. A son of deceased had also been residing with him up to about two weeks before the homicide. The deceased and defendant were hunting together on Sunday afternoon, June 23, 1905, returning about half past 7 in the evening. The deceased claimed to have left $19.50 between the mattresses of his bed, and when he returned from the hunt it was missing, and he accused the defendant with taking it. They quarreled. A disturbance was heard out of doors, and defendant took the shotgun and went out the back door, and deceased came to the front door and had undressed for bed. The noise seemed to have been made by a pet dog, and defendant said he would shoot it, and deceased remarked, "You dirty son of a bitch, if you shoot him you will never shoot another dog as long as you live." They came in the house and were quarreling about the money all the time. The daughter was out of doors, ready to go with defendant in a buggy to Mrs. Stoffal's near Lytton's Springs. She heard the shot fired, and in a minute defendant came out, and she asked him what he had shot, and he replied he had killed a skunk. Defendant and the daughter then got in the buggy and drove away. The report of the gun was heard by the witness Bennett, who was 150 yards away, and the next morning Bennett went into the Pearce cabin and found the deceased lying on the bed dead. He had been shot with a shotgun. The wound was at the top and back of the head, and there were no powder marks. The evidence showed the shot was fired from the rear, and a person sitting on the bed in the room occupied by defendant could plainly see deceased's head where the charge of shot entered. The doorway between these rooms was an open space. All the evidence up to this point, and none of it elicited from the defendant, fully established the facts that the death of deceased was caused by criminal means, and by another person, and not by his own act or by accident, and all this independently of who committed the crime. Besides, the evidence pointed very strongly to the defendant as the guilty person. At this point objection was made to the admission, actions, and statements of defendant, upon the ground that the facts above narrated did not establish the corpus delicti. People v. Tapia, 131 Cal. 647, 63 Pac. 1001. The objection was overruled, and upon the same ground, and that without these admissions and statements of defendant the corpus delicti had not been proven, defendant moved a dismissal and to have the court instruct the jury to acquit. The court denied the motion, and we think very properly. The corpus delicti involves the elements of crime, and in order to prove it all the elements of crime must be made to appear before defendant's confessions, admissions, or statements are admissible for any purpose. In other words, every necessary element to show the act was a crime must be proven before anything the defendant may have said tending to connect him with such crime can be given in evidence. People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Jones, 31 Cal. 566; People v. Thrall, 50 Cal. 415; State v. Kesner (Kan.) 82 Pac. 720; People v. Ward, 145 Cal. 736, 79 Pac. 448. The corpus delicti was abundantly proved before any statement of defendant was offered in evidence.

There is a more serious assignment of error. The defendant complains of the instruction No. 6, asked by the people and given by the court. As the criticism has been quite pointed of the decision of this court rendered in People v. Solani (Cal. App.) 83 Pac. 281, we feel compelled to review the subject much more at length than we otherwise would. The ruling in the Solani Case was based upon what we conceived to be the decision in People v. Newcomer, 118 Cal. 267, 50 Pac. 405. Whatever conclusion counsel for the people may draw from the language used in the Newcomer Case, this is what the court said, quoting the instruction first: " 'Every person is presumed to intend what his acts indicate his intention to have been, and, if you find from the evidence beyond a reasonable doubt that the defendant shot the deceased with a pistol and killed him, the law presumes that the defendant intended to kill the deceased; and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless.' Appellant objects to this because it omits to state that this presumption does not arise where 'the proof on the part of the prosecution tends to show' that the killing was justifiable. It is evident, however, that this instruction does not deal with the question as to when the burden of proof is on the defendant to show that the killing was justifiable. It deals only with the question of the intent to kill. In this view the instruction would not have been erroneous if it had not closed with the expression, 'the law will not hold him guiltless.' The court no doubt intended to say that the shooting of the deceased with a pistol was sufficient proof of his intent to kill, in the absence of any other evidence tending to show that he did not intend to kill; but the conclusion that in the absence of any such other proof 'the law will not hold him guiltless' was erroneous, because he might have intended to kill and yet have been guiltless." It is true the case was not reversed because of this instruction, but upon other grounds, error in another instruction; but the court did hold that the instruction was erroneous, and we think proceeded to advise the trial court not to use it again, and that the Newcomer Case was one in which the defendant sought to show the killing was in self-defense can make no difference. The court seems to lay great stress upon the last words of the instruction, "The law will not hold him guiltless."

The instruction in the Solani Case is as follows: "Intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. The intent must be proved; but when an unlawful act is proved, the law presumes it to have been intended, unless otherwise shown by the evidence. It is never required by the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made; and it is deemed sufficient to prove the unlawful act, and from such proof the law presumes the unlawful intent. And if the defendant in this case shot John Guidotti, and killed him, the law presumes the defendant intended to kill the deceased; and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." The instruction in this case at bar is as follows: "Intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. The intent must be proved; but, when an unlawful act is proven, the law presumes it to have been intended, unless otherwise shown by the evidence. It is never required by the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made; and it is deemed sufficient to prove the unlawful act, and from such proof the law presumes the unlawful intent. And if the defendant in this case shot W. S. Pearce, and killed him, the law presumes the defendant intended to kill the deceased; and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." It is true that in declaring such instruction erroneous in the Newcomer Case no reference is made to other cases in which the instruction has been held good. In the case at bar the defendant testified in his own behalf, and said he was taking the shotgun from his bed to hang it on the wall when it was accidentally discharged and shot the deceased, and we think to give the last clause of the instruction is taking away from the jury the question of accidental killing. The jury was told, "And if the defendant in this case shot W. S. Pearce, and killed him, the law presumes the defendant intended to kill the deceased." Now he did shoot the deceased, and he did kill him, and therefore he intended to kill him. The court then said to the jury: "Unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." It can make no difference, in our opinion, that the words "unlawful killing" were used in Solani Case and the case at bar, and were not used in the Newcomer Case. The words "unlawful killing" in the instruction stand too far away from the words "the law will not hold him guiltless" for them to have the qualifying effect the Attorney General claims for them.

People v. Langton, 67 Cal. 428, 7 Pac. 843, is a case which the Attorney General cites and a case in which the court sustains a somewhat similar instruction. The question raised here and in the Solani Case was not raised there. The contention there was that the instruction fixed upon the defendant to show by testimony adduced by himself what his intention was. And the court said: "The words 'unless the defendant can show' mean unless he can or does show from the whole evidence in the case." In People v. Bushton, 80 Cal. 162, 22 Pac. 127, 549, cited by the Attorney General, the words "unless the defendant can show" were changed to "unless it is shown by the evidence," thus expressing clearly just what the court had said the words in the Langton Case intended. And the court approved it by simply saying, "The eleventh instruction stated the law correctly," referring to the Langton Case.

We feel certain this instruction was prejudicial to defendant's rights, and entitles him to a new trial. We again call attention to the Newcomer Case as furnishing authority in this case for this ruling. Not necessary to notice other assignments of error.

Judgment is reversed, and cause remanded for a new trial.

We concur: CHIPMAN, P. J; McLAUGHLIN, J.

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3 Cal. App. 519

GRANGE CO. v. FARMERS' UNION & MILLING CO.

(Court of Appeal, Third District, California. May 15, 1906.)

1. SALES — STOPPAGE IN TRANSITU — TERMINATION OF TRANSIT.

Civ. Code, § 3078, declares that the transit of property is at an end when it comes into the possession of the consignee, or its agent, unless the agent is employed merely to forward the property, and section 3080 declares that stoppage in transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof. Plaintiff sold certain grain to C. & Co., which was shipped according to their directions to defendant. A draft on C. & Co. was returned dishonored on September 15th and they became bankrupts on the 16th. Plaintiff obtained the shipping receipts on the next day, and notified the railroad agent not to deliver the grain to defendant, but was informed that it had already been delivered, whereupon notice was given to defendant, not that the grain should not be forwarded to C. & Co., but that plaintiff held the shipping receipts and demanded warehouse receipts; defendant having stored the grain for C. & Co. *Held*, that defendant was not a mere forwarding agent, and that there was no effective stoppage in transitu.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 837, 847.]

2. BANKRUPTCY — REDELIVERY OF SHIPPING RECEIPTS TO SELLER—EFFECT TO REVEST TITLE.

Where a bankrupt consignee of grain, after the filing of a bankruptcy petition against him, redelivered the shipping receipts for the grain to the seller, the grain having been already delivered to the consignee by the carrier, such redelivery did not operate to reinvest the seller with the title, which had already become vested by operation of law in the bankrupt's trustee.

3. SALES—PASSING OF TITLE—INTENTION OF PARTIES.

Where, by a course of business between buyer and seller, the conduct of the latter indicated an intention to pass title to grain shipped on delivery of the grain to the carrier, the title vested in the buyer as of the date of shipment, as provided by Civ. Code, §§ 1140, 1141.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 535.]

Appeal from Superior Court, San Joaquin County; W. D. Nutter, Judge.

Action by the Grange Company against the Farmers' Union & Milling Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Dennett & Wathall, for appellant. Nicol & Orr, for respondent.

McLAUGHLIN, J. Action to recover the value of certain grain which appellant claims the respondent converted to its own use. On September 8, 1904, the appellant corporation sold two car loads of wheat, and one car load of oats to A. B. Costigan & Co., of San Francisco, who directed that the grain be shipped to them, care of the Farmers' Union & Milling Company, at Stockton. The grain was loaded and shipped according to directions, and the shipping receipts were sent to the purchaser's office in San Francisco. The wheat was shipped on September 12th and the oats two days later. On the last mentioned day the appellant issued its draft upon A. B. Costigan & Co., payable to the First National Bank of Modesto, for the sum of $1,500, and on September 15th this draft was returned after dishonor and protest. A. B. Costigan & Co. filed their petition in bankruptcy about 4 o'clock on September 16th, and three-quarters of an hour thereafter the shipping receipts were, pursuant to directions previously given, mailed to the appellant at Modesto. Upon receiving notice that the draft had been protested, the vice president and assistant manager of appellant went to San Francisco, and was informed of the bankruptcy of Costigan & Co. and of the return of the shipping receipts. He returned to Modesto, procured the shipping receipts, and went to Stockton, where, on September 17th, he notified the railroad agent not to deliver the grain to respondent, but was informed that it had already been delivered. There can be no question that the grain had been delivered and unloaded by respondent before appellant took any steps to prevent its delivery according to the billing instructions, which required that it be delivered to respondent. The car load of oats was delivered after the wheat. It reached Stockton on September 15th, was placed in the private yard on the private tracks of respondent on the 16th, and unloaded on the morning of the 17th, before appellant had notified the railroad agent not to deliver it, and before said agent had communicated with respondent. The business of respondent with A. B. Costigan & Co. was generally a warehouse business. At times respondent loaned them money on grain in the warehouse. On July 13, 1903, an agreement was entered into between A. B. Costigan and respondent, by the terms of which all grain and grain bags stored with the latter became pledged as security for advances made to A. B. Costigan & Co. Just prior to the delivery of the grain in question, the respondent made certain shipments of grain for their pledgor, with the distinct understanding that it was to be replaced with grain to be shipped by appellant within a few days. At no time subsequent to July 13, 1903, was respondent acting as the mere agent of A. B. Costigan & Co. to forward property to the latter as consignee. There is abundant evidence to show that, according to the customary and unvarying business methods and usage obtaining between these two concerns, the delivery of this grain to respondent constituted a complete and final delivery to Costigan & Co. Of course there is a conflict in the evidence on this and other vital points, but every presumption and intendment must be indulged in favor of the action of the trial court, and hence we are compelled to accept the evidence supporting the findings and judgment as absolutely true.

The first point urged by appellant is that the grain was stopped in transit, and that appellant by recaption had resumed possession thereof before final delivery. "A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him, after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof." Civ. Code, § 3076. "The transit of property is at an end when it comes into the possession of the consignee, or into that of its agent, unless such agent is employed merely to forward the property to the consignee." Civ. Code, § 3078. Stoppage to transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof." Civ. Code, § 3080. That respondent was the agent of the consignee is shown, not only by the whole course of business between them, but by the conduct of appellant in billing the grain to be delivered to respondent Stockton and endeavored to prevent deconduct of appellant's agent who went to at Stockton and endeavored to prevent delivery of the grain according to the terms of the bill of lading. Every act of appellant's agents before and after delivery of the grain to respondent, unerringly and convincingly indicates full knowledge that the grain was to be delivered to respondent and stored in its warehouses at Stockton, and that such delivery was considered as a final delivery to Costigan & Co. This is evidenced by the very terms of the bill of lading, by the draft pursuant to business usage between seller and purchaser, and by the steps taken to exercise the right of stoppage in transit, which but for tardiness would have been all sufficient. In all of this record we can find nothing indicating a belief that respondent was a mere forwarding agent. If such belief had been entertained, the ordinary, usual, and legal course would have been to give immediate notice to respondent, as depositary of the property not to forward the same to the consignee. Instead of giving such notice, however, two notices were served, both notifying respondent that appellant held the shipping receipts, and demanding the warehouse receipts. This is hardly reconcilable with the theory that respondent was regarded as a mere forwarding agent, or that delivery to respondent was not regarded as a delivery of the consignee. The context of both notices, and particularly the one dated September 22d, clearly demonstrates that appellant entertained no such idea. Much is said about the secret pledge claimed by respondent, but in the view we take of the matter, the existence or validity of this pledge concerns neither the appellant nor this court. This action is brought upon the theory that appellant owned and had a right to the possession of this grain, because it was stopped in transit before delivery to the consignee. If it was delivered to an agent not employed merely to forward the property to the consignee, before the right of stoppage in transitu was exercised, then appellant must fail in this action whether respondent has a lien or not. Having reached the conclusion that the evidence is sufficient to support the implied finding that it was so delivered, it is unnecessary to consider the intricate and interesting questions which would be presented if a mere forwarding agent was attempting to enforce a pledge under the circumstances disclosed by this record.

The second point urged is that the return of the shipping receipts was a symbolical redelivery of the grain, or at least a refusal to accept it. We do not think it had any such effect. At the time such receipts were returned the grain had been delivered to the consignee, through its agent, to whom it was shipped. Most of it had been unloaded and stored, and the remainder was in a car which had been delivered by placing it on the private tracks, in the private yard of the respondent. It was, through such delivery, in the possession of the consignee whose property it became beyond power of recall by the seller. If it be admitted that the mere return of the receipts issued by the carrier to the shipper can in any case operate as a symbolical redilivery of or a refusal to accept the goods shipped, it certainly could not have such effect under the circumstances disclosed by the record before us. The legal status of the property had been fixed by its delivery to the respondent as agent of the consignee, and no act of the latter could change or vary the legal effect of such delivery. Waiving all other considerations, the consignee, after the filing of the petition in bankruptcy, was absolutely without power to restore to appellant the property interest in the grain which had previously been delivered. The legal effect of filing such petition was to place the grain and other property of A. B. Costigan & Co. in custodia legis for the benefit of all creditors of the bankrupt firm. For this, if for no other, reason, the consignee was powerless to make a symbolical redelivery of the grain thus revesting the legal title thereto in appellant, and was equally powerless to repudiate the act of its agent in accepting possession of the same. Bankruptcy Act U. S. July 1, 1898, c. 541, §§ 1, 3, 18, subd. "g," and sections 29, 70, 30 Stat. 544, 546, 551, 554, 565 [U. S. Comp. St. 1901, pp. 3418, 3422, 3429, 3433, 3451]. Nothing the bankrupt consignee should do at that late hour would or could vest the legal beneficial interest or title to the grain in the shipper, who had completely parted with possession of the property, and had lost his right of recaption. There is another view of the case thus far unnoticed which is fatal to appellant's claim. The course of business between the buyer and seller, the conduct of the latter, and every circumstance attending the sale of the grain, indicates an intention on the part of appellant to transfer the title to the grain at the time of shipment. Under the express provisions of the Code this vested the title to the property sold in the buyer. Civ. Code, §§ 1140, 1141; Lassing v. James, 107 Cal. 356, 40 Pac. 534; Greenbaum v. Martinez, 86 Cal. 463, 25 Pac. 12; Blackwood v. Cutting P. Co., 76 Cal. 216, 18 Pac. 248, 9 Am. St. Rep. 199; Crocker v. Field, 93 Cal. 534, 29 Pac. 225; Habenicht v. Lissak, 77 Cal. 144, 19 Pac. 260.

It results from the foregoing that, as plaintiff's case necessarily rested on its ownership and right to the possession of the grain, the findings and judgment to the contrary are fully supported by the evidence, and therefore the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 501

MASCAREL v. MASCAREL'S EX'RS et al.

(Court of Appeal, Second District, California. May 14, 1906.)

1. ESTOPPEL—BY DEED—PASSAGE OF TITLE—INTENTION OF GRANTOR—CONCLUSIVENESS.
A deed executed and delivered is conclusive as to the intention of the grantor to convey the property.
[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 19, 20, 63, 64.]

2. GIFTS—DONATIO CAUSA MORTIS.
The doctrine of donatio causa mortis applies only to personal property, as provided by Civ. Code, §§ 1146, 1149, et seq.

Appeal from the Superior Court, Los Angeles County; Frank F. Oster, Judge.

Suit to quiet title by Jesus Felis Mascarel, for whom was substituted her executor after her death, against Jose Mascarel's executors and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

H. H. Appel and Haas & Garrett, for appellants. H. G. Weyse and Friend E. Lacey, for respondent.

SMITH, J. In the complaint the plaintiff's title is deraigned under a deed of conveyance of Jose Mascarel, deceased, of date December 26, 1895, which it is alleged was duly delivered by him to the plaintiff; and it is also alleged (besides other necessary allegations) that the plaintiff is, and ever since the date of said deed has been, the owner of the property. These allegations are denied by the appellant defendants, who are heirs of Jose Mascarel; and it is further alleged that at the death of Jose Mascarel he was still the owner of the property in controversy. The other heirs disclaim. The court finds all the allegations of the complaint to be true, and judgment was entered accordingly for the plaintiff, from which the appellant defendants appeal.

The points urged by the appellants, or such as need be considered, are: (1) That the deed in question was never delivered to her; (2) that it was not intended by him that the title should pass; and (3) that, the deed being made in view of impending death, the grantor had the right to revoke the deed during his lifetime. But the first point is disposed of by the finding, which is fully sustained by the evidence; and, assuming the facts to be as stated, the deed itself is conclusive as to the intention of the grantor. As to the third point, the doctrine of donatio causa mortis applies only to personal property (Civ. Code, §§ 1146, 1149, et seq.); and here no facts are pleaded or found tending to raise a trust in favor of the grantor of the deed, nor are any such facts shown by the evidence.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 493

MATTERN et al. v. CANAVAN et ux.

(Court of Appeal, Second District, California. May 10, 1906.)

1. PARTNERS—AGENTS FOR FIRM—PERSONAL PROFITS.

Each partner is the agent of the others as to all partnership transactions, as provided by Civ. Code, § 2429, and hence cannot make a personal profit at the expense of his partners by deception as to the price paid for property purchased for the firm.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 149.]

2. TRUSTS—RESULTING TRUSTS—EVIDENCE.

Defendant C., having made arrangements to purchase certain mining claims, for $2,000, represented to plaintiff M. that he could buy the same for $8,000, whereupon it was agreed that the claim should be purchased, M. furnishing $2,000 and C. paying $6,000 of the price; that a corporation should be organized, to which the claims should be transferred, capitalized at $1,000,000, the shares to be divided 250,000 to M., 500,000 to C., and 250,000 to be left in the treasury. This agreement was carried out, with the exception that the entire purchase price of the claims was paid with the $2,000 furnished by M. *Held*, that under Civ. Code, § 2431, providing that a partner is not bound by the act of a copartner in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act, such facts operated to create a resulting trust in the entire claims, or the stock representing them, for M.'s use.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Harriet O. Mattern and another against J. H. Canavan and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Anderson & Anderson, for appellants. J. L. Murphey, for respondents.

GRAY, P. J. In this action the plaintiffs obtained a judgment against defendants decreeing that defendants held certain stock in a mining corporation in trust for the plaintiff Harriet O. Mattern, and that said stock be assigned and delivered to said plaintiff. The defendants appeal from said judgment and from an order denying them a new trial.

The only points urged for reversal are (1) that a suit to enforce a trust was not the proper remedy in the case, and (2) that the finding of the court that the defendant J. H. Canavan was acting as the agent of Mrs. Mattern when he obtained an option on the Montana group of mines is not sustained by the evidence.

As to the second point, we think the appellants do not understand the finding. It reads as follows: "That said J. H. Canavan, in purchasing said five mining claims [the Montana group], acted as the agent for plaintiff Harriet O. Mattern, and that he obtained said title in trust for her." Of course, the defendant, having admittedly paid her money and only her money for those claims and having taken the deed in his own name, held the title in trust for her, and the finding on the undisputed evidence, could not have been otherwise than it was. It is immaterial whom he acted for when he obtained the option or contract for a sale. The sale was not made until the money was paid and the deed taken out of escrow and delivered to the grantee. The material question is, whose money paid for the property?

As to the first point, we are also satisfied that plaintiffs did not mistake their remedy. The plaintiffs are husband and wife. The defendants are also husband and wife. The defendant J. H. Canavan represented that he could purchase the "Montana Group" for $8,000, and it was agreed between him and Mrs. Mattern that such purchase should be made, she paying $2,000 and he paying $6,000 therefor, and that thereafter they should form a corporation with capital stock of $1,000,000 and 1,000,000 shares, to which the property should be transferred. It was agreed that 250,000 of these shares should be issued to Mrs. Mattern, 500,000 to Canavan, and 250,000 to be left in the treasury. This agreement was carried out, with the exception that Canavan paid only $2,000 for the "Montana Group" in accordance with his previous agreement with the owners thereof. The relation between Mrs. Mattern and Canavan was analogous to that which exists between partners, and whatever Canavan did in the premises was done as the agent of Mrs. Mattern. It has often been held that each partner is the agent of the other as to all partnership transactions. Civ. Code, § 2429. The relations of the parties were therefore confidential, and each party was by law and equity forbidden to make a profit for himself at the expense of the other by deception as to the purchase price. The acquisition of property in this way by a party standing in such a relation is an act of fraud, and subjects the guilty party, not only to an action at law, but to accountability in equity as for a trust constructively raised for the benefit of the injured party. In pursuance of this rule, the plaintiff, having paid the whole purchase price of the five mining claims known as the "Montana Group," was entitled to the establishment of a constructive trust in all that property. This equitable right extended also to the stock in the corporation to which the land had been transferred, which stock may properly be said to be the proceeds of the land, as it is the only thing of value representing said land.

All these propositions find full support in an Alabama case "on all fours" with the case at bar, entitled Johnston v. Little, 37 South. 592. In that case the interest in the property is treated as a constructive trust. It is immaterial, perhaps, whether we call it a constructive trust arising from the fraud, or a resulting trust arising from the fact that the plaintiff's money paid for the land. Civ. Code, § 853. There is good ground, I think, for treating it as a resulting trust. Section 2431 of the Civil Code provides: "A partner is not bound by any act of a copartner in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act." I think the principle of this provision should be applied to the relations existing between the parties here, and that under it the plaintiff should be permitted to repudiate the agreement which she made with the defendant in its entirety, for the reason that the same was induced by the false representations and fraud of defendant. In other words, the contract between them should be treated as if it had never been made. This would leave nothing to be considered, except the fact that the plaintiff's money paid for the property, and the deed was taken in the name of defendant—a clear case of a resulting trust. But, however this may be, it is plain that under either theory the plaintiff is entitled to the entire beneficial interest in the land, and, as this has passed to the corporation, she is equally entitled to so much of the stock of the corporation as represents that interest. That whatever interest she had in the mines attaches also to the stock does not seem to be questioned by the appellant, and therefore we deem it unnecessary to further discuss that question.

There is another view to be taken of the evidence in the case which goes to confirm the views already expressed. Stripped of its fraud and stated in substance, the contract of the parties was that Canavan should buy the property for himself and Mrs. Mattern, and that each of them should have an interest in such property equivalent to the amount that each should pay therefor. Canavan paid nothing, and Mrs. Mattern paid the entire purchase price, and was accordingly entitled to the entire property. This is the way that Canavan, by his representations, made Mrs. Mattern understand the contract. It is also found by the court upon sufficient evidence that some other property was transferred to the corporation, and that for all the property transferred to the corporation Mrs. Mattern paid the sum of $2,000, and Canavan actually contributed thereto $220, and no more. Disregarding all the contracts between the parties, for the reason that they were all tainted with the misrepresentations and frauds of Canavan, and treating the corporation as a mere agency of the parties in their business transactions, as to all of which the court was fully warranted under the facts and law in so doing, it was perfectly proper to find and decree that the parties were owners of the stock of this corporation in proportions respectively represented by these amounts of $2,000 and $220 paid by them. The court made no mistake either in law or in fact in so finding and decreeing. Nor did the plaintiff make any mistake in the remedy which she sought and obtained. The decree makes no new contracts for the parties. It simply treats all the contracts between the parties as vitiated by the fraud of one of the parties to those contracts and holds them null and void for that reason, and, having thus disposed of the contracts between the parties, applies to the case the equitable doctrine of trusts, a doctrine clearly recognized by our statutes and decisions. This doctrine is also properly applied "so as to make the payment of a part of the purchase money carry with it a proportionate equitable estate in the land purchased equal to the amount paid." S. San Bernardino Co. v. S. B. Nat. Bank, 127 Cal. 245, 59 Pac. 699.

There is no merit in the appeal, and the same seems to have been taken merely for delay.

The judgment and order are affirmed.

I concur: ALLEN, J.

SMITH, J. I concur in the judgment of affirmance, but I am not satisfied that the judgment can be justified on the reasoning of the opinion. In view of the terms of the contract between the parties, I do not see how the principle of resulting trust can be held to apply to the purchase of the mines; nor, in view of the fact that stock has been issued to purchasers, do I think that doctrine can apply to the stock regarded as a fund to be divided according to the terms of the contract. Had the corporation been made a party, as it should have been, I think the issue of stock to the defendants should have been held fraudulent, and the stock canceled, or assigned to the corporation. But as the corporation was not made a party, and its nonjoinder was not objected to, it was necessary for the court to determine the controversy between the parties so far as it could be done without prejudice to the rights of others (Code Civ. Proc. § 389); and under the circumstances I do not see how this could have been done otherwise than it was. The judgment is, indeed, open to the objection that the stock in controversy, which properly belongs to the corporation, is adjudicated to the plaintiff to the exclusion of the corporation and the other stockholders; but, as these are not parties, their rights are not affected by the judgment, and may be asserted in another proceeding, and at all events the appellants are not concerned with this question and have no cause to complain.

3 Cal. App. 307

HODGES v. SOUTHERN PAC. CO.

HODGES et ux. v. SOUTHERN PACIFIC COMPANY.

(Court of Appeal, Second District, California. March 10, 1906. Rehearing Denied by Supreme Court May 7, 1906.)

1. JURORS—CHALLENGES—NUMBER.

Where two actions were by stipulation tried by one jury, plaintiffs were entitled to only four peremptory challenges.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 609.]

2. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action against a railway company for injuries to a passenger while alighting at a station on the side of the train away from the station examined, and *held*, that the question of her contributory negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1390, 1402.]

3. SAME—NEGLIGENCE OF CONDUCTOR—EVIDENCE.

Evidence in an action against a railway company for injuries to a passenger while alighting at a station on the side of the train away from the station, in consequence of the starting of the train, examined, and *held* to authorize a finding that the conductor was negligent in not observing the outer side of the train.

4. SAME—NEGLIGENCE OF ADULT PASSENGER—AGE OF PASSENGER—EFFECT.

The age of an adult passenger injured while alighting from a train in consequence of the starting thereof is not a circumstance showing negligence, in the absence of any evidence as to her physical and mental condition.

5. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action against a railway company for injuries to a passenger while alighting, in consequence of the starting of the train, the evidence showed that the train stopped only from 20 to 25 seconds, that the passenger was standing on the lower step, about to step off, when the train started, an instruction authorizing a verdict for defendant, if the accident was the result of unreasonable delay in leaving the train, was objectionable because of the absence of evidence on which it could be based.

6. CARRIERS—TERMINATION OF RELATION OF PASSENGER AND CARRIER.

The court cannot say as a matter of law that the relation of carrier and passenger ceases after the expiration of four minutes after the arrival of the train at the point of destination.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 991–993.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Consolidated actions by N. W. Hodges and by Caroline Hodges against the Southern Pacific Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Valentine & Newby, for appellants. J. W. McKinley, for respondent.

SMITH, J. The following are the instructions referred to in the opinion: Instructions given at the request of the defendant: "(2) If you find that the plaintiff was negligent in getting off on the side of the train away from the station, and that the proximate cause of the accident was such negligence on the part of the plaintiff in alighting upon the side of the train away from the station, then you should find for the defendant." "(4) You may take into consideration the age of the plaintiff in determining whether she was negligent in attempting to step from the train after the same was in motion, if you find that the train was in motion at the time plaintiff stepped therefrom. (5) It is the duty of a passenger upon arriving at destination to leave the train promptly after the arrival of the same, and if you find that the accident in this case was the result of unreasonable delay in leaving the train, you should find a verdict for the defendant. (6) If you believe from the evidence that the defendant had provided a safe landing place at Alhambra Station for the use of the passengers getting on and off of the cars, it was the duty of any passenger knowing this, or who in the exercise of common prudence should know it, desiring to leave the train, to get off on such landing place; and if plaintiff disregarded this duty and attempted to get off on the other side of the train where there was no such landing place, and thereby caused or contributed to the injury, an action cannot be maintained, and you must find for the defendant. But whether or not the plaintiff was negligent in getting off the train on the side away from the depot is a question of fact, which you are to determine from all the evidence in the case. (7) If you believe from the evidence that the trainmen were upon the side of the train next to the station for the purpose of ascertaining whether all passengers had alighted, and that plaintiff was aware of such fact, but disregarded the same and attempted to get off on the platform on the side where there were no trainmen, and thereby caused or contributed to the injury, you must find for the defendant." "(9) If you find that the plaintiff was acquainted with the location of the station, and the habits of the trainmen to get off on that side to ascertain by an examination of that side of the train whether the passengers had all alighted, and that the cause of the injury was the fact that the plaintiff alighted from the other side of the train, then you should find for the defendant" "(11) If the jury believes from the evidence that the train had arrived at the destination of the plaintiff, and a reasonable time had elapsed for plaintiff to alight from the cars after the arrival before the injury to plaintiff had occurred, then the relation of a common carrier between the parties had ceased, and defendant cannot be held liable as a common carrier."

Two cases are involved in this appeal: The one, by N. W. Hodges for injuries to his wife received by her in alighting from the defendant's train; the other, by his wife for the same injuries. The two cases were by stipulation tried by the one jury, who returned a verdict for the defendant. The plaintiff appeals from the judgment thereon entered, and from an order denying her motion for a new trial.

One of the points urged by the appellant is that the court erred in holding that the plaintiffs were entitled to four peremptory challenges only. But in this there was no error. San Luis Obispo v. Simas (Cal. App.) 81 Pac. 972.

Other points urged are that the evidence was insufficient to justify the verdict, and that certain instructions were erroneous. The former point, under the view we take of the case, need not be determined; but it will be proper, with a view to a consideration of the instructions, briefly to state the case as shown by the evidence. The accident occurred at Alhambra, in the county of Los Angeles. There are three tracks running east and west in front of the station; the main track being in the center. The ground between the platform at the station and the outer rail of the outer track has been leveled and oiled. The ground beyond the outer rail is on the same level, but has not been so treated. Mrs. Hodges alighted on the outer side of the outer track. Another train was standing on the main track in the vicinity of the station. Mrs. Hodges was travelling with her husband, her daughter, and the son of the latter, six or seven years old. All these, except the boy (who was not a witness), testify that upon the arrival of the train at Alhambra they "gathered their traps" and proceeded with all haste to the rear end of the car for the purpose of alighting, that the daughter had alighted and taken the boy off, and that Mrs. Hodges was standing on the lower step and about to step off, when the train started without signal or notice, by which she was thrown to the ground and injured. This testimony is uncontradicted, except possibly by the testimony of one of the witnesses, Mrs. Morrissey, who could see the car from the window of her house, and who testified that as the child was taken off Mrs. Hodges "seemed to hesitate * * * perhaps a few seconds as to * * * whether she was going to jump or stay on," and "she seemed to jump when the train had got started. * * * I think the car remained there about 20 seconds before I saw any one come out of the door." Mr. and Mrs. Hodges and their son, Wm. L. Hodges, also testify that it was customary for passengers to alight on the north or outer side of the three tracks—the first saying that as many as one-third of the passengers did this; the second, that "the trainmen always get off on the side next to the station, but the passengers don't always"; and the third, that "there are a great many people get off the north side of the car." Nor was there any contradiction of this evidence. The evidence of the defendant—so far as necessary to refer to it—consisted of the testimony of the witness already referred to, and of Bassett, the conductor, Chambers, the locomotive engineer, and Hanscomb, the business agent of the company. Bassett testifies that on the day in question "we made the usual stop there at the station," which was "at the side track and the station altogether about four minutes," and also that he and the brakeman were on the depot side of the tracks. and looked to see whether any passengers were getting off, but that they did not look on the other side of the train. Chambers testifies that "on that day, from the time I arrived at * * * the west switch and cleared the east switch, I was there four minutes." Hanscomb testifies that the stoppage in front of the station was "20 or 25 seconds," and that the usual stoppage was "from 15 to 30 seconds." It thus appears, from the testimony of Hanscombe and that of Mrs. Morrissey, that the stoppage in front of the station upon the occasion of plaintiff's alighting was "20 or 25 seconds," or, at the utmost, 30 seconds. Nor is the testimony of Bassett and Chambers inconsistent with this fact.

The second, sixth, seventh and ninth instructions, we think, were all erroneous. We are not prepared to hold that on the evidence the jury would have been justified in finding it to be negligence for the plaintiff to alight on the side of the train away from the station. But, however this may be, it is clear from the evidence that the facilities for alighting were substantially the same on both sides of the train, and that the act of Mrs. Hodges in alighting on the outer side of the train could in no way have contributed to the accident, unless upon the theory of the defendant that she might have received warning from the conductor had she alighted on the other side. But we do not think this position can be maintained; but, rather, we are of the opinion that, upon the circumstances shown by the evidence, the jury would have been justified in finding that the conductor was guilty of negligence in not observing the outer side of the train, and that it would have been hardly justified in finding the contrary. But here the question is taken from the jury, who are instructed, in effect, that if they find in accordance with the defendant's theory they must find for the defendant.

The fourth instruction, though perhaps not sufficient to reverse the case, is objectionable. The age of the plaintiff, in the absence of any evidence as to her physical and mental condition, was hardly a circumstance tending to show negligence on her part; nor is there anything in the evidence to justify this instruction.

Instructions 5 and 11 are also objectionable. As to the former, there was no evidence in the case tending to show that there was unreasonable delay on the part of the plaintiff in leaving the train. Rather the contrary is shown by the time of the stoppage of the train, which was from 20 to 25 seconds only. Nor was there anything in the evidence to justify either of these instructions. Nor are we prepared to say, as a matter of law, that the relation of common carrier between the parties ceases upon the arrival of the train at the point of destination and the expiration of 25 or 30 seconds, or even four minutes, thereafter.

The judgment and order appealed from are reversed.

We concur: GRAY, P. J.; ALLEN, J.

149 Cal. 325

PEOPLE v. WEBER. (Cr. 1,281.)

(Supreme Court of California. June 21, 1906. Rehearing Denied July 19, 1906.)

1. HOMICIDE—EVIDENCE.

In a prosecution for homicide, evidence *held* sufficient to sustain a conviction of murder in the first degree.

2. JURY—SELECTION—OBJECTIONS.

On the discharge of a juror for illness while the jury was being impaneled, accused moved that the remaining 11 jurors be not discharged, but that the trial be proceeded with by calling the name of another juror, and that each side be allowed the number of peremptory challenges remaining after deducting from the original number the number already used. The court assented to the suggestion, but denied the motion concerning peremptory challenges as premature, with leave to renew the motion; but it was not renewed, and neither side exhausted its peremeptory challenges, and did not attempt to exercise any challenge upon the juror last called. *Held*, that the court committed no error in denying the motion as premature.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 615, 616, 635, 636.]

3. CRIMINAL LAW—TRIAL—OPENING CASE TO JURY.

Pen. Code, § 1093, subd. 2, providing that the prosecution in a criminal case may open the case and state the facts on which it will rely for a conviction, is not mandatory, and hence the prosecution may open its case by the introduction of evidence, without any preliminary or opening statement.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1659.]

4. SAME—SUBJECTS OF EXPERT TESTIMONY.

Where, in a prosecution for homicide, the physician who performed the autopsy on deceased's body testified with reference to a diagram, he was entitled to testify as to the place of entrance and exit of the bullet found in her body as a physical fact which he observed, and not as a subject for expert evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1040, 1062, 1063.]

5. SAME—APPEAL—PREJUDICE.

Where, in a prosecution for homicide, the bullet which inflicted the wound was recovered from deceased's body, and was proved without dispute to have been a 32-caliber pistol bullet, an answer of an expert who performed an autopsy on deceased's body that he believed the wound to have been produced by a 32-caliber bullet was not prejudicial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3138.]

6. SAME—IDENTITY.

Where, in a prosecution for homicide, the state proved that defendant was in San Francisco during June, July, August, and September, 1904, and a pawnbroker had identified defendant as purchasing from him the pistol introduced in evidence in August, 1904, and described defendant's attire at the time of the purchase, evidence concerning the style of the clothes which defendant wore in San Francisco during those months was admissible in corroboration of the pawnbroker's identification of defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 767, 768.]

7. HOMICIDE—MOTIVE—EVIDENCE.

Where accused, who was nearly 21 years of age, was claimed to have murdered his whole immediate family in order that he might acquire his father's estate, evidence of the value of the property belonging to the father and the amount of insurance thereon was admissible as bearing on the issue of motive.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 330, 331.]

8. WITNESSES—EXAMINATION—CRIMINAL LAW—LEADING QUESTIONS.

In a criminal prosecution, leading questions are permissible within the sound discretion of the court.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 795.]

9. CRIMINAL LAW—EVIDENCE—HEARSAY.

In a prosecution for homicide, it was error to permit a witness to testify that deceased, who was defendant's mother, stated to witness in the presence and hearing of defendant that defendant was so mean to her she was afraid to ask him to do anything for her, and that he aggravated her so; such declaration being mere hearsay.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 937, 973.]

10. Same—Prejudice.

The error in such ruling was of such a trifling character as not to justify a reversal of a conviction.

11. Same—Acts of Accused.

In a prosecution for homicide, it was pertinent to show what defendant did or did not do on the day after the tragedy as a basis for arguing that his acts were not those of an innocent person.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 776–785.]

12. Same—Statements of Defendant—Preliminary Proof.

A statement made by accused to the district attorney and to the sheriff on the day after the tragedy, containing no admission or confession, is admissible against him, without preliminary proof that it was voluntary and not made under duress.

13. Witnesses—Cross-Examination of Accused.

Where, in a prosecution for homicide, accused, after hearing the evidence of certain witnesses, testified to the taking of a different route after the homicide from that specified in a statement made by accused to the district attorney and the sheriff on the day after the homicide, a question whether accused had not fixed his route for the sole and single purpose of meeting the testimony of the witnesses, who testified they had seen him at a certain hotel and stable, was legitimate cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 980, 981.]

14. Criminal Law—Trial—Argument of Attorney.

While it is improper for the prosecuting attorney to assert his personal belief as to accused's guilt, if that belief or conviction is predicated on anything other than the evidence in the case, the prosecutor is entitled to urge to the jury that the "evidence" convinces his mind of accused's guilt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1677.]

15. Same — Demonstrative Evidence — Exhibition of Bullets.

Where, in a prosecution for homicide, the bullets taken from the bodies of the persons killed were introduced in evidence in connection with other bullets fired from the same pistol, it was not error to permit the Attorney General to arrange the bullets in a particular order, placed in juxtaposition, and thus submit them to the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 891.]

16. Witnesses—Cross-Examination — Character.

It is legitimate cross-examination of a character witness to ask whether he had ever heard of the person whose reputation is under investigation having been accused of committing acts inconsistent with the character which he has attributed to him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1173.]

17. Same.

A witness, having testified that C.'s reputation was good, on cross-examination was asked whether he had ever heard discussed the fact as to what business C. carried on, which he answered in the negative, when he was asked whether he had ever been told that C.'s license to carry on business had been revoked. He answered this question in the negative, when he was asked whether he had not been told that C. had a lengthy examination before the board of police commissioners and that his license was revoked, to which question an objection was sustained. *Held*, that such question was an illegitimate attempt to get the substance of the inquiry before the jury as an evidentiary fact, and that the objection was properly sustained.

18. Witnesses—Examination — Speculative Questions.

A subsequent question as to whether, if any of such matters had been brought to witness' mind, it would have changed his opinion concerning C.'s reputation, was incompetent as hypothetical and speculative.

19. Criminal Law—Appeal—Harmless Error—Rulings on Evidence.

Where the court by its rulings had stricken out all of the evidence of an expert with reference to his opinion that certain bullets were all fired from a particular pistol, it was immaterial that the court, when it undertook to designate specifically the evidence to be stricken, failed to designate for elimination certain evidence touching a particular exhibit which was included in the court's ruling.

20. Same—Evidence—Experiments.

After a homicide a pistol was found on the premises, concealed in a barn, and this was used by an expert with which to fire certain bullets for comparison with those from the bodies of the persons killed. On the trial it was shown that the pistol was in the same condition, except as to exterior blood marks, when the expert fired the bullets from it as it was when it was found in the barn. *Held*, that the bullets fired from the pistol by the expert were not objectionable, when offered for the purpose of comparison, on the ground that they were not fired under the same conditions as those existing at the time of the homicide.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 854, 891.]

21. Same—Trial—Instructions—Form.

Where, in a prosecution for homicide, the case was otherwise fairly tried, the fact that the court, in giving one of accused's proposed instructions, struck the concluding language, that, if the jury should find so and so, they "should find the defendant not guilty," or "should acquit him," was not ground for reversal.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1989.]

22. Same—Conflicting Instructions.

Instructions that if the jury, from a consideration of all the evidence, were satisfied of defendant's guilt beyond a reasonable doubt, it was their duty to find him guilty, and that, as the evidence was circumstantial, each material circumstance must be proven to the jury's satisfaction beyond a reasonable doubt, or they should acquit, were not in conflict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1967, 1968.]

23. Same—Requests—Refusal.

Where, in a prosecution for homicide, the court had specifically charged that unless the jury were satisfied from all the evidence beyond a reasonable doubt that the presumption of innocence of the defendant was overthrown, it was their duty to find defendant not guilty, it was not error for the court to refuse to charge that unless the jury found the evidence sufficiently strong to overcome the presumption of innocence, and to satisfy their minds of defendant's guilt beyond a reasonable doubt, he was entitled to an acquittal.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

24. Same.

Where the court charged that the jury must not consider the evidence of all the witnesses which had been stricken out, it was proper for the court to refuse an instruction that the evidence of certain named witnesses had been stricken, and therefore must not be considered; the list of witnesses not including the names of all the witnesses whose testimony had been stricken.

25. Same—Abstract Instructions.

An instruction that the mere possession "of any article," whether it can or cannot be used in the perpetration of a crime, is not of itself sufficient to convict accused, but is merely a circumstance, etc., was abstract, and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1979.]

26. Same — Request to Charge — Modification.

Where accused requested that the jury be told that he was entitled to the independent judgment of every juryman, it was proper for the court to modify the instruction so as to read that each side was entitled to the independent judgment, etc.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2013, 2014.]

27. Same.

An objection to an instruction in a criminal case that it is not sufficiently full is unavailable, unless a fuller instruction is requested.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2005.]

28. Same—New Trial—Grounds—Theory of Prosecution.

Where, in a prosecution for homicide, accused was advised of the nature of the circumstantial evidence on which the state relied for a conviction, and it did not appear that on a new trial any new evidence would have successfully controverted the Attorney General's theory adopted at the trial, the fact that such officer, in finally arguing the case to the jury, adopted a theory different from that advanced at the preliminary examination, etc., was not ground for new trial.

29. Same—Newly Discovered Evidence—Impeachng Testimony.

In a prosecution for homicide, it was not an abuse of the trial court's discretion to refuse a new trial because of newly discovered evidence tending to impeach the testimony of a witness, not upon the principal fact of his testimony, but merely as to one of the reasons which he gave for his identification of the weapon by which the state claimed the homicide was committed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331–2332.]

30. Same.

Affiant testified in an affidavit in support of a new trial for newly discovered evidence that he had purchased the pistol with which the crime was committed from a man whom he designated as "the Sailor." He knew nothing more concerning him, and testified that shortly thereafter he (affiant) went to the beach with several companions and tried the pistol, and that they were all surprised at the way in which the pistol shot, yet the affiant gave the name of no one of his companions. He testified that he sold the pistol to a man employed in a repair shop in Oakland, but did not state the name of the man nor of the shop, and, while he was unable to remember such names, he was able to identify the pistol by description and number, and also the day of the month on which he sold the pistol He also testified that he wrote defendant's attorneys concerning what he knew, but this statement was not corroborated, and the affidavit failed to give any evidence of the witness' location or whereabouts. *Held*, that the refusal of the trial court to credit such affidavit was not an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2335, 2336.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Adolph Julius Weber was convicted of murder, and he appeals. Affirmed.

Grove L. Johnson, Ben P. Tabor, F. P. Tuttle, and Sam. J. Cullen, for appellant. U. S. Webb, Atty. Gen., A. K. Robinson, Dist. Atty., and George W. Hamilton, for the People.

HENSHAW, J. On November 10, 1904, Julius Weber with his family resided in Auburn, Placer county. His family consisted of his wife, Mary Weber, his daughter, Bertha Weber, aged 18, a son, Earl Weber, aged 9, and a second son, Adolph Julius Weber, aged 20, the defendant herein. The home was a two-story frame building situated within its own grounds, some little distance away from the house of any neighbor. At about 6 o'clock of the evening of November 10th, the family was seen alive in the house by passers-by. At 7:35 of the same evening the house was discovered to be on fire, and at 7:42 the fire alarm bell was rung. The first people to arrive saw no living person within or about the buildings. A number of people, firemen and citizens, were soon upon the ground. A front room upon the ground floor was entered by them through the window. This room contained a piano and is designated "the piano room." It was full of thick, heavy, smoke, but no fire was detected. From this room three bodies were carried; Mary Weber, Bertha Weber, and Earl Weber. Mary Weber and Bertha Weber were both dead, and had been frightfully burned after death. The little boy was not burned at all. He was alive, though unconscious, when removed from the room to the yard, but died almost immediately after. He was in his night clothes. They were moist with blood. An autopsy disclosed that Mary Weber and Bertha Weber came to their death by gunshot wounds. Mary Weber was shot twice; Bertha Weber, once. In each case the wounds were almost immediately fatal. Neither could have survived the wounds more than five minutes. The bullets were recovered, and were pistol bullets of 32 caliber. The burns were inflicted upon the bodies after death. The little boy had not been shot. His death was caused by blows upon the head, inflicted with some blunt instrument, and subsequent suffocation. The house burned to the ground. The following day the body of Julius Weber was found in the bathroom of the dwelling. It had been subjected to great heat and was frightfully burned. An autopsy disclosed that the cause of his death was a bullet wound caused by a bullet of like caliber to those which killed the others. Upon November 22, 1904, there was found in the basement of the Weber barn, about 250 feet from the dwelling, a revolver described as an "Iver-Johnson 32-caliber revolver, old style." When found, there was dry blood upon it and one or two light-colored hairs, and the pistol contained the shells of five discharged cartridges. The defendant was in a clothing store in Auburn about five minutes to 7 on the evening of the tragedy. He there purchased a pair of trousers. He took off his old trousers in the store. They were rolled in a bundle by himself, and afterwards more compactly by the storekeeper, who wrapped them in a paper and returned them to the defendant. The defendant's manner at this time was not such as to excite attention. He comported himself as usual. Prior to that he had been seen on Brewer Lane, going from his house to Auburn at about 6:30 p. m. He was seen in the washroom of the American Hotel at 6:40 or 6:43 p. m., where he washed his hands, and hurriedly left the place. He was seen on the street going toward Cohn's store, where he purchased the trousers at about 6:45. He was on the streets of Auburn after this time until the alarm of fire, and his appearance and conduct during that time was natural. Upon hearing the alarm, he ran to the Weber house in company with a friend, carrying the bundle which contained his old trousers. These trousers he used to break in a window to gain access to the house. He did enter the house, and testifies that he assisted in removing the body of his little brother. His testimony as to this was contradicted. The bundle containing the trousers was burned in the house. Upon November 11th he was examined by the district attorney and the sheriff as to his knowledge of the fire and the homicide, and his answers were reduced to writing. On the evening of the same day he testified as a witness at the coroner's inquest. Upon the following day he was arrested and charged with the murder of his family. Upon preliminary examination he was held for murder. An information was filed against him by the district attorney upon November 29th, charging him with the murder of Mary Weber, his mother. Upon this charge he was brought to trial in January, 1905. The trial consumed about a month, the jury returning a verdict of guilty of murder in the first degree. His motion for a new trial was denied, and he was sentenced to be hung. From that judgment, and from the order denying his motion for a new trial, he prosecutes this appeal.

The prosecution contended, and to this their evidence was addressed, that the defendant had killed his parents, sister, and brother, in the manner indicated; that the father was killed in the bathroom; the mother and daughter in the piano room; the little boy beaten while in his night clothes, and brought to the piano room; that the murderer then saturated the clothing of Mrs. Weber and the daughter with inflammable oil and set fire to it; that he likewise set fire to the house; then, hiding the pistol in the barn, hurried to Auburn to establish an alibi; that the heavy, black smoke from the piano room came from the burning oil and burning flesh, and the room being inclosed, the oxygen was soon exhausted and the flames thus smothered, in support of which it was shown that when the burned bodies were carried to the open air the fire revived, and sparks were seen upon the clothing. The people's contention was, further, that defendant hurried to the washroom of the American Hotel to remove the blood and other traces of crime; that the trousers which he wore were blood stained, which necessitated the purchase of a new pair, and that he deliberately threw the old pair into the burning building in order that this evidence of his crime might be destroyed. Stress also is laid upon the asserted unnatural conduct of the defendant during and after the fire, that he did not approach the bodies of his mother and sister after they had been taken from the house nor inquire about them. It was shown that Julius Weber was worth about $50,000. Upon the death of the other members of the family, this defendant would succeed to property of this value. Herein the prosecution imputed the motive for the crimes. Upon leaving the fire, the defendant went to the home of a friend, and, on account of his excited condition, a doctor was called. The doctor dressed a cut upon the young man's hand, which probably he had received in forcing a window of the burning house. The defendant wanted to know if his mother were alive. The doctor replied that his mother was in the care of friends with a physician in attendance, and that he could not see her, nor could he see any member of the family that night. The defendant said: "I want to know if my mother is alive. I know she is dead. They told me she is alive, but I know she is dead." The doctor gave him a composing draft, and the young man said that if he was permitted to go out for a time he would come back and remain quietly all night. To this the doctor consented, and the defendant went out with his friend, and at his own suggestion visited an ice cream parlor, where they had an ice cream soda, and after that called at the Amercian Hotel to visit some young ladies; the defendant making the suggestion, saying: "Let's go see the girls in the hotel." The foregoing is instanced merely as an example of the unnatural conduct which it is insisted by the prosecution the defendant displayed after the frigntful tragedy. Further, the prosecution produced a pawnbroker of San Francisco, who identified the Iver-Johnson pistol as one which had been owned by him, and which in turn he had sold to defendant, positively identifying the defendant, and describing with some particularity the clothing which he wore at the time of the purchase. All of the evidence was wholly circumstantial, and the defense contends that it was likewise wholly insufficient to uphold a judgment of conviction. This is based upon the inconsistency and irreconcilability of the evidence. Thus, it is said that the defendant must have left his home before 6:30 p. m., since he was seen upon Brewery Lane walking to Auburn at that hour, and was afterwards, and up to the time of the alarm of fire, seen so frequently in the town of Auburn as to render a surreptitious return to the house impossible; yet that Bertha Weber was heard by a disinterested witness playing upon the piano at 6:40 or 6:45 p. m., and another disinterested witness heard the scream of a woman from the house between 6:40 and 7 p. m., and that the fire was first discovered in the house at about 6:30 or 6:45. From this it is argued that as Bertha Weber was heard playing the piano somewhere between 6:30 and 6:45, her brother, who was at that time absent from the house, could not have been the murderer; and, moreover, that it would have been impossible for him to shoot three people, all adults, haul the bodies of two of them in the piano room, where there was no fire, and set fire to them, go upstairs and beat his little brother upon the head, and carry his body down to the piano room in the length of time established by the evidence. But to this it must be answered that the witnesses who fixed the time do not pretend to do so with positiveness and exactness. They fix it as "about" such an hour and even if it be conceded that an irreconcilable conflict in the evidence arises, it must be noted that the testimony of the piano playing and of the woman's scream was offered by the defense, and it was the province of the jury to weigh and decide and to reconcile the testimony if they could, and, if the conflict was irreconcilable, to affix their own value to the offered evidence. And it must be added that, when allowance is thus made for inaccuracies as to time, there is nothing in the whole case to show that the defendant could not have committed these horrible deeds, with all their attendant circumstances, and still have made his appearance upon the streets of Auburn at the time shown. Upon this subject, therefore, it must be concluded that the evidence is sufficient to justify the verdict.

To the rulings of the court in the impanelment of the jury, and upon the admission and rejection of evidence, appellant's counsel reserved very numerous exceptions. The same is true of the court's rulings in giving, in refusing to give, and in modifying instructions. No one of these rulings has failed to receive the careful investigation which the gravity of the case warrants, and we pass to a consideration of those which call for particular mention and discussion. After 12 jurors had been sworn to try the cause, but before the information had been read or the plea of the defendant stated, or the opening statement of the prosecution made, one of the 12 was excused because of illness. A special venire was issued and a twelfth juror accepted and sworn, without any challenge interposed. At the time of the final completion of the jury, the defendant had 9 peremptory challenges unused. Upon the discharge of the sick juryman, defendant moved the court that the remaining 11 jurors be not discharged, and that the trial be proceeded with by calling from the box the name of another juror, and that each side be allowed the number of peremptory challenges remaining after deducting from the original number the number already used. The court assented to the suggestion, but reserved its ruling concerning the number of peremptory challenges to which each side would be entitled, denying the motion as premature, with leave to renew it at any time. In this state of the case no question arises as to the number of peremptory challenges, since neither side had exhausted the number to which it was clearly entitled under the law, and since neither side exercised or attempted to exercise any challenge upon the juror last called to the box. The ruling of the court in this matter was correct, and is supported by People v. Brady, 72 Cal. 491; 14 Pac. 202; People v. Van Horn, 119 Cal. 332, 51 Pac. 538.

The Attorney General made an opening statement to the jury, at the conclusion of which the defense moved that the prosecution be required and directed by the court to state to the jury what the other facts referred to by the Attorney General were, and what they expected to prove, and on what a reliance for a conviction of the defendant was placed. The court denied the motion. It is asserted that Penal Code, § 1093, subd. 2, is mandatory, that the prosecution must open the case, and that in so doing it must state what it expects to prove. Such, however, is not the meaning of the law. A prosecution may open its case by the introduction of evidence without any preliminary or opening statement. The purpose of such statement is merely to outline the testimony about to be offered, to the end that the jury may more clearly sift and digest it. People v. Stoll, 143 Cal. 691, 77 Pac. 818; People v. Ellsworth, 92 Cal. 595, 28 Pac. 604.

The physician who performed the autopsy upon the body of Mary Weber was permitted to testify as to the place of entrance and of exit of the bullet found in her body. It is said that special skill will not entitle a witness to give an opinion, where the jury is capable of forming its own conclusions from facts susceptible of proof in the common form. This is undoubtedly true, and it may be conceded that the observation even of the unprofessional eye could determine which was the point of entrance and which the point of exit, and if the body had been exhibited to the jury they could have formed their own conclusions from their own observations. But they had not this opportunity, and the physician was merely illustrating upon a diagram and testifying to a matter which had come under his own observation, so that even if it be conceded that the question did not call for expert evidence, the answer was none the less admissible as being direct testimony to a physical fact which the witness had observed and the jury had no opportunity of seeing. The same witness was allowed to answer a question as to the size of the wounds on the body referred to as bullet wounds and answered: "I believe them to have been produced by a 32-caliber bullet." A motion to strike out the answer was denied. It is sufficient here to say that as the bullet which inflicted the wound was recovered from the body, and was proved without dispute to have been a 32-caliber pistol bullet, the answer could not have been injurious.

It was shown by the prosecution that the defendant was in San Francisco during the months of June, July, August, and September, of 1904. The pawnbroker, Henry Carr, had identified the defendant as purchasing from him the pistol introduced in evidence in August, 1904, and this witness described the attire of the defendant at the time of the purchase. Through the testimony of the witnesses Mrs. Muston, Mrs. Hilliker and others, the prosecution showed the style of clothes which the defendant wore in San Francisco during those months. The effort was directed to establishing that the clothes which the defendant actually wore during that time were such clothes as Henry Carr described the defendant as wearing at the time of the purchase of the pistol. This evidence was admissible in corroboration of Carr's identification.

Proof of the value of the property belonging to Julius Weber was objected to upon the ground that it was not shown that the defendant, a mere youth, knew the value of the property of his father, or the amount of insurance upon it, and unless he did so know, the testimony had no pertinency upon the question of motive. But, in the absence of such a direct showing, it was established that the young man, nearly 21 years of age, had been living with his family upon the property, and was continually surrounded by evidence of his father's possessions, and it would be no strained, but a natural, inference for the jury to say that he had at least some knowledge of the matter.

Touching the conduct of the defendant upon the morning after the fire, a witness was asked and permitted to answer the following questions: "Did he, during any of that time (about three minutes) say anything about his mother being dead? Did he speak about any of the members of his family being dead? During these three minutes that you were in his presence, did he tell you that any members of his family were dead?" The only objections to these questions are that they are leading. But even leading questions are permissible within the sound discretion of the court. The answers were in no sense injurious, the witness replying, "He said something, or Adrian Wells said something to him; I didn't understand, and he said, "I don't see why they could not get out of the house.'"

Mrs. Snowden was allowed to testify that Mrs. Weber said to her in the presence and hearing of defendant: "Dolphy is so mean to me I am almost afraid to ask him to do anything for me. He does aggravate me so." Defendant moved to strike out this statement, and the motion was denied. It should have been granted. It is not every statement made in the presence and hearing of a person which is admissible in evidence against him. Nor is the statement, so far as its contents are concerned, admissible as evidence at all. It is merely the conduct of the person in connection with the declaration, his failure to act as it might reasonably be expected that an innocent person would act, which is the evidence, and the declaration is received merely to illustrate the person's conduct under the particular circumstances. Jones on Evidence, § 291; People v. Teshara, 134 Cal. 544, 66 Pac. 798; People v. Philbon, 138 Cal. 530, 71 Pac. 650. Nothing is disclosed as to the conduct of the defendant at the time the statement was made, so that it stands upon the record as a naked hearsay declaration of the mother of the defendant. But even so, it is of such trifling character as not to justify a reversal of the cause.

Many questions were asked of different witnesses concerning the actions and statements of the defendant upon the day after the tragedy. They were all offered in proof of the alleged unnatural and thus guilty conduct of the accused. It was pertinent to show what the defendant did or did not do under those trying circumstances. It was permissible to argue that he did or did not act as an innocent person would have acted. The weight of all this testimony was for the jury, but it was not error to admit it.

Objection is made to the introduction of the statement made by defendant to the district attorney and to the sheriff upon the day after the tragedy. It is said that it appears that it was not a voluntary statement, but one made under duress. A reading of the statement, however, discloses that it contained no admission or confession of guilt, and it is only as to the latter class of statements that the rule requiring preliminary proof of their free and voluntary making has application. So, in People v. Jan John, 144 Cal. 286, 77 Pac. 950, it is said: "But this rule applies only to confession of guilt, and does not forbid proof of other admissions of the defendant, though these, taken in connection with other proofs, may tend to prove him guilty." See, also, People v. Ammerman, 118 Cal. 32, 50 Pac. 15; People v. Hickman, 113 Cal. 86, 45 Pac. 175. In the statement which the defendant made to the district attorney and sheriff upon the day after the homicide, and also in the testimony which he gave before the coroner's jury, he described the course which he took in leaving his father's house and going into town. This course carried him directly across Brewery Lane, and by a roundabout and circuitous way, to a point on College Lane where three routes were open to him to go to Cohn's store. In both of these statements he declared that he did not know, could not recall what route he had taken from College Lane to Cohn's store. This circuitous route, if actually taken by the defendant, would have consumed some 15 to 20 minutes of time, and would have rendered it improbable that he could have been at his home at the time the murders were committed. Another route was open to him, much shorter and more direct, from his house to Cohn's store. This was down Brewery Lane. This latter route would have carried him past the American Hotel, where it was in evidence that he was seen washing his hands, and hurriedly departing, past Crosby's Livery Stable, which he was seen passing, coming from the direction of the American Hotel, and so to Cohn's store. From College Lane, no one of the three routes, readily accessible to defendant, would have carried him past these places where the witnesses saw him. Upon the trial he heard the testimony of these witnesses, and when, in turn, he took the stand, he described with minute circumstance, the route which he had taken from College Lane. That route involved a divergence from the direct course to Cohn's store, and the witness testified that he did diverge in his course and walk down Sacramento street, upon which was the American Hotel and Crosby's stable, that he passed these places upon the opposite side of the street, crossed over and came back to Cohn's store, passing in front of the American Hotel, though not stopping there. Upon cross-examination the witness was asked if he had not fixed his route for the sole and single purpose of meeting the testimony of those who had seen him at the American Hotel and Crosby's stable. This question was, in the condition of the case as shown, within the limits of legitimate cross-examination, since it was at least within the scope of fair argument before the jury to urge that the defendant's recollection as to his route had been stimulated by the necessities of his case.

In the course of his argument to the jury the Attorney General said: "We believe, gentlemen, and I say so not without a feeling of pity, not without a feeling of sadness, not without a feeling of pathos, but with a feeling that the evidence in this case as it stands to-night recorded in the notes of this trial, points unerringly, points accurately, beyond the possibility of mistake, to this defendant as the murderer of Mary Weber." Objection was made to this language. It was urged upon the trial court that it was improper for a prosecuting officer to express his belief in the matter of the guilt or innocence of an accused, and that he could with propriety argue only upon the facts in evidence. To this objection the court ruled in the following language: "The court does not feel it incumbent upon itself to determine the sufficiency of the point as a legal proposition, because the observation of the Attorney General was that he believes that the evidence points to that conclusion. The objection is overruled." It is, of course, improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of an accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the indisputable right to urge that the evidence convinces his mind of the accused's guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds, although it did not convince his. A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes. People v. Romero, 143 Cal. 460, 77 Pac. 163. Nor can we perceive the slightest impropriety, nor just cause of exception in the remarks which the court made in ruling upon this matter.

The bullets taken from the body of Mary Weber and of Bertha Weber, as to which evidence has been introduced that they had been fired from the Iver-Johnson pistol also in evidence, were with certain other bullets fired from the same pistol, some by the prosecution and some by the defense, all arranged by the Attorney General in a certain order and so exhibited to the jury, the bullets themselves, of course, having been duly admitted in evidence. Objection was made to the exhibition of the bullets to the jury as arranged. It is said that this should not have been permitted; that the jurors could take the bullets and examine them as they chose, not having one bullet placed in juxtaposition with other bullets. The objection was overruled. It cannot be perceived wherein lay the error in permitting the Attorney General to place these exhibits in any order or in any sequence, to point out similarities or dissimilarities, or for any other legitimate purpose connected with his argument. Such, in effect, was the ruling of the trial court. To that ruling it was added that the jury might and doubtless would at their convenience rearrange them in any other order which they saw fit.

The reputation of Henry Carr, the pawnbroker who testified that he had sold the pistol to the defendant, having been attacked by the defense, affirmative evidence to meet it was offered by the prosecution in rebuttal. The witness Abrahams, having testified that Carr's reputation was good, upon cross-examination, without objection, was asked and answered the following questions: "Q. Have you ever heard discussed the fact as to what business he carried on? A. No, sir. Q. Have you ever been told that his license to carry on business has been revoked? A. I am not aware of the fact." And then followed this language: "Q. Have you ever been told that he had a lengthy examination before the board of police commissioners and that his license was revoked?" To this objection was made and sustained. It is, of course, legitimate cross-examination of a character witness to ask whether he has ever heard of the person whose reputation is under investigation having been accused of committing acts inconsistent with the character which he has attributed to him. People v. Gordon, 103 Cal. 568, 37 Pac. 534; People v. Moran, 144 Cal. 48, 77 Pac. 777. In this case the witness had been asked and had answered that he had not heard that Carr's license to carry on business in San Francisco had been revoked. It is nowhere contended by astute counsel for the appellant, either in the record, which is full upon the question, nor in their briefs, that the first answer was evasive, and that therefore they had the right to pursue the inquiry further. It is not to be believed that if counsel had considered the answer evasive or had considered it other than as a direct answer they would not have insisted upon their right to ask the second question upon this ground. They did not do so in the trial court, they did not do so in this court, and the only fair inference to be derived from this state of the record and of the briefs is that this answer was accepted as positive and direct both by court and by counsel. So accepting it, the ruling of the court upon the subsequent question was perfectly proper, and the remarks of the court in pronouncing its rulings were equally unobjectionable. It is apparent that the succeeding question would have elicited another negative answer, and that the purport of the question was not to obtain the witness' answer, but to get the substance of the inquiry before the jury as an evidentiary fact, to the detriment of the witness Carr. This obvious purport of the question justified the court's ruling in excluding it. The court's ruling excluding the subsequent question of the witness was likewise proper. That question was: "If any of those matters had been brought to your mind would it change your opinion?" The question itself was hypothetical and speculative, and, moreover, was but another veiled attempt to present to the jury the excluded matter.

Howard Carr, an expert in small arms, had been permitted to testify that the bullet taken from the body of Mary Weber (Exhibit G), and the bullet taken from the body of Bertha Weber (Exhibit H) had both been fired from the Iver-Johnson pistol (Exhibit Q). Upon the next day, in doubt of the soundness of its ruling, in view of testimony subsequently given by Carr that his opinion was that the bullets had been fired from that pistol because he had compared the markings on the bullets taken from the bodies with the markings on the bullets which he had fired from the pistol, the court concluded to strike out the testimony in these words: "In other words, I hold that the comparison of the two bullets on the one hand with the two bullets on the other is not a matter of expert testimony, but one within the ordinary capacities of the average juror or citizen. Now this being so, I wish to strike out the statement of the expert, that in his opinion the two bullets taken from the bodies were fired from this pistol, leaving that as a question for the jury to determine by an inspection of the bullets themselves. Accordingly, Mr. Reporter, near the top of page 529 note this question: 'Just holding this bullet, plaintiff's Exhibit G, I now ask you if you are able to say whether or not that bullet was fired from the pistol, plaintiff's Exhibit Q., which you now hold in your hand, the answer being: A. I should say it was. Q. You are so able to state? A. Yes, sir. Q. Was it fired from that pistol that you hold? A. I say, yes, it was fired from this pistol.' Those questions and answers are stricken out, or rather the answers are stricken out." The record discloses that defendant made no specific motion based upon this ruling of the court to strike out also the testimony as to Exhibit H, nor did he call the court's attention to the omission to strike it out, but throughout all subsequent proceedings the matter was treated as though the testimony to both Exhibits G and H had in fact been stricken out. The court had by its rulings stricken out all of this evidence. When it undertook to designate specifically the evidence, by oversight, it failed to note the evidence touching Exhibit H. The original ruling, however, covered the matter: the evidence was subsequently treated as eliminated from the case, and no injury could have resulted to defendant.

It is insisted that it was error to admit in evidence two bullets which the expert testified he had fired from the Iver-Johnson pistol, upon the ground that they were not fired "under the same conditions as those existing at the time of the homicide." The objection is untenable. It was shown that the pistol was in the same condition, except as to exterior blood marks upon the surface when Carr fired the bullets from it, as it was when found in the Weber barn, and it is very apparent that, as tending to fix the identity of the weapon from which the fatal shots were fired, the similarity or dissimilarity of the bullets which Carr fired to those which were found in the body was pertinent and important evidence.

We have thus considered the alleged errors of the rulings of the court in the trial of the cause. Those which have not been specifically noted have not been overlooked. They have been omitted only because they belong to one or another of the classes and kinds of questions of which particular discussion has been had, and a more detailed analysis of them, therefore, becomes unnecessary.

In the rulings of the court upon the instructions, some 28 errors are asserted. It would extend this consideration without profit to set forth all of these instructions at length. It must suffice in most instances to state the result of the examination which has been made of them.

First, as to reasonable doubt. Upon this question the court instructed with elaborate fullness and care, avoiding any novel language of its own, and abiding by the definitions well tested and long approved by this court. Certain proposed instructions upon reasonable doubt, as well as upon other subjects, the court refused to give, as having elsewhere been embodied in its charge. Complaint is made of this in many instances, but the complaint is not well founded. Complaint is also made of the court's action in certain instances in striking out the concluding language of defendant's proposed instruction, that if the jury shall find so and so, they "should find the defendant not guilty," or "should acquit him." It is true that the court did this in certain instances, but in many others it presented the instructions without even this modification. No single individual instance of this would warrant the reversal of a cause otherwise fairly tried. Only by taking the instructions as a whole would a court be enabled to say whether or not the defendant had received fair treatment in this regard, and so reading the instructions in this case the conclusion is irresistible that the jury was fairly and impartially charged. The court had instructed the jury that if they should, from a consideration of all the evidence in the case, be satisfied of the defendant's guilt beyond a reasonable doubt, it would be their duty to find him guilty. It also instructed the jury that the evidence of defendant's guilt was circumstantial, and that each material circumstance must be proven to their satisfaction, beyond a reasonable doubt, or they should acquit. It is urged that these instructions are in conflict, the one nullifying the other. But this conflict and nullification we are unable to perceive.

The court instructed the jury: "The defendant's plea on this trial is 'not guilty.' Upon that plea a presumption of his innocence arises. That presumption accompanies him throughout the trial. It goes with you in your retirement to consider your verdict. It will avail to acquit the defendant, unless it be overcome by sufficient proof of guilt. You must examine the evidence by the light of that presumption." This instruction was proposed by the defendant and was given by the court. The complaint is made that the court in giving it, modified it by striking out an accompanying statement to the effect that unless upon their examination they found the evidence sufficiently strong to overcome the presumption of innocence, and to satisfy the jury of defendant's guilt beyond all reasonable doubt, he was entitled to an acquittal at their hands. The portion stricken out was unobjectionable, and might well have been given, but the substance had been given so frequently in other instructions that it was no abuse of the discretion of the court to refuse to give it upon the ground that it was mere repetition. In this regard it is to be noted that the court had already specifically charged the jury that unless they "are satisfied from all of the evidence in the case, beyond a reasonable doubt, that the presumption of innocence of the defendant which the law gives him is overthrown, it is their duty to render a verdict of not guilty."

The court's modification of instruction No. 7 was not objectionable. It would have been justified in refusing to give the instruction as a whole. Instead of so doing, it eliminated certain portions of the instruction as being argumentative, and other portions as having already been covered by the charge, and gave the remainder.

It was not error to refuse to give an instruction to the effect that the evidence of certain named witnesses had been stricken out, and, therefore, must not be considered. The court had given an instruction covering this matter as to the testimony of all witnesses which had been stricken out. The naming of these particular witnesses could but have served to confuse the jury, since from the list were omitted the names of other witnesses whose testimony was likewise stricken out.

The court refused to give an instruction as follows: "I instruct you that the mere possession of any article, whether it can or cannot be used in the perpetration of crime, is not of itself sufficient to convict the defendant, but is merely a circumstance, which may or may not tend to prove the charge against the defendant." We cannot perceive wherein the refusal to give this instruction was error at all much less prejudicial error, for as was said in People v. Buckley, 143 Cal. 375, 390, 77 Pac. 169, under like circumstances: "It may be that as mere abstract propositions of law they are correct, but as mere abstract propositions of law they apparently bear no direct relation to the particular charge contained in the information." The defendant, it was shown, possessed numerous articles. Some of these, like the clothing which he wore, were not used in the perpetration of any crime. The common knowledge of the jurors would tell them that as to any article the mere possession is insufficient to convict. If the defendant had a desire to have specific instruction to the effect that mere proof of ownership of the pistol, even if it were shown that the fatal shots were fired from the pistol, was not in and of itself alone sufficient evidence to warrant a conviction, he should have requested such an instruction. But the instruction as proposed, going to the possession of "any article, whether it can or cannot be used in the perpetration of a crime" was of academic significance merely.

Defendant asked that the jury be told that he was entitled to the independent judgment of every juryman. The court gave the instruction, modifying it so as to read that "each side is entitled to the independent judgment," etc. This assuredly was not error.

The court, at the request of the prosecution, instructed the jury that "an alibi simply means that the accused was at another place at the time of the commission of the crime, and, therefore, could not have committed it." It is not contended that this instruction is erroneous in point of law, but it is urged that the court should have instructed the jury more fully upon the subject. But had the counsel for the defendant so desired, it was their duty to have requested such instruction. People v. McNutt, 93 Cal. 658, 29 Pac. 243; People v. Oliveria, 127 Cal. 381, 59 Pac. 772; People v. Balkwell, 143 Cal. 264, 76 Pac. 1017.

Upon his motion for a new trial defendant urged two propositions: First, that at the preliminary examination the prosecuting attorney advanced the theory that Mary Weber and Bertha Weber were shot, then burned, and their bodies then dragged into the front room, where they were found; that nothing occurred upon the trial of the cause, nor in the opening argument of the prosecution before the jury, to lead defendant to believe that this theory had in any wise been changed or abandoned; that only upon the final argument of the Attorney General was it disclosed that the people were contending that Mary Weber and Bertha Weber were shot in the room where the bodies were found, and their clothes were there saturated with some inflammable oil and ignited. The contention of appellant is that this conduct upon the part of the prosecution was unfair, and, moreover, that the theory advanced by the Attorney General came at so late a time as to preclude the defense from offering evidence to countervail against it. But to this it must be answered that no deception was practiced by the prosecution; that it was not incumbent upon the prosecution to offer any particular theory as to the manner in which the crime was committed, and that, upon the other hand, it was perfectly proper to argue that the crime was committed in any manner which the evidence showed reasonably possible. Furthermore, as to the nature of the circumstantial evidence the defendant was advised. It is not made to appear by the affidavit that upon a new trial any new evidence would have successfully controverted the Attorney General's theory.

But the point upon which principal stress is laid is that a new trial should have been granted because of newly discovered evidence impeaching the testimony of the witness Henry Carr. Carr, it will be remembered, had testified that he had sold this particular revolver, Iver-Johnson old style No. 19,554. Upon cross-examination he testified that he remembered it and identified it because it was a peculiar make, and that it was the only one of that make that he had ever owned since he had been in business. J. G. Applegate makes affidavit, giving his place of residence and occupation; that he was in the company of Edward Harrington on the 29th of July, 1904 (which is the month Carr fixes as the month of the purchase of the pistol by defendant); that they visited Henry Carr's place of business, and Harrington there bought with a lot of cartridges, an Iver-Johnson pistol, old style, and that he believes Harrington has the pistol still in his possession. Edward Harrington makes affidavit, giving his address and occupation, that he did on the 29th of July buy from Henry Carr, at his pawnbroker shop in San Francisco, an old style Iver-Johnson pistol. Accepting these affidavits as being absolutely true, they serve to contradict the witness, not upon the principal fact of his testimony, but merely as to one of the reasons which he gave for his identification of the weapon. To that extent, and no more, they serve to discredit the witness. But it cannot be said that the trial court abused its discretion in refusing to reopen the case because of this impeaching testimony.

But of more consequence, however, is the affidavit of one Nathan C. Beard. Beard's affidavit is that he purchased a pistol on a railroad train from a man who was not known to him other than by the name of "the Sailor." That upon the 4th of July, 1904, wishing to celebrate, he took the pistol out of his valise, and with several companions took it to the beach, and fired it several times. Being surprised at the way it shot, he examined it carefully to see what make it was, and found it to be an Iver-Johnson, old model, 32-caliber short, No. 19,554. "We spoke then of the number and wondered if that many pistols of that make had been made. When the testimony of Henry Carr was published in the newspaper I saw that he swore he had sold this pistol to Adolph Weber. After I heard of this I wrote to Weber's attorneys and told them what I knew of this pistol. I kept this pistol in my possession until the 30th day of September, 1904, when I sold it to a man who was employed in a repair shop in Oakland, Cal. for a dollar and a half. On the 24th day of March, 1905, at the request of the attorneys for Weber, I came to Auburn and * * * there carefully examined the pistol which had been introduced in evidence in the murder case against Weber. * * * I recognized in this pistol so marked and shown to me as aforesaid, the pistol which I bought from the sailor and which I sold to the man in Oakland on the 30th day of September, 1904." As to this affidavit the brief of the people states that, "if the trial court had been convinced of the truth of this affidavit, a new trial would have resulted. More than this, it is probable that if the trial court had not been fully satisfied that the statements in this affidavit were absolutely false, a new trial would have been granted."

Considering that this affidavit was prepared by counsel eminent in the law on behalf of a client convicted of the most horrible crime of matricide, it is certain that the affidavit contains everything pertinent to the case which the affiant was willing to have appear. Yet, this affidavit is open to grave suspicion as well from the statements which it contains, as from the absence of statements which it should contain. Affiant knows nothing of the sailor from whom he bought the pistol; he went to the beach with several companions who were all surprised at the way in which the pistol shot, yet the name of no one of these companions is given; he sold it to a man employed in a repair shop in Oakland, but neither the name of the man nor of the shop is stated. Yet, while he cannot remember the sailor's name nor state the name of his companions, nor the name of the man to whom he sold the pistol, nor the shop in which he worked, he is not only able to remember that the pistol in question was an Iver-Johnson old model, 32-caliber short, but that its number was 19,554. He can remember also the very day of the month—September 30, 1904—upon which he sold the pistol. He swears that he wrote to Weber's attorneys and told them what he knew. No corroboration even of this is offered by the attorneys. But a circumstance of even greater suspicion is that his affidavit failed absolutely to give any evidence of his location or whereabouts. It is to be remembered that a wise discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial. This discretion is to be exercised in determining the diligence shown, the truth of the matter stated, and the materiality and probability of the effect of them, if believed to be true. Moreover, it is to be remembered that a trial court is justified in regarding with distrust affidavits of newly discovered evidence in motions for new trial. People v. Howard, 74 Cal. 547, 16 Pac. 394; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Freeman, 92 Cal. 359, 28 Pac. 261; People v. Gonzales, 143 Cal. 605, 77 Pac. 448; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; People v. Russing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141; People v. Warren, 130 Cal. 683, 63 Pac. 86; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Sing Yow, 145 Cal. 2, 78 Pac. 235. Potent as this affidavit might have been, if believed, it may not be said that the trial court did not exercise a sound discretion in discrediting it, and so in denying the motion in support of which it was brought forward.

We have thus disposed of all the legal questions which in our view demand detailed consideration. That the verdict was the result of passion and prejudice upon the part of the jury cannot be affirmed from the record before us. The community in which the defendant and his family resided was doubtless shocked at the atrocity of the crime, and was doubtless intensely interested in the arrest and conviction of the perpetrator. But when the hand of the law fell upon the son as the criminal, the very horror of the charge must have caused a suspension of judgment in the mind of every right-thinking person. It was almost unbelievable that a son and brother could have done so foul a deed, and that the trial was had and concluded in such a condition of arrested public judgment, seems to be borne out by the fact that defendant scarcely exhausted one-half of the peremptory challenges allowed him by law before obtaining a jury of his fellow-citizens before whom he was put upon his trial.

There was for this court naught to do but to affirm the judgment and order appealed from; and it is so ordered.

We concur: COOPER J.; ANGELLOTTI, J., SLOSS, J.; SHAW, J.; LORIGAN, J.

NOTE.—Justice McFARLAND being unable to act, Justice COOPER, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

BEATTY, C. J. (dissenting). The murder of the Weber family was one of those atrocious crimes which always arouse an intense desire to discover the perpetrator, and bring him to justice. Such a state of feeling pervading a whole community increases the danger that one upon whom suspicion first happens to fall may be convicted upon evidence which, in cases of a less aggravated character would not be deemed thoroughly satisfactory proof of guilt. This fact makes it peculiarly the duty of the courts in such a case to enforce with scrupulous care every right which the law accords to persons accused of crime—rights accorded not for the purpose of screening the guilty, though capable at times of being perverted to that end, but solely in order to guard, as far as may be consistent with the practical administration of justice, against the danger of convicting the innocent. I cannot persuade myself that on the trial this defendant's rights were duly preserved. The evidence against him was wholly circumstantial, and aside from the testimony of the witness Henry Carr (who swore that during the month of August preceding the murder he had sold to the defendant at his shop in San Francisco the identical pistol which was found in the Weber barn 12 days after the murder) was utterly inconclusive. It showed, it is true, that the defendant had an opportunity to commit the murders and set fire to the house before he left the premises at about 6.30 p. m. on November 10th. But it showed, also, that there was ample time for some other person to have entered the house, to have committed the murders and kindled the fire between the time of his departure and the first signs of the fire. It showed, also, that he had a possible motive for the murder of the whole family in his supposed desire to succeed to his father's whole estate, and there was proof of one or two circumstances justifying a suspicion of his guilt. But altogether this evidence was insufficient to make out the case against him beyond a reasonable doubt. With the addition of Carr's testimony, however, if true, the proof was complete. The only defense, therefore, which he could make was to meet the testimony of Carr either by direct rebuttal or by impeachment of his character. Deprived of a fair opportunity to do this, he was in effect deprived of his whole defense. In view of the capital importance of this item of evidence, I think the interests of justice demanded that he should have been given the fullest and fairest opportunity to meet it. He was, on the contrary, studiously and purposely deprived of such opportunity. Extraordinary precautions were taken prior to the trial to keep from him all knowledge of this witness, and of the testimony he was expected to give, and in opening the case in a speech an hour and a quarter in length, counsel for the prosecution made no allusion to this essential link in their chain of evidence, so that the first knowledge the defendant had of the name or existence of Henry Carr, or of his residence or business, was derived from his testimony as a witness in the midst of the trial. This course of procedure is justified upon the ground that there is no law which obliges the prosecution in a criminal case to make an opening statement to the jury, or if one is made, to disclose any more of the case than they deem sufficient. It is true that there is no violation of the letter of any law in concealing from the prisoner and his counsel the name and the expected testimony of a witness who has not testified before a grand jury, but there is a violation of the spirit and policy of our law which has always required the names of all witnesses examined before a grand jury to be indorsed upon the indictment, and which, since prosecutions by information have been authorized, requires the testimony produced before the committing magistrate to be reduced to writing and filed as a public record. The policy of these laws is evident, and they are in the interests of justice. It does not accord with our ideas of justice, and has no tendency to promote its ends, to keep the most important witness against a prisoner in ambush until the moment when he is called upon to make his defense. If a witness that is to be called to support a criminal charge bears a good reputation, and can be depended on to tell the truth when placed upon the stand, there is no occasion to keep him in hiding, and if, on the other hand, he is a person of doubtful antecedents, engaged in unlawful business in an unsavory locality, there is all the more reason that the accused should not be deprived of any legitimate means of exhibiting him in his true character before the jury which is to weigh his testimony.

The argument upon which the course of the prosecution in this particular is defended is, in substance, this: We knew that the defendant was guilty, and if he had been informed of what we expected to prove by Henry Carr, he was capable of resorting to any illegitimate means of preventing or rebutting his testimony, which means, I suppose, that he would have suborned him to keep away from the trial, or would have suborned witnesses to impeach or contradict him. This is an argument which begs the whole question which it is the sole purpose of a trial to determine; the question, that is to say, whether the defendant is guilty. It assumes his guilt in advance as a justification for depriving him of a fair opportunity to show that the evidence against him is false or untrustworthy, and it ignores the fundamental principle upon which our entire system of criminal procedure is based, viz., that the defendant in every criminal action is presumed to be innocent until he is proved to be guilty.

But, after all, it cannot be said that in the matters so far considered there is any ground for reversing the judgment and order of the superior court. The prosecution did not transgress the letter of any law and there was no ruling of the court in this connection which can be pronounced erroneous. The preceding discussion, however, will be seen to have a material bearing upon an erroneous ruling made during the cross-examination of a witness called to sustain the reputation of Henry Carr at a later stage of the proceedings. The cross-examination of Henry Carr showed that he kept a second-hand store on Dupont street, San Francisco, between Pine and California; that under the pretext of buying articles and agreeing to sell them back to the vendor at an advance, he was really doing a pawnbroker's business without a license, that among other articles in which he dealt were black-jacks and brass knuckles. Several witnesses, including a former police judge and officers of the police, testified that his reputation for truth, honesty and integrity was bad, and that they would not believe him under oath. The defendant also offered to prove by a certified copy of the proceedings of the police commissioners of San Francisco that the license of the defendant to deal in second-hand goods had been revoked after a hearing of charges of receiving stolen goods and soliciting a thief to steal. This evidence was excluded on an objection by the prosecution. The objection, of course, was valid upon technical grounds, but there is no doubt that the evidence of the police commissioners themselves, if they had been placed upon the stand, would have been admissible as to his reputation. The defense also offered to prove by a certified copy of a San Francisco ordinance that the selling or keeping for sale of black-jacks and brass knuckles (the weapons of thugs and assassins) was a misdemeanor. This evidence was also excluded on objection by the prosecution, and the ruling was erroneous. The offer was not to prove specific instances of misconduct on the part of Carr, which would have been inadmissible, but only to show that the business which he had admitted that he was carrying on both by his direct and cross examination was a contraband and disreputable business. It was clearly competent and relevant to the question of his character.

A more important error was committed by the court in ruling upon an objection to a question asked the witness Abrams, who had testified to the good reputation of Carr. The cross-examination of this witness developed the fact that his favorable testimony was based solely upon reports that Carr was in the habit of making prompt payments to the wholesale dealers who supplied him with goods. The following questions, answers, rulings and exceptions then ensued: "Q. Have you ever heard discussed the fact as to what business he carried on? A. No sir. Q. Have you ever been told that his license to carry on business has been revoked? A. I am not aware of that fact. Q. Have you ever been told that he had a lengthy examination before the board of police commissioners and that his license was revoked? (The prosecution objected to the question as being wholly irrelevant, immaterial and incompetent.) The Court: The court is certainly of the opinion that the questions are asked for the purpose of the question, not the answers. I don't think you can change the mind of the court upon it. These matters the court ruled out as being grossly immaterial, and the court cannot help but hold and rule that they are asked for the purpose of questions and not the answers, and the court must sustain the objection. (The defendant excepted to the remarks of the court and to the ruling of the court.)" This ruling was clearly erroneous, and the error was aggravated by the unmerited rebuke administered to counsel in sustaining the objection.

I entirely dissent from the view of this question taken in the opinion of the court. The witness had not answered the first question asked him, in what is conceded to have been a proper line of cross-examination. He had evaded it. He was not asked whether he knew that Carr's license had been revoked, but whether he had heard the matter discussed. His answer that he was not aware of the fact might have been literally true, although he had heard the matter discussed. Counsel then, as he had a perfect right to do, asked him the same question in a more specific form, and had a right to an answer. It is a peculiarity of the rule of evidence relating to the impeachment of witnesses that you cannot prove by direct evidence specific instances of improper or criminal conduct for the purpose of discrediting them, but if a witness is called to rebut evidence of bad reputation, he may be asked on cross-examination if he has not heard of such specific instances of misconduct. The cases cited in the opinion of the court sustain this proposition, and it is sustained by abundant authority elsewhere. The first branch of the rule was invoked successfully against the defendant when he offered to prove by the record of the board of police commissioners that they had revoked Carr's license after an investigation of charges of receiving stolen goods, etc. But when he endeavored in a perfectly legitimate manner to avail himself of the other branch of the rule, not only was his right to do so denied him, but his counsel was censured by the court in the presence of the jury, in language clearly implying that he was seeking in bad faith to get before the jury matters which they were forbidden to consider. Suppose that, instead of sustaining the objection of the district attorney, with a plain intimation that nothing more would be heard from the defense, the court had overruled the objection and compelled the witness to give direct answer to the question, and suppose, as is not improbable, that he had admitted having heard of the action of the police commissioners, of what value would the testimony of this witness have been? Instead of rebutting he would have confirmed the evidence offered on the part of the defense. It may be said that this was a small matter not of sufficient importance to justify an order for a new trial, but in my estimation it was not a small matter. Carr was the most important witness for the state, and if it can be supposed that uncontradicted proof of his bad reputation for honesty and integrity would have induced one or more jurors to reject his testimony the defendant would not have been convicted of a most horrible and unnatural crime, and sentenced to an ignominious death. Evidently the prosecution did not consider it a trifling matter, and neither they nor the court had any reason to suppose the question was asked in bad faith. If they expected it to be answered in the negative, the answer could have been given in far less time than it took to interpose the objection, and that would have ended the matter to their advantage.

There are other minor errors disclosed by the record which I do not care to discuss. It is enough to say that the defendant was denied his substantial rights in respect to the testimony of a witness of doubtful reputation, upon the vital point in the case.

For these errors, the judgment and order of the superior court should be reversed.

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149 Cal. 307

PEOPLE v. TREBILCOX. (Cr. 1,291.)

(Supreme Court of California. June 11, 1906.)

1. CRIMINAL LAW—VOLUNTARY INTOXICATION —INSTRUCTIONS.

In a prosecution for murder, an instruction on voluntary intoxication as furnishing no excuse for crime should contain the phrase "when sane and responsible."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1830; vol. 26, Cent. Dig. Homicide, § 605.]

2. SAME—DEFENSES—UNCONTROLLABLE OR IRRESISTIBLE IMPULSE—EMOTIONAL INSANITY.

Uncontrollable or irresistible impulse, or emotional insanity, beginning on the eve of the criminal act and ending with its consummation, is no legal defense to the crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 64; vol. 26, Cent. Dig. Homicide, § 44.]

3. SAME—INSTRUCTIONS.

Requests to charge in a criminal case, based on a supposititious state of facts, to the existence of which there was no evidence, were properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1979.]

4. HOMICIDE—DEGREES OF OFFENSE.

Where deceased placed herself between defendant and A., or for any reason got in range, and defendant fired, intending to strike A., and not then intending nor expecting to strike deceased, but killed deceased, defendant was guilty of murder in the first degree, and not manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 23.]

5. CRIMINAL LAW—ARGUMENTATIVE INSTRUCTIONS.

In a prosecution for homicide, instructions which are purely argumentative in asking the jury to pay particular attention to particular circumstances, as tending to show the irresponsibility or insanity of the defendant, were properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

In Bank. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

William J. Trebilcox was convicted of murder, and he appeals. Affirmed.

Chas. W. Kitts and John Mulroy, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Geo. L. Jones, Dist. Atty., for the People.

HENSHAW, J. Defendant was convicted of the crime of murder in the first degree, and the death penalty was imposed. Upon his appeal the only complaint which he makes is of errors of the court in giving and refusing to give instructions. In general it may be said that the jury was instructed with great care and clearness. The instruction upon voluntary intoxication of which complaint is made omits the phrase "when sane and responsible." This is an important qualification and should always be given; but its omission in this case is covered by other qualifying instructions. People v. Methever, 132 Cal. 332, 64 Pac. 481.

Instructions 5 and 6, given at the plaintiff's request, were to the effect that "uncontrollable or irresistible impulse" or "emotional insanity," beginning on the eve of the criminal act and ending with its consummation, had no legal standing in this state as a defense to crime. In this the court adopted the rule and language of People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651, and People v. Kernaghan, 72 Cal. 622, 14 Pac. 566, a rule which ever since, without wavering or hesitation, has been adopted by this court. The murder was committed in the presence of an eyewitness. The defendant shot and killed his own wife. The testimony for the prosecution showed that at 9 or 10 o'clock of the morning of the homicide he was seen and appeared sober and rational. He then went to a gun store and purchased a pistol, which was loaded for him. About 11 o'clock he went to a saloon, where he drank beer and appeared to be intoxicated, saying: "There will be three funerals before night." From the saloon he went to the residence of his wife, knocked at the front door, which was opened for him, and said to the witness William Allen: "Here I am. You get out." He drew the pistol from his pocket, pointed it at Allen and said: "I have a good mind to kill you." Defendant's wife appeared and asked what was the matter. She stepped to one side. He said to his wife: "You son of a bitch; I will kill you" — and fired and she fell. Within the hour he returned to the saloon, saying to its proprietor: "Hello, Dick! I done it. I have shot my wife." To the city marshal, who arrested him, he said: "I surrender, Dan. I have killed my wife. I was drove to it." The marshal said to him that she might not be dead, and he replied: "If she ain't, I intended she should be."

Some of the instructions which the court refused to give at the request of the defendant were properly refused as being wholly outside of the evidence in the case, or as being based upon a supposititious state of facts to the existence of which there was not the slightest testimony. For example may be quoted defendant's proposed instruction 2: "If it be a fact that Mrs. Trebilcox placed herself between Charles Allen and the defendant, or for any reason got in range and the defendant fired intending to strike Allen, and not then intending nor expecting to strike Mrs. Trebilcox, then the defendant cannot be convicted of murder in either the first or second degree, and can be convicted of no crime higher than manslaughter." This instruction is quoted as an example of those which were presented to the court and which were properly refused. In the first place, as to the facts there was not the slightest testimony that the homicide occurred under these circumstances, and, in the second place, the law of the instruction is as erroneous as the facts, since the homicide by one who kills another under such circumstances is not manslaughter, but murder in the first degree. People v. Suesser, 142 Cal. 365, 75 Pac. 1093. Other instructions were properly rejected as being purely argumentative in their character in asking the jury to pay particular attention to this or that or the other circumstance as tending to show the irresponsibility or insanity of the defendant.

The judgment and order appealed from are therefore affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HALL, J.

NOTE.—Justice McFARLAND being unable to act, Justice HALL, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 4, of the Constitution.

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149 Cal. 293

BONE v. OPHIR SILVER MIN. CO. et al.

(S. F. 3,465.)

(Supreme Court of California. June 7, 1906. Rehearing Denied July 5, 1906.)

1. Master and Servant—Injuries to Servant—Latent Defects — Extraordinary Dangers—Warning.

It is the duty of the master to inform his servant of latent defects, or extraordinary dangers or risks connected with the service, of which the master has knowledge, but which are unknown to the servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 297–316½.]

2. Same—Action—Pleading—Issues.

Where, in an action for injuries to a servant, the complaint alleged that the injury resulted from the master's failure to inform plaintiff of an unexploded shot in a mine, the explosion of which caused the injury, and of which the master had knowledge, but which was unknown to plaintiff, and the answer contained no denial of such knowledge, but averred that plaintiff was fully advised and informed of the danger before he went to work, whether defendants' foreman and watchman, who had knowledge of the danger, were plaintiff's fellow servants, was not in issue.

3. Appeal—Verdict—Conflicting Evidence.

Where the evidence on the sole issue in the case is conflicting, the verdict will not be disturbed on appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William H. Bone against the Ophir Silver Mining Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Deal & Tauszky, for appellants. Milton S. Eisner and Charles S. Wheeler, for respondents.

HENSHAW, J. In the decision of this case in department it was said: "Plaintiff sued defendants to recover damages for personal injuries sustained by him while he was a miner in their employ. The gravamen of his complaint is that he was employed by defendants and put to work excavating rock and soil from a winze in their mine, in which winze there were certain unexploded charges of blasting powder; that these unexploded charges of blasting powder made the place of his labor to a high degree unsafe and dangerous; that defendants knew these facts, but carelessly and negligently put him to work at that place without informing him of them; that while so at work one of these charges exploded and inflicted upon him serious injuries. Trial was had before a jury, and the plaintiff recovered. From the judgment in his favor, and from an order denying their motion for a new trial, defendants appeal. Plaintiff's testimony showed that he had followed mining for some 38 or 39 years, and was thoroughly familiar with the work and with the use of giant powder. He testified that there would have been no danger in his place of work if he had known of the unexploded charges, but that, being in ignorance of this fact, he was liable at any time to strike one of them with his pick and cause it to explode. This was, in fact, what happened. He further testified that it was the rule in the mine that when a shot failed to explode during a shift the miners coming off reported to the foreman or watchman, who, in turn, would notify the men of the oncoming shift, so that they could guard against any possible danger. In this particular case there was a sharp conflict in the evidence as to whether or not the plaintiff had been informed. The jury, however, accepted his testimony, and it must be taken as proved to their satisfaction that plaintiff was put to work in the winze in which there were unexploded charges of giant powder without being informed of that fact. Were the defendants responsible in law for this failure so to inform him? The rule is unquestioned that the duty of informing a servant of latent or extraordinary dangers or risks connected with the service of which the master has knowledge is not only a duty, but is a primary duty, such that the delegation of it to another cannot relieve the master from responsibility, if that other, in turn, shall fail to give the necessary information. Baxter v. Roberts, 44 Cal. 192, 13 Am. Rep. 160; Rodgers v. C. P. R. R. Co., 67 Cal. 607, 8 Pac. 377; Berg v. Mining Co., 12 Mont. 217, 29 Pac. 545; Elledge v. Railway Co., 100 Cal. 287, 34 Pac. 720, 38 Am. St. Rep. 290; Gibson v. Sterling Furniture Co., 113 Cal. 6, 45 Pac. 5; Higgins v. Williams, 114 Cal. 182, 45 Pac. 1041; Tedford v. Los Angeles Electric Co., 134 Cal. 80, 66 Pac. 76, 54 L. R. A. 85; Simone v. Kirk (N. Y.) 65 N. E. 741; Woods' Master and Servant (2d Ed.) §§ 354–448; 4 Am. & Eng. Ency. of Law, p. 60, note. It is to be noted, however, that this rule applies to latent and extraneous dangers of which the master himself has knowledge, or of which, with the exercise of ordinary care, he should have had knowledge. This is, of course, a just limitation upon the rule; for otherwise the law would be exacting impossibilities if it attempted to compel the master to inform the servant of dangers as to which the master himself knew nothing, and concerning which he could have acquired no information. The question, therefore, to be resolved in this case, is that presented as an issue by the pleadings, namely, did the defendants have knowledge of these unexploded blasts, and yet put the plaintiff to work in the winze where they were without giving him any information concerning them?"

The opinion in department then proceeded to show that the only persons having knowledge of the unexploded shots were the foreman and the watchman, and the case was disposed of under an instruction which it was thought that the court had given to the effect that the foreman and watchman were fellow servants of plaintiff, and their failure to inform plaintiff was the negligence of a fellow servant, for which defendants were not responsible. Upon petition for rehearing it was pressed upon the attention of the court, first, that the court was in error in supposing that the quoted instruction had been given. In fact, it was a proposed instruction which had not been given. Second, it was strenuously insisted that the question which in department was said to be presented as an issue, namely, "Did the defendants have knowledge of these unexploded blasts, and yet put the plaintiff to work in the winze where they were, without giving him any information concerning them?" was not a question in the case, and that no issue whatever had been joined by defendants' answer as to the knowledge of the defendants which was charged against them in the complaint.

The complaint was framed under the rule above set forth in the quotation from the department opinion, namely, that it is the master's duty to inform his servant of latent or extraordinary dangers or risks connected with the service, of which the master has knowledge and the servant has not. The complaint charged that the defendants did have this knowledge, that the plaintiff did not have it, and that the defendants put plaintiff to work without informing him of this latent danger. Under the most liberal construction of defendants' answer it cannot be said that issue is joined upon the allegation of their knowledge. First, there is no denial whatsoever of the knowledge. Second, the answer, admitting knowledge of the unexploded charges, rests its defense upon the averment that plaintiff was fully advised and informed of the danger before he went to work. This admission in the pleading necessarily eliminates from the case all question as to whether or not the foreman and the watchman were fellow servants, and as to whether or not, in the operation of a mine, there was, under circumstances such as here disclosed, any primary duty cast upon the defendants to inform the oncoming shift of unexploded blasts, or whether a failure of an outgoing shift so to do was merely the negligent failure of a fellow servant. All this is eliminated we repeat, because the case as presented by the pleadings is a case where the employer admits that at the place where his employé was put to work there were latent and extraordinary dangers, and that he (the employer) knew of these dangers. There is left in the case the sole issue as to whether or not, so knowing, he advised his employé of this concealed hazard. Upon this point, as has been stated, the evidence is conflicting and the verdict of the jury may not be disturbed.

For these reasons, the judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HARRISON, J.; LORIGAN, J.; SLOSS, J.

NOTE.—Justice McFARLAND being unable to act, Justice HARRISON, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 4, of the Constitution.

149 Cal. 297

HUNT v. JONES et al. (S. F. 3,578.)

(Supreme Court of California. June 8, 1906. Rehearing Denied July 5, 1906.)

1. PLEADING—INDEFINITENESS—DEMURRER.

That a complaint is indefinite or uncertain can be raised only by a special, and not by a general, demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 511–518.]

2. COVENANTS — PERSONAL COVENANTS — ENFORCEMENT—PURCHASER WITH NOTICE.

Personal covenants or agreements, bestowing benefits and imposing restrictions on the use of land, may be enforced in equity against a subsequent purchaser from the covenantor with notice of the existing equitable claim in favor of another.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 30.]

3. WATERS AND WATER COURSES—IRRIGATION COMPANIES — SALE OF WATER RIGHTS — RIGHTS OF PURCHASER.

Complainant contracted to purchase certain land from a colony association, and as a part of the contract the association sold to complainant a sufficient amount of water from its water supply to irrigate the land, to be delivered as plaintiff might need the same, at a rate not to exceed 10 cents per miners' inch. The water right was the main inducement to the purchase of the land, and the land without the water was worth only a small part of the consideration paid. Thereafter the association sold all of its land and water rights to defendant company, which purchased with knowledge of complainant's contract, but later refused to furnish water to irrigate complainant's land, after he had expended large sums in planting an orchard thereon, unless complainant would pay $100 a year. *Held*, that defendant water company purchased the land from the association with notice of its covenant to furnish complainant water as agreed, and that complainant was entitled to restrain defendant from turning off the water in violation of such contract.

Department 2. Appeal from Superior Court, City and County of San Francisco.

Action by A. B. Hunt against A. F. Jones and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

A. B. Hunt, in pro. per. Corbett & Goodwin, for respondents.

LORIGAN, J. This is an appeal from a judgment, and involves the validity of an order sustaining a general demurrer interposed to an amended complaint by the defendant Oroville Water Company. The complaint (it is quite lengthy, and we give such a synopsis of it as we deem pertinent on this appeal) alleged that in 1887 an association known as the "Thermalito Colony Company" was the owner of 2,000 or 3,000 acres of land near Oroville, Butte county, and was the owner at the same time of a large supply of water; that it had surveyed said land into lots and blocks for a colony site, and had laid mains and water pipes along the avenues of said tract, and was running water through them for the purpose of irrigating said lots and blocks, so as to enable the production thereon of citrus fruits; that thereafter, and prior to 1889, plaintiff entered into a written contract with said company to purchase, and did purchase, a block of land consisting of 20 acres; that as part of said contract and sale said company sold to plaintiff a sufficient amount of water from its said water supply to irrigate said 20 acres of land so that it would grow citrus fruits thereon, which water was to be delivered by said company upon said 20 acres in such quantities as plaintiff might need, plaintiff to pay said company not to exceed 10 cents per inch, miners' measurement, for each 24 hours the said water was run and used by him; that the covenant selling said water and agreeing to furnish the same was made a covenant running with the land then owned by said company, and also with the water supply, mains, ditches, and water pipes owned and used by it; that plaintiff paid to said company for said 20 acres of land and said water the sum of $2,000 cash; that the main and only inducement for the purchase of the said land was the sale of said water as aforesaid, and that the land without the water was not of the value of $5 an acre; that thereafter said company not having conveyed said land and water to plaintiff, and the legal title being in defendant A. F. Jones, at the request of the company, Jones conveyed to plaintiff said land and water, which conveyance in 1894 plaintiff caused to be recorded in Butte county. At the time of his purchase of the land and water the company had laid down mains and pipes for carrying it to the tract purchased by him; that relying on the promises, covenants, and agreements of said company to furnish said water at the price agreed, said plaintiff set out said 20 acres in olive and orange trees, and said company furnished plaintiff with water from said pipes and mains according to the terms of the agreement for many years thereafter; that in 1898 the defendant Oroville Water Company purchased from said Thermalito Colony Company its entire water supply, water ditches, water rights, pipe lines, and mains, and its right to run water in said pipes and deliver and sell the same to persons who had purchased land from said colony company in said tract, and ever since said date has been selling and furnishing water to said persons by means of said water supply and mains aforesaid; that at the time of the purchase by said water company it knew that plaintiff had purchased said 20 acres of land from the Thermalito Colony Company, and a sufficient amount of water to irrigate the same, according to the terms herein referred to, and had for many years been in the actual use and possession of said land, growing citrus fruits thereon, and irrigating the same from said water supply purchased by him from the colony company; that the said Oroville Water Company after its purchase and up to 1902 furnished water to irrigate said piece of land according to said terms; that in said year it notified plaintiff that he would have to pay $100 a year for water rights to irrigate said lot, and if half thereof was not paid by the 1st of April of that year the water would be shut off from use by him; that if said water is shut off as threatened by defendant, and the said orange and olive trees not irrigated each month they will die; that said land without said water to irrigate said trees would be worthless; that there is no means or way by which said land can be irrigated except by said water supply, water pipes and mains of defendant, and that to shut off said water would cause him irreparable damage and injury; that the plaintiff had already expended in the care and growing of said trees more than $4,000. The prayer of the complaint was for a perpetual injunction restraining defendant corporation from shutting off the waters threatened, and for a decree determining his right to said water as contracted for and conveyed by the Thermalito Colony Company to him.

As we have said, the demurrer which was sustained to the complaint was a general one. Much of the brief of respondents is devoted to the point that the allegations of the complaint are indefinite in several respects, particularly as to whether plaintiff purchased his land and water rights from the Thermalito Colony Company, an association, or the Thermalito Colony Company, a corporation, which latter corporation, while we have not mentioned it heretofore in our statement, was composed of the same persons who had constituted the association and by the allegations of the complaint, it appears therefrom, succeeded to all the rights of the association to the water supply, water mains, and right to furnish water to said colony, and subsequently transferred them to the defendant Oroville Water Company. We think a fair consideration of the complaint shows that the plaintiff alleged that he purchased his land and water from the Thermalito Colony Company, the association. But if the complaint were indefinite or uncertain in this respect, it was subject to a special and not a general demurrer. Amestoy v. Electric R. P. Co., 95 Cal. 311, 30 Pac. 550; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568.

It is further insisted that the contract with reference to the water supply for the benefit of plaintiff's land made by the association was not a covenant running with the land, but, at most, a personal covenant, which was not binding upon the water company defendant, as assignee of the Thermalito Colony Association. We do not discuss the point as to whether the covenant here in question was one running with the land so as to bind the assignee of the water company as grantee of plaintiff's covenantor, the Thermalito Colony Company, association, because we think that, treated simply as a personal covenant or agreement under the allegations of the complaint, a court of equity would be warranted in enforcing it against the defendant. There can be no doubt of the proposition that personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another. The general rule is stated in Pomeroy's Equity Jurisprudence (2d Ed.) §§ 688 and 689: "The third and, in its practical effects, by far the most important rule is that a party taking with notice of an equity takes subject to that equity. The full meaning of this most just rule is that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of an existing estate, interest, claim, or right, or to some subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. * * * A purchaser with notice of a prior contract to sell or lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution. * * * On the same principle, if the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements, or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which 'in law runs with the land.'" In Whitney v. Union Railway Company, 11 Gray (Mass.) 359, 71 Am. Dec. 715, it is said: "The precise form of the nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.

These authorities undoubtedly sustain the proposition that where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land. And we think there can be no question but that the facts alleged in the complaint show a proper case for the application of the rule in the case at bar. There is every equitable reason for its application, and none to be suggested why it should not be applied. The Oroville Water Company acquired its title to the water works and right to distribute water throughout the colony tract, from the company from which plaintiff had purchased his land and right to the water, with full knowledge of the interest that plaintiff had acquired under his deed. It undoubtedly was advised of the situation and surroundings, and knew that the land on which this water was being distributed was only valuable by reason of the fact that water to irrigate it could be provided. The sole inducement to the purchaser of the tract acquired by plaintiff was that he could acquire a water right in connection with it, that without it the land was practically worthless, and he did acquire this right practically for a cash consideration of $1,900, the right to have water distributed on his land at certain fixed rates, and on the faith of such purchase and contract set out his orchard and expended thousands of dollars in caring for it; that without the use of this water his orchard would perish and his investment become a total loss. All these facts must, in the nature of things, have been known to the defendant corporation when it purchased from the association, and it particularly knew, so it is alleged, that plaintiff had purchased his land and accompanying water right from its grantor. Taking all these facts into consideration it would be clearly inequitable after plaintiff had paid a full consideration of $1,900 for the water right, which he was enjoying at the time that the defendant made its purchase from the association, to say that the association could transfer all its interest in the water supply to the defendant, and that though the latter knew of plaintiff's purchase and right thereunder, it, nevertheless, acquired the property from the association free from any claim or interest in favor of plaintiff as to the particular water right which he had previously purchased, and likewise free from any obligation the association had incurred or assumed relative to it in his favor. If this were true, it would follow that defendant would be under no obligation to furnish plaintiff with any water for irrigation at all, with the inevitable result, if it did not, that his orchard would perish and his property become worthless. The facts recited in the complaint, we think, set forth a proper case in which equity should interfere to prevent this result, and that the order sustaining the demurrer was erroneous.

The judgment is reversed, with directions to the lower court to overrule the demurrer, and allow the defendant to answer.

We concur: BEATTY, C. J.; HENSHAW, J.

149 Cal. 287

PEOPLE v. FALLON. (Cr. 1,284.)

(Supreme Court of California. May 31, 1906.)

1. Criminal Law—Admissions — Homicide—Corpus Delicti—Proof.

In a prosecution for homicide, evidence of the corpus delicti *held* sufficient to warrant the admission of defendant's statements, made immediately after the shooting, that he had shot his wife.

2. Homicide—Malice Aforethought.

An instruction in a prosecution for homicide that malice aforethought is manifested by the doing of an unlawful or felonious act intentionally and without legal cause or excuse, not necessarily implying a pre-existing hatred or enmity towards the individual injured, was a correct statement of the law.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 15–18.]

3. Same—Insanity—Declarations—Instructions.

Where, in a prosecution for homicide, the jury were fully instructed on the subject of insanity and of defendant's right to an acquittal in case the jury should find that at the time of the homicide he was insane from any cause and was unable to distinguish between right and wrong as to the act charged, defendant was not prejudiced by the court's refusal to charge that if the jury found him insane, they should disregard declarations made by him at the time of the homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 715–718.]

4. Same—Form of Instruction.

Where, in a prosecution for homicide, declarations of defendant, made immediately after the shooting, that he had shot his wife, together with accompanying statements assigning his reasons for so doing, were admitted in evidence, a request to charge that if the jury were satisfied by a preponderance of the evidence that defendant, at the time of the fatality, was in such a state of mind that he could not distinguish between right and wrong as to the act charged, the jury should disregard, as a circumstance tending to convict him, any and all statements alleged to have been made by him at the time, for the reason that if he was insane he was not responsible and could not be bound by his statements was properly refused, as ignoring the jury's right to consider defendant's statements in determining the question of his sanity.

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Thomas P. Fallon was convicted of murder, and he appeals. Affirmed.

J. J. Guilfoyle, Jr., and Frank V. Cornish, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

LORIGAN, J. Defendant was prosecuted for the murder of his wife, Agnes Fallon, in San Francisco, April 1, 1904, convicted, sentenced to be executed, and appeals. Several grounds are urged for a reversal.

It is insisted that the court erred in admitting evidence of statements, made by defendant immediately after the shooting, that he had shot his wife, on the ground that at the time such evidence was admitted the corpus deliciti had not been proven. When these admissions were received the evidence showed that about 6 o'clock on the evening of April 1, 1904, the defendant and his wife entered her room at 949 Mission street (they were living apart, she having commenced an action for divorce from him a couple of days previously); that shortly thereafter pistol shots, fired in rapid succession in the room, were heard; that defendant immediately came out of the room with a smoking pistol in his hand, which he placed in his pocket, and when it was taken from him it was warm; that this pistol had been in the possession of defendant for several days previously and when taken from him at the time of the shooting contained four exploded cartridge shells; that immediately after the shooting his wife was found lying on the floor of the room under a table with four bullet wounds in different part of her body—one in the throat another in the heart—from the effects of which she immediately died. This evidence was sufficient proof of the corpus delicti or of the elements of crime—the death of deceased as the result of criminal means or agency—to warrant the admissions of defendant that he killed her; admissions which the evidence complained of shows he made as he came out of the door with the pistol in his hand and which he subsequently reiterated. This proof of the corpus delicti, existing at the time these particular objections to the admissions of defendant were offered, was further supplemented by additional evidence on that subject, which makes the further complaint of defendant that the court erred in refusing to advise the jury to acquit for failure of such proof entirely without merit.

Complaint is made relative to instructions. The court instructed the jury fully on the different degrees of murder, and upon the subject of "malice aforethought," express and implied, in its relation to the crime of murder. The court defined these different kinds of malice aforethought as they are defined in the Code itself, and continuing, used this language: "Malice aforethought, of either kind, is manifested by the doing of an unlawful or felonious act intentionally and without legal cause or excuse. It does not imply a pre-existing hatred or enmity towards the individual injured." It is of this quoted portion that complaint is made. We perceive no valid ground for criticism of it. An exactly similar instruction was complained of, but was approved, in People v. Balkwell, 143 Cal. 263, 76 Pac. 1017, as being a correct statement of the law.

The only defense interposed on behalf of defendant at the trial was that at the time of the homicide he was insane. Among other instructions on the matter of insanity requested by counsel for defendant was the following: "If you are satisfied by a preponderance of evidence that the defendant at the time of the fatality was in such a state of mind that he could not distinguish between right and wrong as to the act charged, you should disregard, as a circumstance tending to convict him, any and all statements alleged to have been made by him at that time for the reason that if then insane he was not responsible for and cannot be bound by any statement or statements made by him at that time." This instruction the court refused to give, and counsel now insists that the refusal was error. We cannot agree with him. The jury were fully instructed under other proffered instructions of the defendant given by the court, and in the instructions given by the court of its own motion, upon the subject of insanity and of the right of defendant to an acquittal should they find that at the time of the homicide he was insane from any cause—unable to distinguish between right and wrong as to the act charged. The jury were particularly instructed at the request of defendant that if, at the very time of the commission of the act alleged against him he was mentally unconscious of the nature of the act in which he was engaged, he was legally irresponsible for it and should be acquitted. It cannot be said that the defendant was prejudiced in refusing to give an instruction telling the jury that, if they found him insane, then to disregard declarations made by him at the time of the homicide when they were repeatedly told that a finding of insanity itself entitled him to an acquittal.

But, aside from this, the instruction as requested was misleading. The statements made by defendant, which his counsel sought by this instruction to have the jury informed that they should disregard if they were satisfied defendant was insane, were his declarations made immediately after the shooting that he had shot his wife and certain accompanying statements assigning his reasons for doing so. The instruction as tendered is open to the objection that it leaves the jury to infer that they may only take into consideration the statements of defendant accordingly as they find from the other evidence upon the subject whether at the time of the killing he was sane or insane; that, if from such evidence they find him sane the statements may be considered as a circumstance tending to convict; if they find him insane the statements must be disregarded as a circumstance tending to that end. The instruction ignores entirely the right of the jury to take these statements into consideration in determining the question of sanity itself, or rather leaves an inference that they are only to be considered after sanity is otherwise established. Of course, no such limitation on the right of the jury to consider such statements is warranted. When the sanity or insanity of a defendant at a given time is involved, it is always important and proper that his acts and declarations at such time should be considered by the jury in determining that question, and any instruction which even inferentially limits or restrains that right is improper. There may be cases (although the evidence in the case at bar does not bring it within the class) where peculiar circumstances might call for an instruction to the jury to disregard incriminating admissions made by a defendant should the jury find him insane when they were made—an instruction in addition to general instructions to be applied in determining the question of sanity, but such special instructions should at least be framed so that the jury would not be left under the erroneous impression that the admissions referred to were not to be considered by them as bearing on the question of sanity but only to be disregarded as a "circumstance tending to convict" should the other evidence in the case show that the defendant was insane when he made them.

It is true, as asserted by counsel for defendant, that, in the case of People v. Wreden, 59 Cal. 396, it was held, among other errors warranting a reversal, that the lower court should have given an instruction tendered by the defendant in that case that "'if, at the time of the making of the alleged statements,' the jury were 'satisfied that the defendant was insane,' they 'should disregard them entirely, no matter what caused the insanity.'" This, as we have quoted it, is the entire instruction as it appears to have been there requested. The opinion in that case does not disclose the facts or circumstances under which the statements of the defendant referred to were made, or indicate the statements themselves to which the instruction was intended to apply. It is probable that peculiar facts in that case, which did not exist in the case at bar, may have made the instruction a proper one to have been given, independent of other general instructions as to the law to be applied in determining the question of sanity. But whether they did or not it will be noticed that the instruction in the Wreden Case is very different from the one under consideration here. The giving of it would be in entire harmony and consonant with the right of the jury to take such statements into consideration in determining the question of sanity. The instruction there was open to no objection that it entirely limited the jury to a consideration only of the statements of the defendant as a circumstance tending to convict, ignoring them as a proper element to be taken into consideration in determining the question of sanity or insanity, while this apparent limitation and restriction on the right of the jury to consider it for that purpose is the particular vice of the instruction requested at bar.

This disposes of all the points made on appeal, and finding no error in the record, the judgment and order denying a new trial, which are appealed from, are affirmed.

We concur: SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; HALL, J.

NOTE. Justice McFARLAND being unable to act, Justice HALL, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

(149 Cal. 269)

JERSEY ISLAND DREDGING CO. v. WHITNEY. (S. F. 3,127.)

(Supreme Court of California. May 28, 1906. Rehearing Denied June 25, 1906.)

1. EVIDENCE—PAROL EVIDENCE—CONTRADICTING RECEIPT.

Where defendant claimed that a receipt was given in full satisfaction of all work done and to be done under a contract, while plaintiff contended, in accordance with the true construction of the receipt, that it only included plaintiff's claim for work done up to and including the day on which the receipt was executed, parol evidence as to the circumstances under which the receipt was given was admissible to prove defendant's contention.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1829-1842, 2083.]

2. APPEAL—PREJUDICE.

Where answers of a witness, objectionable as stating the witness' conclusions, constituted no more than a mere summary, in the form of a conclusion or opinion, of the previous testimony of the witness, and could have added nothing to the effect thereof in the mind of the trial judge, the admission of such conclusions was harmless.

3. RELEASE—CONSTRUCTION.

Where a bill for services was dated September 17, 1900, and contained a claim for $721.35, purporting to be for work to and including September 13th, and across the face of the bill was written a statement that $650 was received in full satisfaction of all claims, such writing, though treated as a release, instead of a mere receipt, was prima facie effective only as a discharge of the services itemized in the bill.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 73-76.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Jersey Island Dredging Company against Arthur L. Whitney. Judgment in favor of plaintiff and an order denying defendant's motion for a new trial were reversed by Court of Appeal. 86 Pac. 509. Affirmed.

Myrick & Deering, for appellant. Walter H. Linforth, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff to recover the sum of $550.45, alleged to be due it from defendant, for certain dredging work done by it on defendant's ranch at the head of San Pablo Bay, between the 19th and 30th days of September, 1900, at the agreed price of $70 per day of 22 hours. Plaintiff had judgment for the full amount claimed, and defendant appeals from such judgment, and from an order denying his motion for a new trial.

Among other defenses, the defendant alleged that all claims of plaintiff on account of any dredging work had been fully compromised, satisfied, and discharged. The trial court found against defendant upon this issue. The principal point made here is as to the rulings of the trial court in admitting certain evidence upon this issue. To a proper understanding of these rulings, a brief statement of facts is essential. According to the contract between the parties, the dredger was hired by defendant at a certain rate per diem of 22 hours, viz., $70, the dredging work to be done under the direction of defendant, and to continue during his pleasure; the contract not specifying, describing, or limiting the work to be done. On September 1, 1900, a bill had been presented by plaintiff to defendant for work done prior to that date, amounting at the prescribed rate to $1,097.75. This bill itemized the days and hours of work. Upon this bill, defendant had paid $1,000. On or about September 17, 1900, plaintiff presented to defendant a bill, bearing date September 17, 1900, for $721.35, purporting to be for work to and including September 13th. Upon this bill the charges were itemized as follows, viz.: "Bal. due on bill Sept. 1st, $97.75; 143 hour's work, $455.00; 53 hours aground, $168.60." Attached thereto was an itemized statement of the hours of actual work each day. At this time the dredger was still engaged in the service of defendant, and continued so to be to and including the 1st day of October, and between September 17th and October 1st the work for which recovery is here sought was done. Upon the presentation of the bill of September 17th, some dispute arose between plaintiff's president, Mr.

Wright, and defendant, as to the precise nature of which there is a conflict of evidence, which continued over a period of several days, until, on September 25th, defendant paid Wright $650, and wrote across the face of the bill the following, viz.: "Sept. 25, 1900. Paid $650 in full satisfaction of all claims and guaranteed against liens." This was signed by Wright as follows: "Jersey Island Dredging Co., per W. H. Wright, Pres't." At this time no bill for any work done subsequent to September 13th had been presented. It is this statement, written across the face of the bill of September 17th, that is claimed by defendant to constitute a written contract of compromise and release of all claims on account of dredging work, not only for such work as was done prior to September 17th and embraced in said bill, and that done between September 17th and September 25th, but also for that done subsequent to September 25th.

It is apparent that, construing this writing most favorably to defendant, it could not include any claim for work done subsequent to September 25th, the day it was executed, and that defendant was compelled to resort to parol testimony to substantiate the claim made by him, viz., that the $650 was paid and received in full satisfaction of all work done and to be done. This he was allowed to do, and he testified that there was a dispute both as to the character and manner of work and the charges therefor, and that he and Wright agreed that Wright would go on and finish such dredging work as remained to be done, and that he would pay Wright $650, with the understanding that such payment ended the matter, and with the $1,000, already paid, constituted full payment for all services rendered and to be rendered under the contract. This was the only claim made by defendant, and there was no pretense that the writing was made to cover, in addition to the charges specified in the bill, merely amounts due at its date, September 25th. As we have said, defendant was allowed to give this evidence to support a claim at variance with the terms of the writing. In rebuttal, Wright was allowed to testify that the only item in the bill of September 17th that was ever disputed was the charge of $168.60 for 53 hours while the dredger was aground; Wright claiming that such charge was entirely proper and customary, and that, after several interviews, he agreed to make a slight reduction, and accept $650, if Whitney would pay that sum at once. He further testified that there was no discussion or consideration as to any other bill or claim than the one presented, and no discussion as to the payment of $650 being in full as to anything except that bill, and that at the time of the payment he did not know what work had been done since the making of the bill. Thus far, he certainly did no more than to testify, in reply to the testimony of defendant, as to the circumstances under which the payment was made and the writing signed, and to contradict the testimony of defendant as to a parol agreement at variance with the terms of the writing. He was then asked: "When you accepted this $650 and signed this paper, what were you settling?" and answered: "That bill," referring to the bill of September 17th. He was then asked: "Were you settling anything else?" and answered: "No sir." The questions were each objected to on the sole ground that they constituted efforts to contradict a writing by parol evidence, and the objections were overruled. These are the only rulings relative to the admission of evidence which are assigned as error and discussed in defendant's brief.

The questions were objectionable as calling for the mere opinion or conclusion of the witness, but no such objection was made. And even if error was committed in the admission of such testimony, we would not be justified in holding it to be prejudicial, for the answers of the witness did no more than to give the conclusion which would necessarily follow his testimony as to the circumstances under which the alleged release was signed. The answers to the questions under consideration constituted no more than a mere summary, in the form of a conclusion or opinion, of the previous testimony of the witness, and could have added nothing to the effect thereof in the mind of the trial judge. There was certainly no error in the admission of such previous testimony. Assuming that the writing relied on constituted a valid contract or release, instead of a mere receipt, the question still remained as to what was released thereby. It is true the writing stated that the $650 was "in full satisfaction of all claims"; but, taking into consideration the fact that this was written across the face of the itemized bill of September 17th and that the amount named and paid was less than the total amount of such bill, it cannot reasonably be claimed that it clearly and explicitly shows a release and satisfaction of all claims, of whatever nature, from the beginning of the world to the date thereof. Taking the whole writing together, which includes, not only the statement as to payment, but also the bill on which the statement is written, one might reasonably conclude therefrom that the whole subject-matter of the release was the bill upon which it was written and the claims evidenced thereby, and, in the absence of any evidence at all as to the surrounding circumstances, there would be strong ground for holding this to be the proper construction of the writing. Under these circumstances, parol evidence as to the surrounding circumstances was admissible, in order that the trial judge might be placed in the position of those whose language he was to interpret. Civ. Code, § 1647; Code Civ. Proc. § 1860. Taking as true the evidence of Wright as to these circumstances, which for the purposes of this appeal must be done, there can be no doubt as to the sufficiency of the evidence to sustain the conclusion of the trial court that the instrument relied on by defendant was a release only of such claims as were evidenced by the bill of September 17th. As has been said, none of these claims are involved in this action.

We cannot see that the additional words "and guaranteed against liens" are at all material in the determination of the question as to the subject-matter of the alleged release. The evidence was sufficient to sustain the finding of the trial court to the effect that no part of the amount claimed had been paid. Some point is made as to $250 shown to have been advanced by a tenant of defendant to plaintiff, but the evidence entirely fails to show that this payment was made for or on account of the defendant, or that it was intended as a payment at all. No other point is made for reversal.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

BEATTY, C. J. I dissent for reasons that appear in the opinion of the District Court of Appeal. 86 Pac. 509.

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149 Cal. 303

MORSE v. STEELE (S. F. 3,584.)

(Supreme Court of California. June 8, 1906. Rehearing Denied July 5, 1906.)

EXECUTORS—ACTIONS EX CONTRACTU—PRESENTATION OF CLAIMS.

Plaintiff delivered certain animals to defendant's testator under the latter's agreement to care for them as carefully as he did his own stock and to breed them for four years, at the end of which time the young were to be sold for the mutual benefit of plaintiff and testator; the agreement further providing that it should come to an end at the expiration of four years, and that testator should have no ownership of the original stock delivered into his custody. Testator died before the expiration of the contract. Plaintiff sued the executrix under a complaint, alleging performance of the contract on plaintiff's part, but that testator in his lifetime, and the executrix thereafter, failed to properly care for the animals, by reason of which they were lost and destroyed and never returned to plaintiff, to his damage, etc. *Held*, that the complaint alleged a cause of action ex contractu, and not for tort, and was therefore demurrable for failure to charge that the claim was presented to the executrix, as required by Code Civ. Proc. § 1500.

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Henry N. Morse against E. S. M. Steele, as executrix of E. L. G. Steele, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Noble Hamilton, R. M. F. Soto, and J. W. Dorsey, for appellant. Bishop, Wheeler & Hoefler and J. F. Bowie, for respondent.

PER CURIAM. In September, 1892, E. L. G. Steele, the owner of a ranch in El Dorado county, entered into a written contract with plaintiff with reference to the care and proceeds of certain live stock, which were to be and were delivered by plaintiff to Steele. By the terms of the contract plaintiff was to deliver about 100 jacks, jennies, and mares to Steele upon his ranch. Steele was to receive the animals and care for them "as carefully as he did for his own stock." They were to be bred for four years, and at the end of four years the colts were to be sold for the mutual benefit of the parties to the contract, provided that by the consent of both parties a portion of the colts might be sooner disposed of. It was provided that the agreement should come to an end at the expiration of four years, and that Steele should have no ownership in the original stock delivered to his custody. About two years after the execution of the contract Steele died, and the defendant and respondent herein became executrix under his will. After she had qualified as such executrix plaintiff presented the contract in question to her as a contingent claim against the estate. The claim was rejected, and plaintiff then commenced suit in the superior court of the city and county of San Francisco. Judgment passed for the executrix upon the pleadings; it being shown on the face of the complaint that the action was prematurely brought and that the claim was not due when the complaint was filed. Upon appeal the judgment of the lower court was affirmed by this court in Morse v. Steele, 132 Cal. 456, 64 Pac. 690. The present action was brought on September 28, 1898, while the appeal in the former action was pending. The two months allowed by section 1498 of the Code of Civil Procedure after the claim became due within which to commence suit thereon had elapsed; the present action, in fact, having been brought nearly two years after the claim upon which it was founded had become due. Respondent herein is sued as executrix only, and it is asked that judgment be rendered against her "as executrix payable in due course of administration." The defendant demurred to plaintiff's complaint. The demurrer was sustained by the court, without leave to amend, upon the ground that the complaint did not show that the claim, which was the foundation of the suit, had been presented to the executrix of Steele's estate, which presentation is, under the provisions of section 1500 of the Code of Civil Procedure, a prerequisite to a suit thereon, if the claim be founded on contract. It is undisputed that a complaint which does not allege presentation of the claim, if presentation of a claim is necessary, fails to state a cause of action, since by section 1500 presentation of a claim is a condition precedent to suit. Ellissen v. Halleck, 6 Cal. 393; Morrow v. Barker, 119 Cal. 65, 51 Pac. 12; Humboldt

Society v. Burnham, 111 Cal. 345, 43 Pac. 971.

To meet this, appellant contends that the cause of action set forth in the complaint is not for breach of contract, but is for tort, pure and simple, and that the presentation of a claim is, therefore, not necessary. This position is untenable. The complaint sets up the contract, alleges performance upon the part of plaintiff, and avers that Steele in his lifetime, and afterwards defendant as executrix, failed and neglected to take care of the animals, and that by reason of such failure and neglect they were lost or destroyed, and that they had never been returned to him, to his damage in the sum of $8,000. Though not expressed, it was the implied duty of Steele in his lifetime, and of the executrix, to have returned the stock at the expiration of the bailment, and this duty itself arose under the contract, as explicitly as though it had been expressly provided for. The complaint avers that "immediately after said contract was executed and in pursuance thereof" plaintiff delivered the live stock to Steele, and the case is, in all its essentials, like that of Chapman v. State of California, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158, where the harbor commissioners of San Francisco had received upon the wharves of the city coal of the plaintiff. While the coal was upon the wharf it broke, "by reason of the negligence and carelessness of the defendant, its officers, and agents, * * * in failing and neglecting to keep said wharf in good and sound condition and repair," and the coal was sunk in the bay and lost to plaintiff. The action was against the state. If it was in tort, plaintiff was not entitled to recover. This court, after so stating, declared: "But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort, pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract. * * * A wharfinger is one who for hire receives merchandise upon his wharf, either for the purpose of forwarding or for delivery to the consignee upon such wharf, and matters alleged in the complaint show a contract of the latter character, and the state is bound thereby to the same extent as a private person conducting the business of wharfinger would be under a similar contract. * * * We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract." In Stark v. Wellman, 96 Cal. 400, 31 Pac. 259, the first count of the complaint averred that plaintiff delivered to defendant, at his special instance and request, a package containing $650 in coin, in consideration of which defendant undertook and agreed to take due and proper care of it, and to redeliver the same to plaintiff upon demand. It charged that defendant did not take due and proper care of said package, but so carelessly conducted himself with respect thereto that it was lost through his gross carelessness, and that he failed to redeliver it upon demand. The second cause of action was for conversion of the same package. A demurrer was interposed to the complaint upon the ground that a cause of action arising upon a contract was improperly joined therein with a cause of action for tort. The plaintiff contended that the first count was for a breach of duty imposed by law and therefore was in tort. This court said: "This contention cannot be sustained. It is true the owner of property injured by the tortious act of another may sue for the injury in tort, without noticing a contract with the wrongdoer of which the wrongful act is a violation. * * * But there can be no question that he may sue for the breach of a contract, as was done in this case. The duty which the defendant is charged with having violated is expressly derived from the contract."

For the foregoing reasons, the judgment appealed from is affirmed.

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149 Cal. 266

VOORMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,565.)

(Supreme Court of California. May 25, 1906.)

1. PLEADING—TIME TO ANSWER—EXTENSION.

On December 29, 1905, defendants obtained an order extending their time to plead, demur, or move for 30 days, but no pleading or motion was filed within that time, and on January 29, 1906, defendants obtained a further extension for 15 days. On December 20, 1905, plaintiff's attorneys granted defendants a stipulation giving them until February 15, 1906, to answer; but on January 31, 1906, defendants not having pleaded, plaintiff demanded the entry of a default. *Held* that, regardless of the validity of the court's second extension of defendants' time to plead, plaintiff by her stipulation had waived her right to a default at the time of her application therefor.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 176; vol. 44, Cent. Dig. Stipulations, § 43.]

2. CERTIORARI—SCOPE.

On certiorari to review an order denying a motion to vacate an order extending defendants' time to answer and for the entry of defendants' default, the only question open for consideration is the jurisdiction of the court to make the order complained of.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 175, 179.]

3. SAME.

Neither an order granting defendants' leave to demur nor the waiver of defendants' right to demur can be reviewed on certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 175, 180.]

In Bank. Application for certiorari, on petition of Mary Voorman, an insane person, by her guardian ad litem, against the superior court of the city and county of San Francisco and another. Dismissed.

Aitken & Skaife, for petitioners. Livingston Jenks, for respondents.

SLOSS, J. On June 13, 1904, Mary Voorman, an insane person, by John R. Aitken, her guardian ad litem, commenced an action in the superior court of the city and county of San Francisco. Among the defendants are Heber C. Tilden and Alice Amanda Tilden, his wife, who were served with summons on December 15, 1905, and on December 19, 1905, respectively. On December 29, 1905, the said defendants obtained from Hon. Thomas F. Graham, one of the respondents herein, an order extending their time to plead, demur, or move for 30 days from said 29th day of December. No pleading or motion was filed by defendants within the 30 days. On January 29, 1906, they applied for and were granted a further order extending their time to plead, demur, or move 15 days from said 29th day of January. On January 31, 1906, the plaintiff, by her attorney, demanded of the clerk that he enter the default of said defendants. This demand was refused. On February 2, 1906, the plaintiff, upon due notice, moved the court to vacate the last order extending time, and to enter the default of defendants. The motion was denied, and defendants were given leave to demur forthwith.

This proceeding seeks to review the order of January 29th extending the time after an extension of 30 days, and the order permitting defendants to demur. Plaintiff contends that, under section 1054, Code Civ. Proc., the court has no power to extend time to plead beyond 30 days, and relies upon repeated rulings of this court to the effect that an order so made is in excess of jurisdiction and void. Baker v. Superior Court, 71 Cal. 583, 12 Pac. 685; Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152; Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291. But here it appears that on December 20, 1905, the plaintiff's attorneys granted to said defendants a stipulation giving them to the 15th day of February, 1906, to answer. Without regard to the order extending time, the defendants were not on the 2d day of February in default. To annul this order, in so far as it enlarges the defendants' time for answer, would not benefit plaintiff, since she was not, in view of her stipulation, entitled to their default when she moved for it. The petitioner seeks to avoid this conclusion by an affidavit in which she alleges that the stipulation extending defendants' time to February 15, 1906, to answer, was given upon the express understanding and condition that they should not demur, and that, by obtaining the extension of time to plead, demur, or move, defendants had violated their agreement, and there resulted a failure of consideration, justifying plaintiff in disregarding her stipulation. But this cannot be considered in the present proceeding, which examines only the jurisdiction of the court making the order complained of. Whether the stipulation was binding, or had lost its apparent effect by reason of oral conditions alleged by the plaintiff, was a question which the trial court had power to decide, if, indeed, it would have been justified in considering, as against a written stipulation, the claim of one party, denied by the other, that there were further conditions not expressed on the face of the writing.

Nor can any order of the lower court, in so far as it grants leave to demur, be reviewed under this writ. It is possible that defendants have waived their right to demur, but whether they have or not is likewise a question for the trial court to determine. In determining such question either way, the court is acting within its jurisdiction.

The proceeding is dismissed.

We concur: BEATTY, C. J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

149 Cal. 227

In re DOLBEER'S ESTATE.

SCHANDER v. GRAY et al. (S. F. 4,473.)

(Supreme Court of California. May 18, 1906. Rehearing Denied June 16, 1906.)

1. APPEAL—REVERSAL—HARMLESS ERROR.

Where the result could not have been different, the Supreme Court will not reverse a judgment for errors which could not have prevented a party from making out a case, or for rulings which, had they all been in his favor, would still not have entitled him to judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4033–4035.]

2. WILLS—TESTAMENTARY CAPACITY—INSANITY—BURDEN OF PROOF.

In a will contest, the burden of proof that testatrix was insane at the time she made the will is on the contestant, as provided by Code Civ. Proc. § 1312.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 101–110.]

3. EVIDENCE—NONEXPERTS—REASONS.

A nonexpert is only permitted by Code Civ. Proc. § 1870, to testify respecting the sanity of an intimate acquaintance on giving the reasons for his opinion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2292, 2297; vol. 49, Cent. Dig. Wills, § 118.]

4. SAME—PRESUMPTIONS.

Proof of the insanity of a person carries no presumption of its past existence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 88; vol. 49, Cent. Dig. Wills, § 105.]

5. WITNESSES — EXAMINATION — RESPONSIVENESS OF ANSWER.

On an issue of insanity, where a witness had testified as to expression of pain on the part of the alleged insane person, and was asked as to whether there was more than one expression, and answered, "No," a further answer that the witness had said to her daughter, after such conversation with the alleged insane person, that witness would never forget the look in the alleged insane person's eyes, and that witness knew her mind was not right, was inadmissible as a voluntary declaration.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 861, 862.]

6. Wills—Testamentary Capacity—Insanity—Evidence.

On an issue of testamentary capacity, evidence *held* insufficient to justify a submission of the question to the jury.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 768.]

7. Same—Declarations of Legatee.

On an issue of testamentary capacity, declarations of one legatee are inadmissible.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 135, 675; vol. 20, Cent. Dig. Evidence, §§ 793, 821, 876.]

8. Coroners — Inquest — Admissibility of Verdict in Other Proceedings.

On an issue of testamentary capacity, the verdict of a coroner's inquisition on the body of testatrix's mother and on testatrix's body, both having committed suicide, was properly excluded.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Coroners, § 28; vol. 28, Cent. Dig. Insurance, §§ 1691, 1692.]

9. Evidence—Nonexpert Opinion.

On an issue of testamentary capacity, questions calling for a nonexpert witness' opinion as to whether testatrix was of sound mind, from witness' knowledge of what she observed of testatrix on a certain day and from what the witness had learned, were objectionable.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2290; vol. 49, Cent. Dig. Wills, § 118.]

10. Wills—Contest—Testamentary Capacity — Hereditary Insanity — Evidence in Rebuttal.

Where, on an issue of testamentary capacity, it was contended that testatrix was the victim of hereditary insanity, acquired both from her mother's and father's people, evidence that her father had never shown any trace of insanity in his lifetime, but was a man of exceptional mental vigor and business capacity, who by his own efforts amassed a large fortune, was admissible.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 122.]

11. Evidence — Experts — Medical Practitioners.

A general medical practitioner, who has had experience in the various kinds of mental diseases, is as competent to testify to the sanity or insanity of a person as skilled alienists.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2345; vol. 49, Cent. Dig. Wills, § 117.]

12. Same—Hypothetical Questions.

Hypothetical questions, involving facts not testified to by the witnesses themselves, cannot be put to nonexperts testifying on the issue of insanity.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2290, 2292, 2297; vol. 49, Cent. Dig. Wills, § 118.]

13. Depositions—Absent Witness—Use.

Code Civ. Proc. § 2021, subd. 3, provides that the testimony of a witness within the state may be taken by deposition when the witness is about to leave the county where the case is to be tried and will probably continue absent when the testimony is required. Section 2032 declares that, if the deposition be taken under the preceding section, proof must be made at the trial that the witness continues absent or infirm, or is dead. *Held*, that section 2021 contemplates that a deposition may be taken when it is believed the witness will be absent when his testimony is "required," so that the deposition of a witness taken during the trial may be used on proof that the witness had left the state two days before and was then absent.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 26, 29.]

14. Same—Depositions Taken Without the State.

It is not necessary to the taking of the deposition of a witness without the state, authorized by Code Civ. Proc. § 2024, that the witness should be a nonresident.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 27.]

15. Same—Use—Preliminary Proof.

Where the deposition of a witness was taken without the state, as authorized by Code Civ. Proc. § 2024, it was not incumbent on the persons taking the deposition to show the witness' continued absence at the time her deposition was offered, under section 2032, providing that, if depositions are taken under section 2021, subds. 2–4, proof must be made at the trial that the witness continues absent or infirm, or is dead, as the latter section applies only to depositions taken within the state.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 246–257.]

16. Evidence — Presumptions — Absence of Witness.

Where a witness was shown to have been absent when her deposition was taken, it will be presumed, in the absence of proof by the party objecting to the introduction of her deposition, that her absence continued.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 87.]

17. Trial—Order of Proof—Rebuttal.

Where, in a will contest, the deposition of a legatee was taken by contestant before trial, and the witness was present under subpœna by contestant throughout the trial of the case, but was not called, contestant was not entitled to have the court open the case for the introduction of her testimony because of surprise when she was not introduced by proponent, and, failing in this, to have her deposition admitted in rebuttal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 156–160.]

18. Wills—Contest—Unsoundness of Mind—Instructions.

In a will contest, an instruction that the fact that testatrix committed suicide, while not of itself sufficient evidence of unsoundness of mind, was proper to be considered on the question of her mental condition, and, if the jury found that she did commit suicide, they might consider that fact in determining whether or not she was of sound mind at the time of the making of the will in question, was improperly refused.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 779.]

19. Appeal—Review—Harmless Error.

The jury having been instructed that they should consider all the evidence in the case in determining the question, and there being no evidence which would have warranted the conclusion that testatrix was of unsound mind at the time she executed the will, the refusal of such instruction was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4229, 4230.]

20. Trial—Argumentative Instructions.

Requests to charge, which were elaborately drawn and were in the nature of a special argument addressed to the jury under the guise of instructions of law, were properly refused.

[Ed Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 561.]

21. APPEAL—SUBMISSION OF CAUSE—DEATH OF APPELLANT.

Where appellant died after the submission of the cause, and the judgment was affirmed, the affirmance would be entered nunc pro tunc as of the date of the submission.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4406, 4407.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Contest of the will of Bertha M. Dolbeer, deceased, by Adolph Schander against George D. Gray and others. From a judgment for defendants, contestant appeals. Affirmed.

See 82 Pac. 192.

Albert M. Johnson and Hiram W. Johnson, for appellant. E. S. Pillsbury and Garret W. McEnerney, for respondents.

HENSHAW, J. This is a contest over the admission to probate of the last will of Bertha M. Dolbeer. The contest was instituted by a maternal uncle of deceased upon the sole ground that at the time of the making of the will Bertha Dolbeer had not testamentary capacity by reason of her insanity. The cause was tried before a jury, which jury rendered a unanimous verdict in favor of the proponents.

Contestant concedes the sufficiency of the evidence to support the verdict of the jury, but urges certain rulings of the court in admitting and rejecting evidence, and in giving and refusing to give instructions to the jury as grounds for reversal. Respondents meet this with the argument that the concession of the appellants that the evidence is sufficient to support the verdict does not go far enough; that, in truth, the evidence admitted in the case, even considered with all the offered and rejected evidence of contestant, would support no other verdict than that which was given. Proponents, therefore, invoke the application of the rule, well settled, that, where the result could not have been different, this court will not disturb a judgment for errors which have not prevented a party from making out a case, or for rulings which, had they all been in his favor, still would not have entitled him to a judgment. In re Spencer, 96 Cal. 449, 31 Pac. 453; Duffy v. Duffy, 104 Cal. 607, 38 Pac. 443; In re Briswalter, 72 Cal. 107, 13 Pac. 164; Chapea v. Chapman, 144 Cal. 366, 77 Pac. 990. It becomes necessary, therefore, even at some length, to consider the facts presented by the evidence actually received, and then the effect which might have been worked by the admission of rejected evidence, or by the exclusion of admitted evidence which was objected to. The burden was upon the contestant to show affirmatively, and by a preponderance of evidence, the insanity of the testatrix, and the evidence is to be considered in view of this burden which the law casts upon him. Code Civ. Proc. § 1312; In re Wilson, 117 Cal. 262, 270, 49 Pac. 172, 711; Estate of Nelson, 132 Cal. 182, 191, 64 Pac. 294; Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

Bertha M. Dolbeer, at the time of her death, was 27 years of age. Her parents, John Dolbeer and Harriet Schander, married in 1872. Of the two children born to them Bertha alone survived. In 1879, when Bertha was 2 years of age, her mother committed suicide by shooting herself with a pistol. At the time of her death there were living two brothers and a sister of Mrs. Dolbeer. One of these brothers is the contestant in this case. From 1879 until the time of her death, July 9, 1904, the testatrix never saw and never spoke to either of these uncles, and this contestant knew her only by sight, because she had been pointed out to him. Of the two sisters of Mrs. Dolbeer, a daughter of one who is dead, Ethel Roche, is given $10,000 by Bertha's will. The other sister is Mrs. Moody, who has three daughters and one son. Mrs. Moody, her eldest daughter, and her son never spoke to John Dolbeer, father of Bertha, and he never spoke to them. They never crossed the threshold of his home while he lived, and never entered the daughter's home after her father's death. With the other two of Mrs. Moody's daughters Bertha Dolbeer was on friendly terms. They visited the Dolbeer home and made various excursions with the father and daughter. Bertha Dolbeer visited Mrs. Moody's home and was on terms of casual acquaintance with her, the son, and the daughter above mentioned. Mrs. Breeden, one of the daughters with whom she was on terms of friendship and intimacy, is dead. The other daughter is Mrs. Watson, whose husband was one of the subscribing witnesses to the will. To sum up, the next of kin of Bertha Dolbeer at the time of her death are all maternal relatives, the brothers and sister of her mother. With the brothers she had no acquaintanceship whatever. As to the sister Mrs. Moody, while Miss Dolbeer was a not infrequent visitor to her house, her friendship was wholly for the two daughters, Mrs. Breeden, now dead, and Mrs. Watson, still living. John Dolbeer had accumulated a large fortune. By his will, after numerous bequests and legacies, the major part of this fortune was given to his only child, Bertha. Her will disposes of property of a value exceeding $1,000,000.

When Bertha Dolbeer was 11 years of age there entered the Dolbeer home as her preceptress, Miss Etta Marion Warren, who from that time on until the death of Miss Dolbeer became and continued to be, not alone her preceptress, but her intimate and devoted friend and companion. John Dolbeer died in 1902. By his will he left a legacy to Miss Warren, and in his will described her as one "who has been for a number of years and is now a member of my family." John Dolbeer's family at this time, in law, consisted strictly of himself and his daughter Bertha, and this inclusion of Miss Warren as a member of his family is not without its significance. By the will of Miss Dolbeer the principal portion of her large estate is left to Miss Warren. In her will Miss Dolbeer describes Miss Warren as "my devoted friend," and the record is full of evidences of her affection, of her devotion, and of her gratitude to this lady. She had been her friend, companion, and confidante from her earliest girlhood years. She took Miss Warren's middle name, Marion, and adopted it as her own, calling herself Bertha Marion Dolbeer. She spoke of her always in the most endearing terms. "She was the best friend a girl could have." "Miss Warren had done everything for her in every possible way, and all she hoped was that she could live long enough to pay back in some small way Miss Warren for all her kindness and all her goodness to her." She "did not know what she would do without Miss Warren." "We are like two sisters in one family." "She was the best friend that I ever had in the world; that is, next to my father." "She had been mother, sister, and brother" to her. "She was the nearest of kin she had in the world." "She had been with her since she was a little girl, and she had always looked out for her." She was "more fortunate in having Miss Warren than any one will ever know." She could "never thank Miss Warren for what she had done for her." She was "the only one who was near or dear to her in all the world." Of these and like expressions the record is full. And against them is to be contrasted the position of this wealthy girl, who was, saving for Miss Warren, alone in the world. Alone, not because of any estrangement that had grown up between her and her mother's relatives, but because those relatives had always been strangers to her. I say this, that the facts may be shown as they exist, namely, that this is not the case of an "unnatural will," where dependents and those who had grown accustomed to lean upon the bounty of one are, at the death of that person, without apparent reason, deprived by his will of that bounty. Nor is it a will where relations, intimate in fact as well as in blood, who have had a reasonable basis for their "expectations," have been disappointed at the expression of the testator. Miss Dolbeer's will left her property at her death where in life she had loved, and unless it shall be said that the claims of blood dominate and control the testamentary right (in which case the laws of wills should be swept from our statute books, and all property pass under the laws of succession), the will in question was natural, in its recognition of the claims of gratitude, affection, and love. Miss Dolbeer's own statements furnish ample recognition of this. Her property had come to her from her father. There had been a complete estrangement between her father and her mother's people. She had never known or cared for these omitted relatives. Moreover, in the making of her own will she had before her a copy of her father's will, and in many of the legacies and bequests she copied the provision of her father's will with a touching fidelity to what she must have conceived would have been his wishes.

After the death of her father Miss Dolbeer lived in the paternal home with Miss Warren. For the first year after her father's death she led a reasonably secluded life; such trips and visits as she made being made quietly and with due regard for the proprieties. From August, 1903, to March, 1904, she entered actively upon the social life of one of her means and freedom from responsibilities. She attended balls, parties, places of amusement, and made many excursions with her friends into the country. She was fond of out door sports and amusements, was an accomplished golf player, and a skilled chauffeuse. There was nothing, certainly up to this time, in all her life to have suggested that in any way, or in the slightest degree, she was the victim of insanity. In the spring of 1904 she was somewhat run down in physical health, and under her physician's advice took a period of 10 days' rest, during which time she cut herself off from social functions. She was attended by a trained nurse, and her friends visited her at will. She was wholly freed from the doctor's care and supervision several days before she executed the will in question. She executed this will, as she herself states, in contemplation of her trip to Europe, which had been planned for some 5 or 6 months. Upon the face of the will, which is olographic and of considerable length, there is not the slightest evidence of derangement or of unsoundness of mind. She knew that an olographic will did not require the attestation of witnesses, but took the precaution of executing it in the presence of two subscribing witnesses with the formalities required in the case of a will not olographic. On the day the will bears date she went to the office of Douglass Watson, husband of her cousin, Mrs. Watson, above mentioned, requesting him to witness it. This was on Saturday, the 23d day of April. On Monday, the 25th day of April, she took to the office of Dolbeer & Carson, which was also her business office, a sealed envelope indorsed "last will and testament of Bertha M. Dolbeer." She then took from the office of Dolbeer & Carson a will which she had deposited there a year before. She departed for Europe with Miss Warren, and after her death, which occurred on July 9th of the same year, it was found that the document with Dolbeer & Carson was a copy of her will, at the foot of which was written in her own hand writing: "The foregoing is a copy of my last will and testament, the original of which is in the California Safe Deposit vaults." She thus not only wrote her will, but wrote a copy of it, and left that copy in her business office, with the attached memorandum showing where the original could be found. More than 30 of her intimate and disinherited friends saw her frequently in the time preceding and shortly before the execution of the will, and all testified to her absolute sanity. Twelve of the witnesses saw her on the day the will was executed, and unite in their testimony to her absolute sanity. Nearly 20 witnesses saw her between the date of the execution of the will, April 23d, and April 27th, when she departed for Europe, and they bear the same testimony to her sanity. Many witnesses saw her after she left San Francisco, in Chicago, in New York, on the steamer, in London, and in Paris, on the return voyage, and again in New York, where she met her death, and they bear like evidence to her sanity.

The internal evidence of the writing itself is of a sound and disposing mind. The reason why Miss Warren is the principal beneficiary of her bounty is convincingly shown by Miss Dolbeer's own statements, and in particular by her explanation that her money had come to her from her father and that her mother's relatives were not on speaking terms with her father. No writing before the execution of the will and down to the time of her death (and besides the will itself there were 10 or 12 of her letters introduced in evidence) bears the slightest testimony to any mental unsoundness. To the contrary, they are precisely such letters as it might be expected she would write. Moreover, it is not pretended that Miss Dolbeer was the victim of any hallucinations, that any of her friendships had changed to antipathies, or that practically to the very day of her death her life had not always run smoothly along its regular current. Where, then, is to be found the evidence that Miss Dolbeer, upon the 23d day of April, 1904, was, within the meaning of the law, insane, so as to be incapable of the testamentary act? It rests upon this: contestant endeavored to show that Mrs. Dolbeer, mother of Bertha, was insane during the period of gestation of her unborn child, and after its birth, and committed suicide by reason of this insanity; that there was insanity in her father's family (though it is not pretended that her father was insane); that Bertha Dolbeer herself committed suicide by leaping from a window in the Waldorf-Astoria hotel; and that she so committed suicide because she was insane. But, without pausing to analyze the insufficiency of the evidence to establish several of these propositions, but, to the contrary, conceding that everything which appellant contends for has been shown by this evidence, it proves nothing more, at most, than that Bertha Dolbeer, in New York, upon the 9th day of July, 1904, committed suicide because of her insanity. The presumption always is that a person is sane. Proof of insanity carries back no presumption of its past existence. It exists only from the time when it is proved to exist, and thus I say that, resolving every disputed point as to the weight of the evidence in contestant's favor, the utmost which that evidence by any stretch of liberality can be said to establish is that the deceased had a hereditary taint of insanity in her blood, which declared itself for the first time upon the day of her death and prompted her to commit suicide; that up to the day of her death she had led the sane, normal life of a girl of her wealth and station; that her last will and testament bears every evidence of sanity, and none of insanity; and that if she had died poor, instead of wealthy, no one would have dreamed of saying that up to the day of her death she had ever displayed the slightest symptom of mental derangement, much less an insanity which would deny her the legal right to make her will.

In making the foregoing statement we have not overlooked the testimony which contestant offered of certain intimate acquaintances of the deceased concerning her unsoundness of mind. Code Civ. Proc. § 1870 permits as evidence the opinion of an intimate acquaintance respecting the mental sanity of a person, but with that opinion must be given the reasons upon which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support. Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Brashears v. Orme, 93 Md. 442, 49 Atl. 620; Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494. These witnesses were but three in number, and all of them interested witnesses—Mrs. Moody, the aunt of Miss Dolbeer and one of her next of kin in case of intestacy; Mrs. Moody's daughter, Mrs. Edna Moody Sherman, whose interest through her mother would be both pecuniary and direct; and Elizabeth C. Phillips, an elderly lady and the cousin of Bertha Dolbeer's father. Mrs. Phillips had been left a legacy of $10,000, with the amount of which she was frankly and avowedly dissatisfied. She likewise objected to the fact that in the disposition of her bounty Bertha had remembered certain people, and in particular she resented the circumstance that Mrs. Warren, mother of Miss Warren, received $25,000 by the will, while she herself received only $10,000. She denies any arrangement between herself and the contestant whereby, in the event of the will being declared invalid, she was to receive an equal sum or more; but she testifies that she haunted Mr. Gray, one of the executors under the will, "for days and weeks to beg for a compromise that I might not be placed on the stand to state what I have done." She testifies, further, that all she had gotten in the world was gone and lost, there was only her husband left, and "all she cared for was money." She says that she "did not want Mr. Brown to have $10,000 in that way. I did not want Mr. Mugan to have $20,000. I did not want Miss Warren's mother to have $25,000. I certainly ought to have had as much as that."

As to Mrs. Moody and Mrs. Edna Sherman, besides their pecuniary interest, if the will should be declared invalid, they were not remembered in it. So much for the attitude of these witnesses.

Coming to their testimony, Mrs. Phillips says she met Miss Dolbeer on April 25, 1904, and declares: "I don't think Bertha was of sound mind in April, 1904." She says: "She acted as though she was under a spell, unsettled, as if she had no opinion of her own, as though she did not know what she wanted to do. She looked very poorly and was very thin. She told me she had been subject to fits of depression." On cross-examination, when pressed for her reasons for her opinion, she says that, in talking of the sudden seizure of her father in New York, just before his death, "she showed more excitement and nervousness than she had ever displayed before. She said: 'I shall never forget it, auntie, I shall never forget it. His struggle for breath, for life. I will never forget it.' She clasped her hands together in a distressed manner." Surely the natural feelings of a daughter over the agonizing scene of her father's sufferings, to which she was a witness, will not be held evidence of insanity. It would have been more pertinent to the issue if the girl had not shown distress. The witness proceeds that "she complained of a pain in her head. She had headache, nervous sleeplessness, pain in her eyes." The pain was "in the back of her head," and her mother's pain was in the back of her head. She could not sleep, and her mother was afflicted with insomnia. When Mrs. Phillips told her that in her judgment she was not fit to go away, Bertha responded: "I have to go. I have to go." And, when pressed further on the subject, she explained that "she had already engaged her steamer apartment." Her manner was as though she did not care for anything, any pleasure. She said she thought the trip on the water might benefit her and she might be able to sleep if she was on the water. She told her aunt that "when one is not well life is not worth living. There is no pleasure in life without health"—her manner during that conversation was depressed. Again, the witness advised her to go to Mrs. Nordingham, the witness' physician, for rheumatism, "and," proceeds the witness, "she promised me she would go. She promised me really she would go. I said I would go for her. She said, 'No, I will surely go, Auntie.' Well, she did not go. It was something that she never made me a promise for anything that she did not keep." She sums up as follows: "It was various little things which impressed me that perhaps I should not worry; but I am satisfied that she was not—her physical health and the mental health would not enable her—well, say, to make that will, I thought, and I was fully satisfied from her manner that she was not responsible; that she was irresponsible." The generalities in which this witness clothes her reasons, the utter inadquacy of the reasons themselves, her naïve declaration that Miss Dolbeer's physical and mental health would not enable her "well, say, to make that will," make this witness' opinion of no probative value in the case.

Mrs. Sherman did not testify to her opinion of the mental soundness or unsoundness of Miss Dolbeer, nor did she testify to a single irrational act. Her evidence was to the effect that Miss Dolbeer was never very enthusiastic nor demonstrative: that on the Sunday before her departure, which was shortly after the making of the will, she was not in very good health; and that she was "more indifferent upon that day than she had ever seen her before." She did not display any enthusiasm when offered letters of introduction to people "who lived in an out of the way place," but to the contrary, she told the witness that she did not expect to do much traveling during her sojourn in Europe, but would remain most of the time in or about Paris. There is no word of this testimony going to the mental unsoundness of the testator, and nothing (having regard to the presumption of sanity) inconsistent with the established fact that at this time Miss Dolbeer's physical health was not good, and that she was going to Paris for the sea voyage and for rest and recuperation there. It is not only not surprising, but quite natural, that her physical ailment should have produced a certain amount of mental depression, and there is much of sound wisdom and nothing of insanity in the girl's declaration that there is no pleasure in life without health.

Mrs. Moody's testimony was to the effect that Miss Dolbeer was of somewhat phlegmatic temperament and displayed little enthusiasm over things, was never wasteful, but rather economical, and had always been accustomed to the luxuries of wealth. The acquisition of her father's estate did not seem to unbalance her in any way or make her giddy or different from what she had been. She was, like a great many daughters who are humored and spoiled, not particularly fond of study, not interested in anything very much; a person of ordinarily good education, about the average of young women; a young lady of good sense as far as the witness knew; a young lady of fastidious propriety and careful of her good name. Miss Dolbeer was at the house of the witness, on the Sunday before her departure, to say goodbye. That was April 24th, the day after the execution of the will. She did not talk much of her trip, "for she did not seem to know exactly what she intended to do. She only seemed to know she was going. She did not seem to have any plans." There was surely nothing surprising in this, in view of the fact that Miss Dolbeer was going, as has been said, for the sea voyage and for rest and recuperation in Paris. The witness testified that before this day she had not observed anything wrong in Miss Dolbeer's mental condition, except that she was very much depressed at times, and she proceeds: "There was nothing unusual in what she said that I know of. There was nothing said that could be taken as unusual. I know she was not well by a good deal, and I know that from an episode that happened at the house. I asked her to come to dinner the following Monday, and after a while she said she must go. I asked her to stay longer. She said, "No," she had some business to attend to. Before that she had exhibited signs of mental distress, which were quite visible, very plain to be seen. She was sitting there after luncheon, upstairs in the library. Suddenly she grasped herself like this [indicating by putting her arms across her stomach], in a tragic manner. I was quite startled, and I asked her if I could get her some little remedy to help her. I said, 'Perhaps you have eaten something,' and a look of great terror came over her face. She did not say she had a pain in her stomach. She said, 'Oh, my stomach.' The look in her eyes was dreadful. She looked terribly frightened, and shook all over this way [indicating by shaking herself]. She clasped herself convulsively. Her face was one of terror, perfect terror, as though something dreadful had happened. She was terribly frightened at something, and the look of terror was so great that it frightened me. I collected myself and tried to quiet her thoughts and turn them into another channel. I asked her something about her trip, and she threw herself back in her chair and let her arms fall, as though she was exhausted and had no strength. Q. How long did this expression of pain seem to last? A. I do not think it was an expression of pain. Q. Well, the expression which you have described? A. Only a very few seconds. I couldn't tell you. I simply changed the subject. Q. Was there any more than the one expression? A. No; we talked a little more about her trip. I offered to give her letters of introduction to friends in Paris. She said, 'Yes, that would be nice.' Then she started after a while to go home, and I saw her down to the front door. I stayed on the porch, and as she was going I said, 'When you get to Paris, write and tell us about the fashions,' just for something light to say. She turned around and gave me the most pitiful look I have ever seen on any one's face—a haunted look of fear, as though she had something on her mind. She turned her face and looked at me. Then she seemed to lose herself and went on down the stairs. I came in and said to my daughter: *'I shall never forget Bertha's look as she was going away. I know that her mind was not right. I am perfectly convinced of it.'* * * * I offered to give her a little bicarbonate of soda. I thought, if it was her stomach, it might help a little. She seemed so terrified. When I offered it to her this dreadful look of care was on her face, and she was holding herself in that position, grasping herself in that manner, and said, 'No! No! No!' I saw that she was terrified at something, and I turned the subject of conversation." She testifies, further, that, excepting for this episode during the two hours that Miss Dolbeer was there, the conversation was upon ordinary subjects such as would interest young ladies, "matters of society—what was going on in society." The opinion of this witness is entirely inadequate, when the reasons for it are considered, to form any foundation for a judgment of insanity against this testatrix. She had neither done nor said any irrational thing. She had shown a lack of interest toward the offer of letters of introduction to people in out of the way places, which was not unnatural, considering that she had no expectation of visiting those places and was going abroad for rest. She had a pain in the stomach of such nature that the witness thought it could be relieved by bicarbonate of soda, and the expression upon the face which would naturally accompany this pain the witness describes as a look of fear. This testimony itself is of a condition existing after the making of the will; but if it were on the very day of the making of the will, and at the moment of and as a part of the testamentary act itself, it does not amount even to a scintilla of evidence in support of the appellant's contention. It is significant that in all Miss Dolbeer's life she had done nothing, said nothing, to prompt Mrs. Moody to give a thought to her mental condition (so the lady testifies) until that Sunday, which was the day after the making of the will which omitted recognition of the witness. And in this connection we have Mrs. Moody's own words: "She certainly did not make a just will. I don't think the tie of friendship was great enough— Of course, I don't know; that is just my supposition—that the tie of friendship was certainly not great enough as to leave the bulk to one person."

In the quotation from Mrs. Moody's testimony above given has been inserted, certain words in italics which, by order of the court, were stricken out. We have considered the evidence as though these words had been admitted. They were properly excluded, however, as a volunteer declaration of the witness of her statement to her daughter.

The only other witnesses to Miss Dolbeer's mental condition had but a casual acquaintance with her, which acquaintance arose some two months after the making of the will, and while she was returning upon the steamer to New York—the steward and stewardess of the ship. The steward "noticed" that Miss Dolbeer was looking a little sad. There was nothing else peculiar about her, except that she was sometimes sitting as if she was in deep thought, as if she was thinking about something. "I do not think it was anything different than what anybody else would look that was sad or deep in thought upon a thing." "I did not notice any physical ailment of Miss Dolbeer while she was under my observation, while she was on board the ship. I did not notice anything peculiar about the eyes of Miss Dolbeer, only what I have told you, the expression. She was thinking about things, looked as if she was staring out before her." "There was nothing unusual about her conduct. They [Miss Dolbeer and Miss Warren] acted the same as any other passengers on board the ship." "I could not see her in any way different from other people." "My idea was that she had lost somebody of her relatives or something; that some one had died, or something like that." "I think I only spoke to her and the passengers, just when the passengers came up stairs and came out on the deck, we say, 'It is fine weather,' or something. And in this conversation with Miss Dolbeer on deck respecting the weather and other current events, I think she acted the same as any other passenger." The stewardess testified: "There was a strange looking in Miss Dolbeer's eyes. In German, I would describe it as 'ein starblick.' Probably in English you would say staring." "She looked to me nervous, very nervous." "I have seen many other passengers, when they are about to take a trip across the great Atlantic, look nervous, especially ladies, especially on the first day. Her general appearance was about the same as a great many other lady passengers whom I have seen on the first day. There was nothing unusual about her appearance to attract my attention in any way. Q. How differently did she appear than any lady or many other ladies, to you, who had been passengers on that ship? A. She did not; but you know sometimes a person looks strange to you and you cannot tell what it is. I had never seen her before, and I don't know what her appearance was before then."

This, then, constitutes all of the direct testimony of mental unsoundness. If it stood alone, it would in no wise suffice to countervail against the presumption of sanity; but taken, as it is to be taken, with all the evidence of the girl's life and conduct and acts, from her own writings, from her own words, from the lips of dozens of intimate friends, disinterested witnesses, and medical experts, it was absolutely insufficient to raise a conflict. It was absolutely insufficient to have justified the submission of the question of her mental competency to a jury.

In addition to this direct testimony, contestant offered three physicians, no one of whom had known Miss Dolbeer in her lifetime, and to whom were given long hypothetical questions purporting to array the facts in the case—the insanity of Miss Dolbeer's mother during her pregnancy and afterwards until her suicide, two years later, the insanity upon the father's side, the facts of Miss Dolbeer's life, her mental and emotional characteristics, and her death by suicide. These three medical experts, in answer to these long hypothetical questions, replied that, upon the assumption of the truth of the facts stated, they were of the opinion that "at the time of her death" Miss Dolbeer was of unsound mind and suffering from a form of insanity known to medical science as "simple melancholia." The witnesses were skilled alienists, it may be conceded; but the evidence thus adduced of one who has never seen the person, and who bases his opinion upon the facts given in a hypothetical question, is evidence the weakest and most unsatisfactory. Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence, which may be of a thousandfold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value. The remedy can only come when the state shall provide that the courts, and not the litigants, shall call a disinterested body or board of experts, who shall review the whole situation, and then give their opinion, with their reasons therefor, to the court and jury, regardless of the consequences to either litigant. So, and so only, can it be hoped to remove the estimate of infirmity which attaches at the present time to this kind of evidence. In the case at bar the hypothetical question presented to these experts eliminated all the facts overwhelmingly proved in favor of Miss Dolbeer's sanity, bore with emphasis upon and threw into prominence trifling circumstances, and contained many statements not justly borne out by the evidence itself. It thus presented a portrait of Miss Dolbeer's life and mind absolutely lacking in vraisemblance. All perspective was eliminated, all proportion destroyed, and the picture was as false to the original as is a fantastic and distorted shadow cast by a flickering and uncertain light a false protrayal of the reflected object.

But, aside from all this, two other facts render this testimony of no probative value; the first that the witness testified as to the condition of mind of Miss Dolbeer "at the time of her death," and, as has previously been stated, it may be conceded that her death was self-inflicted and caused by simple melancholia, but this would show no more that that she was insane upon that date, and could not have the effect of proving her insane several months before, when she made her will. Saving in the case of one born a maniac or insane, there must always be a time when a person is rational and of sound mind before the dread disease exhibits itself, and, if Miss Dolbeer was insane upon the day of her death, the evidence fails to disclose that her mental incompetency to make a will arose before that day. Second, the testimony of the physicians is that the form of insanity from which Miss Dolbeer suffered was "simple melancholia," and the characteristics of this kind of insanity are explained at length. Some of its pronounced characteristics are an indifference to life and to worldly interests and affairs. As it developes, delusions will develop, but of a very mild nature, the victim is depressed, and the usual outcome is a suicidal tendency; but the intelligence is either unimpaired or slightly impaired, and one afflicted with simple melancholia would converse apparently rationally, would write apparently intelligently, and would converse with friends or acquaintances so that the affliction would not be noticeable. The main condition is a change in the emotions and disposition. "The desire for life which is natural to most individuals becomes a desire for death. The people that they have loved formerly they grow indifferent to. They often cling to one individual." Assuming that all these attributes and characteristics of simple melancholia were present in Miss Dolbeer at the time that she made her will (though they were not), still there is nothing in this to establish the legal incapacity to dispose of her property. This insanity and these delusions must be shown to have directly affected the testamentary act. But the truth is Miss Dolbeer had not shown any change in disposition, other than a change which might be natural because of her debilitated state of physical health. She had shown no desire for death, but, on the contrary, a very earnest desire for life and health, since she had taken a "rest cure" and was going abroad for the very purpose of building herself up. She had not grown indifferent to anybody whom she had formerly loved, and while in truth she did cling to one individual, Miss Warren, that was an individual to whom she had clung with a mixed feeling of sisterly and daughterly love since she was 11 years of age. For all these reasons, therefore, the testimony of contestants' medical experts cannot be said to raise even a conflict of the evidence upon the question of the sound and disposing mind of Bertha Dolbeer at the time she executed her will.

The Code declares that evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. "Such evidence alone," it says, "will justify a verdict." Code Civ. Proc. § 1835. One would indeed be presumptuous to say that the evidence contestant offered was "satisfactory." As a result of this survey, the evidence admitted being such as to establish the fact that contestant wholly failed to make out a case, the rulings of the court are to be considered in the light of this conclusion, and such rulings only need be considered, therefore, as contestant insists either prevented him from making out a better case, or unjustly, by the admission of improper evidence, assisted the proponents.

It is contended that the court erred in refusing to admit the declarations of Etta Marion Warren, which declarations, it is asserted, would have been favorable to contestant. Upon the admissibility of such evidence there is a contrariety of opinion in the decisions of our sister states. In Estate of Arnold (Cal. Sup.) 82 Pac. 252, the question was before this court, but was not decided, but the great weight of both reason and authority is against the admission of the declaration of one legatee or devisee when mental incapacity is in issue. One of the vital reasons for this is that the interests of legatees and devisees under a will are several, and not joint. Each claims independently of the other, and it would be unjust under these circumstances to allow the interest of one to be affected by the acts and declarations of another with whom he is not in privity. And for very obvious reasons the declarations cannot be admitted against the individual legatee or devisee who makes them, where the mental incapacity of the testator is the question in issue. If the testator did not have mental capacity to devise or bequeath as to one, he had no more capacity to do so as to another, and it has been held in this state, as of course it must be held, that the statute not only makes no provision by which a portion of a will can be admitted to probate, and probate denied to the remainder (Estate of Pforr, 144 Cal. 121, 77 Pac. 825), but further, that a will cannot be annulled in part; it must be annulled in its entirety or not at all (Estate of Freud, 73 Cal. 555, 15 Pac. 135). The industry of counsel discloses that in 17 of our states such declarations are held inadmissible, and in only 3 states, Georgia, Kentucky, and South Carolina, are they held admissible, while in 2 states, South Carolina and Tennessee, there are conflicting decisions. The most recent case is Fethergill v. Feathergill (Iowa) 105 N. W. 377, and upon the same subject may be cited Roberts v. Trawick, 13 Ala. 68; Appeal of Dale, 57 Conn. 127, 17 Atl. 757; Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080; Phelps v. Hartwell, 1 Mass. 71; McConnell v. Wildes, 153 Mass. 487, 26 N. E. 1114; Hayes v. Burkam, 67 Ind. 359; In re Ames' Will, 51 Iowa, 596, 2 N. W. 408; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105; Prewett v. Coopwood, 30 Miss. 369; Schierbaum v. Schemme, 157 Mo. 1, 57 S. W.

526, 80 Am. St. Rep. 604; Carpenter v. Hatch, 64 N. H. 573, 15 Atl. 219; In re Van Dawalker's Will (Sup.) 71 N. Y. Supp. 705; Matter of Baird, 47 Hun, 77; Stull v. Stull (Neb.) 96 N. W. 196; Thompson v. Thompson, 13 Ohio St. 356; Nussear v. Arnold, 13 Serg. & R. (Pa.) 323; Mullins v. Lyles, 1 Swan. (Tenn.) 337; Whitelaw's Adm'r v. Whitelaw's Adm'r, 96 Va. 712, 32 S. E. 458; Forney v. Ferrell, 4 W. Va. 729. The ruling was therefore proper.

The court was correct in excluding the verdict of the coroner's inquisition upon the body of Mrs. Dolbeer in California, and also upon the body of Miss Dolbeer in New York; but, even had the rulings been error, the result, for reasons already stated, could not have been affected. It has been expressly decided in this state that a verdict of a coroner's jury is not admissible in such a case as this. Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855; Rowe v. Such, 134 Cal. 576, 66 Pac. 862, 67 Pac. 760; Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899. And, indeed, the great weight of authority elsewhere supports this view. Germania Ins. Co. v. Ross-Lewin (Colo. Sup.) 51 Pac. 488, 65 Am. St. Rep. 215; Railroad Co. v. Moore, 61 Ga. 151; State v. Commissioners, 54 Md. 426; Goldschmidt v. Ins. Co., 102 N. Y. 486, 7 N. E. 408; Ins. Co. v. Milward (Ky.) 82 S. W. 364, 68 L. R. A. 285; Wasey v. Ins. Co., 126 Mich. 119, 85 N. W. 459; Kane v. Maccabees (Mo. App.) 87 S. W. 547; Life Ins. Co. v. Schmidt, 40 Ohio St. 112; Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; Chambers v. Woodmen (S. D.) 99 N. W. 1107; Whitehurst v. Commonwealth, 79 Va. 556.

The court sustained an objection to questions asked by contestant of Mrs. Moody. These questions were: "Taking all the facts you have learned in respect to Miss Dolbeer, together with the events of the Sunday just before she went East, and from your knowledge of what you observed of her on that day, your opinion is that on that day she was not of sound mind?" The second question, framed along similar lines, was: "Now, Mrs. Moody, from what you observed on the Sunday before her departure, and what you had learned and what you knew of Miss Dolbeer, and what you had observed, her actions and conduct and language, all taken together, massing all that knowledge in your mind, was she of sound mind the day she visited you?" Both questions are subject to the same objection—that they permit the witness to testify upon hearsay information, "from what she had learned." There can be no difference in principle between this question and one which calls for the opinion of the witness based upon what he may have heard. And it has been repeatedly held that to allow a witness to testify upon knowledge or information thus received is error. People v. Wreden, 59 Cal. 392; Xenia Bank v. Stewart, 114 U. S. 224, 5 Sup. Ct. 845, 29 L. Ed. 101; Flanagan v. State, 106 Ga. 109, 32 S. E. 80; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801.

Evidence was offered, and admitted over objection, showing that John Dolbeer, father of Bertha, not only never showed any trace of insanity in his lifetime, but was a man of somewhat exceptional mental vigor and business capacity, who by his own efforts amassed a large fortune. This evidence was properly admitted. The contention of contestant was that Bertha Dolbeer was the victim of hereditary insanity, and that the taint was in the blood of Bertha, from her mother's and her father's people. Even though no effort was made upon the part of contestant to show that her father had been insane, it was perfectly proper to put before the jury the fact that her immediate paternal progenitor was not only not insane, but was of exceptional mental power, and had borne a prominent part in the active affairs of business life. As said in Estate of Redfield, 116 Cal. 637, 48 Pac. 794, it will not be presumed that a child inherits the insane, and not the sane, tendencies of her family.

Dr. Hertzstien, a skilled medical man, had met Miss Dolbeer in Paris upon her last visit there. He had met her socially at a dinner party. He qualified as an expert, his experience covering all classes of diseases, mental and physical, requiring medicinal or surgical aid. He was asked the opinion whether, upon the occasion when he met Miss Dolbeer, she was of sound mind, and answered, over objection, that she was. A general practitioner who has had experience in the various kinds of mental cases is as competent to testify to the sanity or insanity of a person as the skilled expert who devotes his entire time to the study of mental diseases. Wigmore, Evidence, §§ 569, 687; Estate of Toomes, 54 Cal. 515, 35 Am. Rep. 83; Davis v. State, 35 Ind. 497, 9 Am. Rep. 760; Phelps v. Commonwealth (Ky.) 32 S. W. 470; Abbott v. Commonwealth (Ky.) 55 S. W. 196. Without multiplying authorities upon this proposition, it is sufficient to refer to 12 Ency. of Law (2d Ed.) 452, which shows this to be the rule, not only in the courts of the United States, but in 20 and more state courts whose cases are there cited.

Hypothetical questions, involving facts not testified to by the witnesses themselves, were put by contestant to certain nonexpert witnesses, familiar friends of the deceased, and by the court were ruled out. These rulings were proper. No case has been cited which allows such a line of inquiry, even upon cross-examination, and as to the impropriety of such questions reference may be made to Rambler v. Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; Hogmire's Appeal, 108 Mich. 410, 66 N. W. 327; Dunham's Appeal, 27 Conn. 192; Pittard v. Foster, 12 Ill. App. 132; Ragland v. State, 125 Ala. 12, 27 South. 983; Appleby v. Brock, 76 Mo. 314; Bell v. McMaster, 29

Hun (N. Y.) 272; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268.

It is not perceived that the contestant suffered in any of his rights by the alleged improper limitation upon the cross-examination of certain of proponents' witnesses. To the contrary, it affirmatively appears that every reasonable latitude, and in some instances even a most liberal latitude, was allowed in this regard.

The exclusion of the deposition of Theodore Rumney under proponents' objection was not error, and from no point of view, if error, could the ruling have been injurious to contestant. Mr. Rumney was a New York banker. In his deposition he testified that Miss Dolbeer and Miss Warren called at his office on July 9, 1904, the day of Miss Dolbeer's death; that she drew some money on a letter of credit which she had with her, and handed the money to Miss Warren. Mr. Rumney testified repeatedly that on that occasion Miss Dolbeer's appearance was rational, and that she acted in a rational manner, and that "it never entered his head to think she was other than rational." On cross-examination, when asked whether at any subsequent time he had any suspicion of the fact that Miss Dolbeer was irrational, he answered: "Not that she was irrational; that did not. * * * She was rational; but after I had read the evening paper [containing an account of her death], it seemed to me, in thinking it over, that she was in a tense mood, never irrational."

The court did not err in receiving in evidence the deposition of Fred A. Greenwood. The appellant's objection to this was that the deposition was taken on November 11, 1904, during the trial which commenced on November 2, 1904. It was read in evidence on December 7th and 8th, on proof that the witness had left the state two days before, namely, December 5, 1904, and was then absent. The proposition urged by counsel is that the proponents should have called the witness, because he was in the state during the progress of the trial. The sections of the Code covering the subject are as follows: "The testimony of a witness in this state may be taken by a deposition: * * * (3) When the witness is about to leave the county where the case is to be tried and will probably continue absent when the testimony is required." Code Civ. Proc. § 2021, subd. 3. "* * * If the deposition be taken under subdivisions 2, 3 and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm or is dead." Code Civ. Proc. § 2032. This section contemplates that a deposition may be taken when it is believed that the witness will be absent, not during any part of the trial, but when his testimony is "required," and the only additional requirement of the Code is that the witness shall be absent when the deposition is used. It was not even shown that proponents had knowledge that deponent Greenwood was in the county during the progress of the trial, and, as said in Abless v. Miller, 12 Tex. 111, 62 Am. Dec. 520, if the deposition is legally taken it is admissible, and "it would be unreasonable to require a party to keep an eye on the witness after his testimony had been taken, and to make it his duty to put the witness under subpœna should he move into the county."

Nor was it error for the court to admit in evidence the deposition of Miss Ethel Postley. This deposition was taken in New York on the 28th day of October under the provisions of section 2024 of the Code of Civil Procedure. To permit its introduction in evidence no preliminary proof was required to be made under the provisions of section 2032 of the Code of Civil Procedure, since that section applies only to depositions taken in the state. To take a deposition under section 2024 it is not necessary that the witness be a nonresident. The question of the witness' residence is not involved. All that is required is that the witness be out of the state. It was, therefore, not incumbent upon the proponents to show her continued absence at the time her deposition was offered. The presumption existed that, the witness having been shown to have been absent, her absence continued; and it was upon the party objecting to prove the contrary. Randolph v. Woodstock, 35 Vt. 291; Hennessy v. Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892; Gaul v. Wenger, 19 Mo. 541; Brewer v. Beckwith, 35 Miss. 467. This proof was not made by the contestant. The only testimony upon the subject was that by Mr. McEnerney, who stated merely that he had been informed that the witness was in San Francisco, but had been unable to subpœna her. Mr. McEnerney's information upon this matter is not the measure of the proof contemplated by the law.

The deposition of Miss Warren had been taken by the contestants, and she had been examined at great length and with much particularity. She was under subpœna by contestant throughout the trial of the cause. Contestant did not call her to the witness-stand, nor did proponents. At the conclusion of the taking of proponents' evidence contestant sought to have the court open the case for the taking of Miss Warren's testimony, upon the ground of surprise; their expectation being that proponents would call her as a witness, and failing in this they sought to have her deposition admitted as rebuttal evidence. His motions addressed to these ends were denied by the court, and there was no error in these rulings. The sole issue in the case was the mental incompetency of the deceased. Upon this contestant had the burden and was required first to introduce his evidence. What Miss Warren would testify to was known to him from the deposition which he had taken, and she was present in the courtroom in obedience to his subpœna. If he failed to present the testimony of a witness, which testimony would have been valuable to his cause, under these circumstances, the responsibility for this failure must rest with him; for it cannot be said that there was any abuse of the discretion of the court in refusing to allow the case to be reopened for this purpose. As to the proffer of the deposition by way of rebuttal testimony, it was properly excluded as being in no sense rebuttal.

Exception is taken to the rulings of the court in giving and refusing to give instructions. It may be said that generally the complaint is, not that the instructions actually given were erroneous, but that the instructions proposed by the contestant, being unimpeachable in point of law, should have been given. In some instances there is merit in this contention of appellant. This is true of the proposed instruction as follows: "The jury are instructed that the fact that the testatrix committed suicide, if the jury shall find that she did commit suicide, is not of itself sufficient evidence of unsoundness of mind; but this is proper to be considered upon the question of the mental condition of the testatrix, and if the jury find that Bertha M. Dolbeer did commit suicide, they may take that fact into consideration in determining whether or not she was of sound mind at the time of the making of the will in question." Nevertheless, it cannot be said that the refusal of the court to give this instruction and others which may be considered to stand in like position affords substantial ground for reversal of the case. In the first place, it certainly may be presumed that, when the court admitted evidence tending to show that Miss Dolbeer committed suicide, the jury understood that it was to be considered by them as evidence bearing upon the question of her mental capacity at the time of the making of the will. Moreover, the jury was instructed that they were to consider all the evidence in the case in determining this question; and, finally, since, as has been said, the evidence in the case would not have warranted any other conclusion than that which the jury reached, the refusal to give these instructions becomes unimportant, and the objections entirely lack the significance which would attach if the case had been in any sense a close or doubtful one.

The court, at the request of the proponents, instructed the jury as follows: "A hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts proved or to be proved, and calls upon the witness to assume all the material facts stated to be true and express his opinion as to a certain condition. The witness to whom the hypothetical question is addressed assumes them to be true, and bases his answer upon the assumed case. The opinion of the witness must, therefore, be brought to the test of the facts in order that you may judge what weight the opinion is entitled to." Appellant concedes that his instruction "may be true as an abstract proposition of law," but insists that its tendency was to discredit the testimony of the expert physicians whom he had called. This objection is untenable, and the reasons which have been already given answer contestant's exception to the court's refusal to give certain instructions proposed by him upon the subject of expert testimony.

Contestant's instructions, which embodied their "theory of the case," were properly refused. The same objection obtains to these instructions that obtains to the hypothetical questions which they propounded—that the evidence did not in vital respects tend to substantiate their theory. Again, these instructions were elaborately drawn and were in their nature a special argument addressed to the jury under the guise of instructions of law, and for this reason also were properly refused.

No other matters seem to call for particular consideration, though it may be added that, upon a review of all the instructions, the conclusion is irresistible that the jury was fairly and impartially advised.

Application for a writ of supersedeas pending the decision of this cause has been asked for. This decision renders more formal consideration of that application unnecessary. It is denied.

Appellant having died since the submission of this cause, it is ordered that the judgment and order appealed from be affirmed nunc pro tunc as of the date of submission.

We concur: LORIGAN, J.; McFARLAND, J.

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149 Cal. 316

WEBER v. McCLEVERTY. (S. F. 3,143.)

(Supreme Court of California. June 21, 1906. Rehearing Denied July 20, 1906.)

1. Executors and Administrators — Claims —Presentation—Deed of Trust.

Code Civ. Proc. § 1475, declares that, if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate of the deceased owner, and provides the manner in which the funds of the estate shall be applied. Civ. Code, § 1114, declares that the term "incumbrances" shall include taxes, assessments, and all liens on real property, and section 2872 provides that a "lien" is a charge, imposed in some mode other than by a transfer in trust, upon specific property, by which it is made security for the performance of an act. Code Civ. Proc. § 1180, defines a "lien" as a charge imposed on specific property, by which it is made security for the performance of an act. *Held*, that a deed of trust of a homestead, given to secure a debt, by which the title was transferred to the trustee, was neither a lien nor incumbrance on the property within section 1475, and hence the holder of the debt secured by the deed was under no obligation to present the same for allowance against the estate of the grantor as a condition of the creditor's right to foreclose the deed.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 773.]

2. MORTGAGES—DEED OF TRUST—EFFECT.

A deed of trust vests in the trustee, for the purposes of the trust, the absolute and legal title to the entire estate held by the grantor immediately prior to its execution, which estate remains in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 277.]

3. SAME—VALIDITY OF SALE.

Where a deed of trust included a homestead and other property, a sale of the entire property in disregard of the demand of the widow of the trustor that the property other than the homestead should be first sold was voidable only at the election of the widow.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1142.]

4. SAME—WAIVER OF DEFECTS.

Where a deed of trust of a homestead and other property authorized the trustees to sell the property as a whole or in parcels, and the property was all sold in bulk to a purchaser who was not shown to have had notice of a demand by the widow of the trustor that the property other than the homestead should be first sold, and in an action by the purchaser to recover possession, the widow filed no cross-complaint and did not ask that the sale be vacated, she was not entitled to such relief, though the sale was voidable at her election for violation of such demand.

5. SAME—NOTICE OF CLAIM.

Where a deed of trust was executed on property on which a homestead was subsequently declared and on other property, the possession of defendant as executrix and as widow of the trustor was consistent with the right of the trustees to sell the property for nonpayment of the debt, and was not of itself notice to a purchaser at the foreclosure sale of any homestead claim.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Adolph C. Weber against Mary E. McCleverty. From a judgment for defendant, plaintiff appeals. Reversed.

C. E. Hatch and Alexander D. Keyes, for appellant. R. M. Fitzgerald and Campbell, Fitzgerald, Abbott & Fowler, for respondent.

SHAW, J. The plaintiff sued the defendant to recover possession of a certain tract of land. Judgment was given for the defendant in the court below, and the plaintiff appeals on the judgment roll and a bill of exceptions containing the evidence.

The main defense is that the title of the plaintiff was acquired solely by purchase and conveyance to him from certain trustees at a sale of this and other tracts of land, made by them under a deed of trust of the lands executed to them by Charles McCleverty, the husband of plaintiff, giving them power to sell the lands, in default of the payment of a debt owing to the Humboldt Savings & Loan Society, and apply the proceeds in payment upon the debt; that after the execution of the deed of trust, and while she and her said husband were residing on the tract sued for, she recorded a duly executed declaration of homestead thereon, it being community property; that thereafter, and before the trustees' sale, her said husband died, she became executrix of his estate, and was duly appointed and qualified; and that no claim against the estate of said deceased for the debt secured by said deed of trust was ever presented to the executrix of the estate. It is claimed that, under the provisions of section 1475 of the Code of Civil Procedure, the power of sale given by the deed of trust cannot be enforced against the homestead thus created, except for the deficiency that may remain unpaid on the debt after it has been presented and allowed against the estate and the funds of the estate applied as far as they will go upon its payment, and hence that a sale to enforce a trust deed of this character, made without presenting a claim against the estate for the debt, is void.

1. It has not been generally supposed, hitherto, that this section required the presentation for allowance, against the general assets of an estate, of a claim secured by a deed of trust executed by the deceased in his lifetime, as a prerequisite to the execution of the power of sale created by the deed of trust, as against a homestead selected after the making and recording of the trust deed. It may be assumed that such powers have heretofore been exercised, in like cases, without the presentation of any claim, and that some titles to real estate will be unsettled if such prior presentation is now held to be essential. A decision to that effect should not be made unless the terms of the statute clearly require it. Section 1475 of the Code of Civil Procedure, so far as it applies to the present question, is as follows: "If there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with the other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment." The application of this section to the estate of a trustee, holding under a trust deed, made to provide for the payment of a debt of the deceased due to a third person, by virtue of a power of sale for that purpose conferred upon the trustee by the terms of the deed, primarily depends upon the question whether or not the trust deed, or the estate and power thereby vested in the trustee, can be considered a "lien or incumbrance" on the land conveyed to the trustee by the deed, in the sense in which those words are used in the section. If it is neither a lien nor an incumbrance, then that statute has no application to this

case. It is not contended that it comes within the technical definition of a lien, but it is earnestly argued that it constitutes an incumbrance.

There can be no doubt that often in contracts, and sometimes perhaps in statutes, the word "incumbrance" is used in a connection, or under such extraneous circumstances, that it is very properly given a meaning broad enough to include such a qualified estate or interest as that vested by a deed of trust, or, indeed, any outstanding estate or right in the land, or its attributes, that would limit or qualify an otherwise absolute estate in fee. Equitable considerations frequently require that these or similar terms shall be allowed a wider significance than their technical or natural meaning would permit. We do not think the present instance is of this character. It is true that it is the policy of the law to favor homesteads, to a certain extent, for the protection and preservation of homes and families. But there is a limit beyond which this policy should not be allowed to control. It should not be invoked for the purpose of establishing a new application and interpretation of a statute, contrary to its true meaning and in the face of a long-established understanding and usage based on its true meaning. The different Codes are to be harmonized and construed together as parts of the same statute, as far as may be reasonably possible. (Political Code, § 4480.) Language in one Code is often used with reference to similar language, or definitions thereof, contained in another one of the Codes. The present case is an instance of this use. The Code of Civil Procedure nowhere defines the term "incumbrance." In the Civil Code, however, we find its meaning clearly stated. Section 114 of that Code, following a section concerning the effect of covenants against incumbrances on land, declares that "the term 'incumbrances' includes taxes, assessments and all liens upon real property." In section 2872 of the Civil Code, in the chapter relating to liens, a lien is defined as follows: "A lien is a charge, imposed in some mode other than by a transfer in trust, upon specific property, by which it is made security for the performance of an act." A deed of trust is not a tax or an assessment, and being, by the terms of the definition, excluded from classification as a "lien," it follows from the language of section 1114 that it is not an incumbrance. Section 1180 of the Code of Civil Procedure defines the term "lien" thus: "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." The language is the same as in the Civil Code, except that the words "in some mode other than by a transfer in trust" are omitted in the Code of Civil Procedure. If this language could be given a meaning broad enough to include a transfer in trust, which is doubtful, it would have no effect in this case. In that event it would be inconsistent with section 2872 of the Civil Code, which was amended in 1878, six years after the enactment of section 1180 of the Code of Civil Procedure. Section 1180, being the earlier enactment, would be repealed by the later statute, so far as the two were inconsistent. Furthermore, as section 1180 of the Code of Civil Procedure constitutes the introductory part of title 4 of that Code, which title relates to the subject "Of the Enforcement of Liens," its scope should be limited to the liens provided for in that title, and it should not be held to refer to deeds of trust, the foreclosure of which is not there provided for.

In legal effect a deed of trust does not create a lien or incumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustees' sale free of all right, title, interest or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed, or ceases to exist by reason of payment of the debt. It is consequently legally impossible for the trustee in his fiduciary capacity to hold a lien or incumbrance on the land which is the subject of his trust. The existence of a lien or incumbrance vested in one person necessarily implies that the title to the property, interest, or estate covered by the lien or incumbrance is vested in some other person. One cannot at the same time hold an estate in real property and a lien or incumbrance upon that particular estate. The trustee holds title to the entire estate for the purpose of conveying it when required in execution of the trust, and he cannot at the same time hold as trustee a lien on the same estate, for that would necessarily imply that the title to the estate was not vested in him. The estate of the trustee in the land is consequently not a lien thereon, even as that term is defined in section 1180 of the Code of Civil Procedure, conceding it to be in force. It is not a charge on the land, but the very land itself. A mortgage or other incumbrance on land does not transfer the title, but leaves it vested in the mortgagor or owner. A homestead attaches to whatever estate in the land may be vested in one or both of the spouses. Consequently, when declared on land previously mortgaged or incumbered, it attaches to the legal title which then becomes the homestead interest, and the mortgage or incumbrance may properly be said to be a subsisting lien or incumbrance on the homestead, and as such it would be governed by section 1475. But it is not so with a deed of trust. It transfers the legal title to the trustee, and, as the homestead applies only to the title vested in one or both of the spouses, and does not affect titles vested in third persons, it follows that the legal title thus vested in the trustee forms no part of a subsequently declared homestead and that the deed of trust, or the title of the trustee is not a subsisting lien or incumbrance on the homestead interest.

The decisions of this court, with one exception, are in harmony with these views. In Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, speaking of the character of a deed of trust, the court says: "Under the decisions, it is practically, though not in legal effect, little more than a mortgage with power to convey. The legal title passes, but it conveys no right of possession and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession. * * * The trustor may file his declaration of homestead and hold the premises as such against his creditors who are not secured by the trust deed. * * * While we must say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such an estate as will enable them to convey." Similar expressions are found in Tyler v. Currier, 147 Cal. 36, 81 Pac. 319. In Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431, in speaking of such deeds, and evidently intending to epitomize the above passage from Sacramento Bank v. Alcorn, to which reference is made, the court says: "In effect they are mortgages with power to sell." The statement that they are in effect, or practically, mortgages with power to sell, means only that the practical result of the enforcement of either is the same; that is, the estate held by the mortgagor at the time of the execution of the mortgage, in one case, and that of the trustor at the time of the execution of the deed of trust, in the other case, are by the respective conveyances of the sheriff on foreclosure sale, and of the trustee on trustee's sale, transferred to the respective purchasers at such sales, and that in the meantime the mortgagor and trustor, respectively, have the use and enjoyment of the property. All this is true, and yet the entire estate of the trustor, for the purposes of the trust, must, during the intervening period, be vested, as an estate, and not as a lien, in the trustee; otherwise, he could not legally convey it in execution of the trust. The case which seems to hold that a deed of trust is an incumbrance and not an interest in the land is Williams v. Santa Clara Min. Ass'n, 66 Cal. 200, 5 Pac. 85. The question there arose whether section 1192 of the Code of Civil Procedure, requiring any person "claiming an interest" in land upon which a building was being erected to give notice that he will not be responsible for the same in order to avoid the enforcement of a lien for the cost of the building against such interest, was applicable to a deed of trust. The court in effect held that, so far as that section is concerned, the estate created by the trust deed should not be deemed an interest in the land, so as to require the trustee to give such notice, and said that the deed should be "treated" as an incumbrance, and that, the deed having been recorded before the building was begun, it was exempt from the lien by the provisions of section 1186 of the Code of Civil Procedure. The court merely says that in the application of sections 1186 and 1192 of the Code of Civil Procedure, a deed of trust should be "treated" as an incumbrance. This is far from deciding that it is, in legal effect, an incumbrance; indeed, the context implies an admission that it has no such legal character, and is to be so considered only when, in a court of equity, the ultimate results are to be considered, rather than legal forms and rules. The point received no thorough treatment in the opinion, the Code definitions were not mentioned, and although we do not in the least impugn the authority of the decision as a construction of the section of the Code there involved, we do not consider ourselves bound to adopt the doctrine as a general principle, and, in the face of the provisions of the Civil Code above given, apply it also to section 1475 of the Code of Civil Procedure.

The claim or interest of the trustees, not being either a lien or incumbrance on the homestead, and the homestead right being subsequent to the deed in point of time and subordinate to it in all respects, it follows that the conveyance of the trustee related back to the estate of the trustor at the time he executed the trust deed, and transferred to the purchaser the entire right, title, interest and estate in the land then vested in the trustor, thereby completely extinguishing the homestead.

2. Another defense urged to the action is that, after the death of Charles McCleverty, the trustor, and before the sale, the defendant made a demand upon the trustees and also upon the creditor, the Humboldt Saving & Loan Society, that upon a sale by the trustees to enforce the trust the property described in the trust deed, other than the homestead, should be sold to satisfy the debt before resorting to the homestead, and that said demand was refused and said property sold as a whole. It may be conceded that the widow had the right to make this demand, and, if disregarded to her injury, to maintain an action or cross-action to vacate the sale. But a sale so made would not be absolutely void. It would be, at most, only voidable at her option. She could waive her right to set it aside, and, if she took no action to vacate it, the sale would stand. She has filed no cross-complaint, and the answer does not ask that the sale be vacated. Nor does it

allege facts which would warrant a decree against the plaintiff declaring it void. It does not show that the value of the property, including the homestead, exceeded the debt, nor that a separate sale would have saved her homestead, nor anything to indicate that a sale in parcels would have been more beneficial to her than the sale as an entirety. The deed of trust authorized the trustees to sell the property as a whole, or in parcels, as they saw fit. The purchaser was not the creditor, but, so far as appears from the pleadings and evidence, a mere stranger, buying without notice of any facts except such as would be imputed to him from the contents of the trust deed. It does not appear that he had notice of the demand for a separate sale, nor that he knew of the declaration of homestead. The possession of the defendant as executrix and as widow of the testator, was entirely consistent with the right of the trustees to sell, and was not of itself notice of any homestead claim.

The court below erred in its conclusion of law that on the facts alleged and found the plaintiff was not entitled to possession, and in giving judgment for the defendant.

The judgment is reversed, and the cause remanded for a new trial, and with leave to the defendant to file amended or additional pleadings as she may be advised.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; COOPER, J.

NOTE.—Justice McFARLAND being unable to act, Justice COOPER, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4 of article 4 of the Constitution.

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149 Cal. 310

FITTS v. SOUTHERN PAC. CO.

(S. F. 3,596.)

(Supreme Court of California. June 12, 1906. Rehearing Denied July 12, 1906.)

1. Jury—Qualifications of Jurors—Bias.

In an action against a railroad for injuries sustained at a crossing, a juror who had formerly been a railroad purchasing agent and had dealings with defendant testified that he had a feeling in favor of the defendant for many years and a prejudice against damage suits, because in his opinion in a good many cases the damage was due to the negligence of the party himself. He also testified that he would vote for a verdict for plaintiff if the proof was strong enough, but that it would require "strong and positive testimony," "ample proof," and "good proof," in order to induce him so to do. *Held*, that he was disqualified on the ground of bias; plaintiff being entitled to recover on proof sufficient to establish a prima facie case.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 431-437.]

2. Trial — Instructions — Misleading Expressions.

In an action for personal injuries, the use of the phrase "in a case like this" in one of the instructions was objectionable, as misleading the jury to suppose that reference was being made to the case at bar, rather than to the class of cases to which that of plaintiff belonged.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by W. L. G. Fitts against the Southern Pacific Railway Company. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Wm. J. Herron, for appellant. P. F. Dunne, for respondent.

LORIGAN, J. Plaintiff was injured in a collision with one of the trains of defendant while driving across the railroad tracks on Treat avenue, in the city of San Francisco, and brought this action to recover damages. The verdict was for defendant, and from an order denying his motion for a new trial plaintiff appeals.

Several grounds are urged for a reversal, only one of which is of sufficient importance to merit particular consideration. It is insisted that the court erred in disallowing the challenge of plaintiff to a juror— C. G. Young —interposed on the ground (subdivision 7, § 602, Code Civ. Proc.) that his examination disclosed the existence of a state of mind evidencing bias against the plaintiff. The testimony of the juror given upon his voir dire showed that, while then employed as a hardware manufacturing agent, he had in former years been a purchasing agent for a railroad company in Arizona—the Arizona & Southwest Railroad Company—and as such had then some dealings with defendant; that he had probably read of the facts of the case in the papers, but had no present recollection of them; that he was acquainted with some of the officials of the defendant corporation, just a casual acquaintance. His examination from this point then proceeded: "Q. Would your acquaintance have any influence with you as a juror in this case? A. I think not, if the proof was strong enough. Q. When you say, 'If the proof was strong enough,' what do you mean by that? A. I mean that there are a good many of these accidents probably caused by the negligence of the parties injured. Q. Would you go into the jury box with a bias in favor of the defendant in a case of this kind? A. Without any testimony, yes, sir. Q. And it would take testimony to remove that feeling? A. I would not render a verdict without strong and positive testimony. Q. Would you not go into the jury box here with that feeling in favor of the defendant? A. Without proof; yes, sir. Q. And you have that feeling now? A. I have had it for many years." Here counsel for the plaintiff interposed his challenge. On examination by the attorney for the defendant the juror continued: "Q. If there was no evidence introduced in this case at all, you would give a verdict for defendant? A. Yes, sir. Q. The plaintiff has to prove his case? A. Yes, sir. Q. You say you have some views upon the question of damage suits? You think that in a good many cases the damage is due to the negligence of the party himself? A. I have no doubt of it. Q. That is a general impression or deduction which you have from your experience? A. Yes, sir." The attorney for the plaintiff here renewed his challenge on account of a feeling of bias and prejudice on the part of the juror, whereupon the court inquired: "Does he say he has a bias? Attorney for Plaintiff: A bias in favor of the defendant. The Juror: No, sir. I believe a great many cases of that kind are through the negligence of the parties injured. Q. Are you in that frame of mind that you would be willing to change places here with the plaintiff and be willing to accept him upon a jury in a case in which you yourself were the plaintiff, provided he was in the same frame of mind as yourself? A. I don't know whether I want to answer that question or not. Q. That is what I want to know. We are entitled to have a fair and impartial jury, and if you should in any way feel that you could not sit upon this case impartially, we want to know it. You are in that frame of mind that the plaintiff would have to make out an exceedingly strong case? A. Yes, sir; the proof would have to be ample. Q. Would you be willing, if he was in the same frame of mind you are, to have him try your case? A. Possibly not. Q. Why not? A. From my remarks you can judge, probably. Q. Have you ever expressed yourself as prejudiced against this class of cases? A. Yes, sir; I think I have. As I remarked to you before, that is all the prejudice I have. Railroad accidents, I believe, a great many of them, are through their own carelessness. Q. You say you cannot answer that question as to whether you would be willing to change places with the plaintiff and have him try a case of yours, provided he was in the same frame of mind that you are? A. In answer to that I will say that I would be perfectly honest in the case, and if the proof was ample he would get my vote for a verdict. But I should require good proof. Q. What do you mean by good proof? A. Proof that satisfied me that he ought to have a verdict. Q. You say that you have expressed a bias or prejudice against this class of cases? A. I have spoken about them a great many times. Q. And you entertain that opinion still? A. I do."

We have produced the entire examination of the juror, because it is not very lengthy, and upon a fair consideration of it we are of the opinion that the challenge interposed should have been allowed. While the law does not guaranty to a litigant on the trial of the cause any particular kind of juror, it does guaranty to him a jury composed of persons who are wholly impartial as far as the particular merits of the suit they are required to try is concerned, and the juror Young was clearly not of the class so guarantied. It is true that a general abstract bias which a juror may entertain to a class of litigation will not of itself disqualify him from trying a cause, when it appears that, notwithstanding he entertains that feeling, he can set it aside, and can and will fairly and impartially decide the particular case solely upon the evidence and the instructions of the court. Baker v. Borello, 136 Cal. 166, 68 Pac. 591; Graybill v. De Young, 146 Cal. 422, 80 Pac. 618. This, however, is not the situation disclosed here. The prejudice the juror held against the class of actions in which that of the defendant fell was a fixed and abiding one. He entertained it as the result of personal observation and experience, had so entertained it for years, frequently expressed it, and still adhered to it. While the juror did not in express terms declare that, by reason of his general feeling of prejudice, his judgment in the particular case would be colored, still we think it is apparent, from the consideration of his entire examination that, in weighing the evidence adduced on behalf of the plaintiff, his judgment would be prejudicially affected against him by reason of his bias against the class of actions to which his belonged. In effect this is what his testimony shows would be his mental attitude towards plaintiff's cause. He declared that he would go into the jury box with a feeling of prejudice in favor of the defendant; that in the case at bar that prejudice would operate in favor of defendant, and it would take strong and positive testimony to remove it. In the face of these declarations, it would seem to be idle to claim that the juror was a fair and impartial one. No juror can be said to be so who enters upon the trial of a cause prejudiced against a class of actions to the extent that a litigant is required in a particular case falling within the class to overcome his prejudice by strong and positive evidence, or any other kind of evidence. The constitutional right to a trial of a case before an unbiased and unprejudiced jury is not afforded a party, when, over his protest, a juror is retained whose prejudice requires such litigant to support his cause, not simply by a preponderance of evidence, but by evidence which must preponderate to an extent so as to overcome the antecedent prejudice with which the juror enters upon the trial of the cause.

Aside from this, when asked if he would be willing to have a case in which he was plaintiff tried by a juror in the same frame of mind as himself, he was uncertain as to whether he wanted to answer the question or not, that "possibly not," and when asked why, told counsel for plaintiff that he could probably judge from his remarks why not. Of course, the only judgment which could be satisfactorily arrived at from his remarks was that he would not want his case tried by a juror entertaining the same prejudice with which he previously declared he would go into the jury box to try the cause of plaintiff. As we have said, it has been held that a juror is not disqualified by reason of general bias entertained against a class of actions, when it appears from his testimony that he can lay aside that prejudice, and uninfluenced by it, try the cause at issue solely upon the evidence and the instructions of the court as to the law. In the case at bar Mr. Young stated on his examination that he would be perfectly honest in the case, and if the proof were ample would vote for a verdict; and it is insisted this was the equivalent of stating that he would try the cause fairly upon the evidence and under the law as declared by the court. Whether this was the meaning he intended to convey is simply matter of conjecture. He nowhere definitely declared any such intention. That the juror was honest and candid in all his answers is beyond question, and that he honestly entertained a prejudice to the extent, and in the manner, that he declared it would influence him in considering the case of plaintiff, is also beyond question. No doubt such a juror would, to the best of his ability, try the cause upon the evidence and instructions of the court. In fact, there would be nothing else upon which he could try it. But he would still try it under the influence of the prejudice he honestly entertained, and which he nowhere announced either his ability or intention to divest himself of.

It is to be observed, too, that in stating that he would be perfectly honest in the case he at the same time declared that he meant thereby that if the proof was ample he would vote for a verdict. Several times during his examination he referred to the degree of proof which he would require before he would return a verdict for plaintiff. He would require "strong and positive testimony," "ample proof," "good proof." These answers as to the amount of proof he would require, considered in connection with the questions to which they were responsive, and in view of the prejudice he entertained, clearly showed that he would require, in the class of actions to which plaintiff belonged, stronger proof than he would consider necessary were the action of another character. While generally no exception could be taken to the answer of the juror that he would require ample proof, yet what this particular juror meant by ample proof is apparent from his answer to the interrogatory: "You are in that frame of mind that the plaintiff would have to make an exceedingly strong case? A. Yes, sir; the proof would have to be ample." While his answer to this particular question of itself clearly indicated what the juror considered would be the ample proof under which he would return a verdict—that it would have to be proof making out an exceedingly strong case—it is, as we say, quite apparent, from all the rest of his examination on this subject, that he would, on account of his prejudice, require stronger proof in the case he was about to try than if it were an action of another kind. This requirement on his part of stronger proof was, of course, perfectly consonant with his declared prejudice against such actions; but the law recognizes no such requirement, and a juror who demands it cannot be classed as a fair and impartial juror. Aside from the fact that a plaintiff may recover upon a prima facie case made, yet, taking for the purpose of illustration the ordinary action for damages where the evidence is conflicting, it goes without saying that if jurors could be deemed fair and impartial who entertain the prejudice and thereby require the degree of proof that the juror Young required, verdicts for plaintiff would be extremely rare. The mental attitude of this juror, we think, was so apparently affected by bias against actions brought to recover from railroad companies for personal injuries as to influence his judgment prejudicially in the consideration of the cause of plaintiff, and for that reason the challenge to him should have been allowed, and it was error not to have granted it.

The other grounds urged for reversal, consisting of alleged erroneous rulings of the court as to the admissibility of evidence, are without force.

Complaint is made as to two of the instructions given. They announce correct principles of law, but in view of a new trial we are inclined to think that the use of the expression, "in a case like this," found in one of them, is open to the criticism that the jury might imply from its use that reference was being made to the case at bar, rather than to the class of damage cases to which that of plaintiff belongs, as that term was doubtless intended to be used. This objection can, however, readily be obviated should the same instruction be again asked.

For the reasons indicated relative to the error of the court in disallowing the challenge to the juror Young, the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

We concur: BEATTY, C. J.; HENSHAW, J.

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149 Cal. 389

PEDERSEN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Cr. 1,356.)

(Supreme Court of California. July 2, 1906.)

ATTORNEY AND CLIENT—APPEARANCE OF ATTORNEY PENDING APPEAL FROM CONVICTION.

Pending appeal by an admitted attorney from a conviction of a felony, without bail, but with a certificate of probable cause staying proceedings on the judgment, the trial court has inherent power to refuse to allow him to appear as attorney for another; he, under Pen. Code,

§§ 1244, 1600, being required to be confined in the county jail pending his appeal.

In Bank. Application by H. N. Pedersen for writ of mandate to the superior court of the city and county of San Francisco and Hon. Frank H. Dunne, judge thereof. Petition denied.

George D. Collins, for petitioner.

PER CURIAM. The petitioner is charged by information in the superior court with a public offense, and by this petition he seeks a writ of mandate to compel that court to allow one George D. Collins to appear as attorney for the petitioner in said court and there to defend him against the said charge. Collins has been regularly admitted to practice as an attorney in all the courts of the state, and has never been disbarred or suspended; but he has been convicted of a felony in the said courts, and has been duly sentenced to imprisonment in the state prison therefor. He has taken an appeal from the judgment of conviction, and has secured from the judge of said court a certificate of probable cause, which stays proceedings on the judgment pending the appeal. Bail has not been allowed to Collins, and in the meantime he is in the custody of the county sheriff awaiting the prosecution and determination of the appeal. The petition avers that, notwithstanding these conditions, Collins can and will appear in the said superior court at all times when necessary to attend to the defense of the petitioner on said charge. This is, of course, a mere opinion of the petitioner, and not an allegation of fact. In truth, he cannot lawfully appear in said court for that purpose.

Section 1244 of the Penal Code provides that when a certificate of probable cause has been issued, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal. Section 1600 of the Penal Code is as follows: "A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the county jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape." In the sense in which the words are used in these sections, Collins is at present in custody either "upon conviction" or awaiting trial; that is to say, the trial of his appeal, and, if the judgment of conviction is reversed, and the cause remanded for a new trial, then for the subsequent trial of the charge. He is therefore to be confined in the county jail, and the sheriff can have no authority, of his own motion, to permit him to appear in court or elsewhere, or to allow him to go outside of the jail for any purpose. If the sheriff does voluntarily permit him to go outside, either with or without an escort, the sheriff himself is guilty of permitting an escape. There is no express authority for the superior court to enlarge him without bail, except for the purpose of allowing him to appear in court to make his defense to the charge pending against him, and possibly to appear for the prosecution of his appeal. The superior court has inherent power, under such circumstances, to refuse to allow an admitted attorney to appear on behalf of another person charged with crime, or to appear as an attorney for any purpose that would involve a subsequent appearance in the same matter for the regular and orderly disposition of the case.

The petition is denied.

149 Cal. 278

KNOWLES v. CROCKER ESTATE CO. et al. (S. F. 3,149.)

(Supreme Court of California. May 31, 1906. Rehearing Denied June 28, 1906.)

1. FORCIBLE ENTRY AND DETAINER—POSSESSION.

For one to inclose land by fences and a natural barrier is a sufficient appropriation of it to his notorious use and control as to constitute actual possession, within Code Civ. Proc. § 1172, providing that on a trial for forcible entry it shall be enough for plaintiff to show, in addition to the forcible entry, that he was peaceably in the actual possession at the time of such entry.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 37–47.]

2. SAME—FORCIBLE ENTRY.

For one to enter on land in the actual peaceable possession of another, with a number of men acting under his direction and control, with such a display of force and accompanied by such acts as are calculated to intimidate the occupant from resisting this intrusion and maintaining his possession, is sufficient to constitute a forcible entry, within Code Civ. Proc. § 1159, declaring one guilty of a forcible entry who by violence or circumstances of terror enters real property.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 5–16.]

3. SAME—RETAINING POSSESSION.

If retention of possession by defendant of land which he forcibly entered is necessary to authorize an action for forcible entry, it is enough that his destruction of the fence about it put an end to plaintiff's exclusive control and dominion over it, and threw it into defendant's larger tract, about which was a fence.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 15–25.]

In Bank. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Frank S. Knowles against the Crocker Estate Company and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Morrison & Cope and W. I. Brobeck (Geo. C. Ross, of counsel), for appellants. Edwd. F. Fitzpatrick and B. B. Newman, for respondent.

LORIGAN, J. This action was for forcible entry. Judgment was rendered in favor of plaintiff for a restitution of the land described in the complaint, and for treble the amount of damages awarded by the jury, and from such judgment and an order denying the motion of defendants for a new trial, this appeal has been taken.

The evidence shows that the land described in the complaint is a portion of a larger tract of about 33 acres in extent in San Mateo county, with a fence on the outside and with cross-fences thereon, which at the dates hereafter mentioned was in the occupancy of one Daly as tenant of the defendant Crocker Estate Company. The defendant Leigh was the agent of said company. In August, 1896, plaintiff brought an action against the Crocker Estate Company to quiet title to about 7 acres of such tract, and the next month entered upon such larger tract, while it was in the occupancy of Daly, and built a fence along the eastern line of the tract described in the complaint and along its southerly line to a point where there was already standing a fence which extended in a northerly direction along all but a small portion of said west line, where there was a bluff. This bluff and these fences—the ones on the south, west, and east—formed an inclosure containing the land described in the action to quiet title and in the complaint in this action, and upon which it was claimed the forcible entry by the defendants was made. The east and south lines of fencing built by plaintiff amounted to about 1,850 feet in length, occupied some 20 or 25 days' work in building them, and no one interfered with plaintiff while he was having them constructed. The tract inclosed, except the extreme northern portion thereof, where there was an old quarry of about an acre in extent, was fertile soil, capable of being used, as it had been many years before, for agricultural purposes. Immediately after building the fences, plaintiff, who lived about a quarter of a mile from the tract, commenced gathering and hauling away the loose rocks scattered about the land, which it was necessary to do in order to thoroughly prepare it for cultivation or for farming purposes. For that purpose he went upon the land every few days, and was so employed up to November 16, 1896. The rock taken off was used by him in filling a ditch near where he lived, but which had no connection with the land inclosed by him, and in repairing the road running down to the property. After the construction of the fences above referred to, Daly had no further occupancy or possession of the property described in the complaint in this action, and did not enter thereon except by permission of the plaintiff to drive his cattle through gates left in the fences constructed by plaintiff so as to reach property of the Crocker Estate Company rented by him and located beyond the tract claimed by plaintiff. About two months after the fences were built by the plaintiff, the defendant Leigh, acting on behalf of the Crocker Estate Company, having been informed of their erection, employed a carpenter named Murray, and directed him to go to the tract and tear down the fences erected by plaintiff, and on the morning of November 16, 1906, Murray left San Francisco for that purpose. Murray had engaged 7 men to assist him, and they, together with the defendant Leigh, met him on that day at a place appointed near the tract. They entered it from the northern end thereof, driving in with a light wagon with a single horse, without, as Murray, the driver, says, being under the necessity of opening any gate or breaking any fence (counsel for appellants state in their brief on this hearing that they entered through an open gate) or meeting with any obstruction or opposition. They carried with them pickaxes, shovels, crowbars, and hatchets, reached the ground about noon, distributed themselves along the fences constructed by plaintiff, and immediately, commenced with these appliances pulling them up and knocking them apart, the materials of which they were composed being thrown into the highway. In the forenoon of that day the plaintiff and his brother had been engaged in hauling some rock from the land, and at the time Murray and his men, with the defendant Leigh, arrived they had gone home to dinner. While the fences were being demolished, the father of plaintiff, passing the premises on his way to town and hearing the noise, went over to where the men were at work, and asked Leigh by what authority he was destroying them. Leigh answered that he was advised by the attorneys for the Crocker Estate Company to do so; to tear the fences down and take possession. The plaintiff and his brother returned about 1 o'clock, and at that time the whole fence built by plaintiff on the eastern and southern lines, except a small portion on the southern line, had been removed. They were then engaged in tearing down this latter portion. Plaintiff also demanded of Leigh by what authority he was doing it, and was also informed that he was doing it at the instance of the Crocker Estate Company. An Italian, who was passing by when the fence was being thrown into the highway, and who had asked permission of Leigh to take away the lumber, and had been granted it, was proceeding to carry it away when plaintiff came up. Plaintiff told the Italian not to take the lumber, when Leigh addressed the man, saying: "You take that lumber away. If you don't I will have it burned." Plaintiff told Leigh he wanted it to replace the fence, to which Leigh responded: "If you build the fence there, I will tear down all the fences you put up." Plaintiff remonstrated against the destruction of the fence, but no attention was paid to him, and the work of demolition continued until all the fence was destroyed. The plaintiff testified that Leigh's manner at that time was very impressive, and that when he told him he would tear down any fence that plaintiff might erect he was very firm in doing so, and the latter took him as though he meant what he said. When leaving, after the fence was destroyed, Leigh stated to plaintiff that if he built the fence again he would probably be instructed to come out and again tear it down. There was no quarrel between the plaintiff and Leigh. Neither Leigh nor the men made any hostile demonstration towards plaintiff, and the latter invited none. The interview between Leigh and himself was gentlemanly and courteous. No attempt was made by plaintiff by force to prevent the destruction of the fences. He protested against their being taken down; that is, such portion of the south fence as was left when he arrived. Leigh ignored the protest, and the destruction of the remainder of the fence by his men went on, with an express declaration on Leigh's part of his intention to destroy any of the fence which might be built. Plaintiff testified that he did not rebuild the fences because he thought it was useless to do so; that Leigh would have torn them down as fast as he rebuilt them; that his attorney told him not to rebuild them because of Leigh's threat to tear them down, and that upon the advice of his attorney he did not rebuild them; that as he had no fence to inclose the land there was no use in going on any further with his preparations of the land for farming purposes. The conversation between Leigh and the plaintiff appears to have been without the hearing of Murray and the other men, and took place at some distance from where they were at work, during which time Murray and they were engaged in removing the remainder of the fence, and upon its accomplishment Leigh and they left the scene.

The sections of the Code of Civil Procedure under which this action is maintained provide: Section 1159. "Every person is guilty of a forcible entry who either: 1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters into any real property. * * *" Section 1172. "On the trial of any proceeding for any forcible entry the plaintiff shall only be required to show in addition to the forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry. * * *"

In order to entitle plaintiff to recover it was essential that the evidence should show that when the alleged entry was made he was in the peaceable and actual possession of the land described in the complaint, and that the entry complained of was made by defendants accompanied by violence or circumstances of terror. It is insisted by defendants that the evidence does not show the existence of either of these conditions, which are essential to a recovery. As far, however, as the peaceable and actual possession of the plaintiff on November 16, 1900, is concerned, we think that the evidence, considered as the law requires it to be on this appeal, in a way most favorable to support the verdict, sufficiently establishes that it was. The evidence shows that the fences built by plaintiff with the fences then existing, and the natural barrier on the north made a substantial enclosure which placed the premises described in the complaint in the exclusive possession of plaintiff. Thereafter he alone exercised acts of ownership and dominion over the tract so enclosed to the exclusion of both the Crocker Estate Company and its tenant Daly. This was sufficient to constitute actual possession within the terms of the statute. It was not indispensable to actual possession that the plaintiff should have resided on the premises, or that he should have cultivated or improved them. Actual occupancy or cultivation or improvement is not requisite. An inclosure of land by fences or substantial barriers, or a combination of both, constitute an actual possession of the premises without any other act being done indicating dominion. Such an inclosure is of itself a sufficient appropriation of the land to the visible and notorious use and control of the person making the inclosure, so as to constitute actual possession, and to protect such possession against the intrusion or interference of others. Our attention is not called to any case which holds that such an inclosure does not establish actual possession, while the authorities in this state (referring to such only as discuss the subject in its relations to actions of forcible entry) are uniformly to the effect that it does. Minturn v. Burr, 16 Cal. 110; Shelby v. Houston, 38 Cal. 410; Brumagim v. Bradshaw, 39 Cal. 24; Gray v. Collins, 42 Cal. 152; Goodrich v. Van Landigham, 46 Cal. 601. The possession of the plaintiff being thus actual within the contemplation of the statute, there can be no doubt from the evidence but that such possession was entirely peaceable until it was disturbed by the entry of the defendants on November 16, 1900.

Nor is there any force in the other claim of defendants that the evidence shows that the entry upon the premises was accompanied by no such violence or circumstances of terror and ouster of the plaintiff from the possession of the land inclosed by him as warranted the maintenance of, and the judgment for damages and restitution of the premises in this summary action of forcible entry; that at most the evidence shows but a simple trespass by defendants.

We are at a loss to perceive anything in the evidence upon which the idea that the conduct of defendants amounted to but a simple trespass can be predicated. The avowed purpose of the agent Leigh in entering upon the inclosure was to break down plaintiff's fences and take possession of the land which they inclosed. That is what he declared he was instructed to do, and which he did, and he entered directly upon the premises as inclosed by the plaintiff to do so. He entered at an hour when plaintiff was absent at dinner, with the strength of combined numbers and with implements as equally available for repelling any resistance as for destroying the fences. He came in force with sufficient men to work rapidly, and when plaintiff, coming on the scene after most of the fence had been removed, protested against further destruction, his protest was ignored, and in a way which plaintiff declares impressed him that Leigh meant what he said, the latter declaring that any fence which plaintiff might further erect he would also destroy. It is true that plaintiff made no physical effort to prevent the destruction of the fence. There was no personal collision, and no threats made save as above stated. But it was not necessary that the plaintiff should have resisted their destruction of his property to the extent that some act in breach of the peace should have been committed. He was not required to offer resistance to their actions in order to demonstrate by possible physical injuries inflicted upon him the forcible character of their entry upon the premises. It must have been obvious to plaintiff as a reasonable man that to have offered resistance against such a force as confronted him would have only precipitated a conflict which would have resulted in a breach of the peace, the very thing the forcible entry act was intended to prevent. The natural impulse of one who finds his property being invaded or destroyed is to endeavor to prevent it, and this he will naturally do unless awed by the manner of invasion or apprehension of violence in the attempt to prevent its destruction. In the case at bar the jury had a right to find from the evidence that the entry was made in such a manner and with such attendant circumstances—the display of a strong hand and determined purpose upon the part of Leigh and his men to destroy the fences and resist any attempt to prevent their doing so—as impressed the plaintiff with a fear of violence should he endeavor to assert his rights to prevent their action. When a person enters upon land in the actual peaceable possession of another, with a number of men acting under his direction and control with such a display of force and accompanied by such instant acts as are calculated to intimidate the occupant from resisting their intrusion and maintaining his possession, such conduct is sufficient to constitute a forcible entry within the purview of the statute.

There is little, if any, difference in the facts stated in the case of Ely v. Yore, 71 Cal. 130, 11 Pac. 868, and those in the case at bar. In that case, upon the subject which we are now considering, the court says: "The Code expression of an entry by 'violence or circumstances of terror' is the equivalent of the English statutory law expression of an entry 'with strong hand and a multitude of people.' To constitute such an entry under either law, it is not necessary that it should be accompanied with tumult or riot directed against the person of the party in possession. It will be sufficient if it is attended with such a display of force as manifests an intention to intimidate the party in possession or to deter him from defending his rights or to excite him to repel the invasion of his possession, and thus bring about a condition of things which the law was intended to prevent and punish, namely, acts tending to excite a breach of the peace. Where an entry is made with such a display of force, accompanied by destruction of property upon the land on which the entry is made, it is a forcible entry. * * * It is conceded that the plaintiff was in the actual or peaceable possession of the premises upon which the defendants at an unusual time and with a large number of men entered by tearing down the fence and removing its materials to another part of the land. Such acts were more than a trespass. Gray v. Collins, 42 Cal. 152; Brown v. Perry, 39 Cal. 23. The fact that the defendant did not personally remain in possession of the land upon which he entered with violence does not affect the character of his entry. He was legally adjudged guilty of a forcible entry." The case of Gray v. Collins, 42 Cal. 152, 156, presents also a similarity of facts with the case at bar and declares the same doctrine which was subsequently followed in the case from which we have just quoted.

These are the two leading cases in this state on the point to which we have cited them, and in both cases it is held that evidence such as is presented in the present case was sufficient to show a forcible entry. Other authorities in this state might be cited, but the law in its application to such a kindred state of facts as is presented here is so clearly stated in both the cases referred to as to make these citations unnecessary. In this same line of alleged insufficiency of the evidence to show that a forcible entry was made, it is claimed that it does not appear that the defendants took or remained in possession of the premises which were inclosed within plaintiff's fences, after such fences were destroyed. Without discussion whether such a showing under subdivision 1 of the section relied on by plaintiff was at all necessary, it is sufficient to say that the avowed intention of Leigh, as the evidence discloses, was that he went there to remove the fences and take possession of the inclosed land, and that he accomplished the latter when the fences were destroyed, and as necessarily incident to their destruction. The inclosed tract of 7 acres, before its segregation by plaintiff's fences, was part of the larger tract of 33 acres. The effect of destroying plaintiff's fences was to put an end to plaintiff's exclusive control and dominion over this 7-acre tract and to put it thereafter in possession of defendants as part of such 33-acre tract by reason of the fences which they had around this larger tract. The fact that plaintiff entered as he did upon the land after the fencing was destroyed and took away some stone which he had dug out for use on a road before the fences were destroyed, and that defendants did not oppose his doing so, did not show that the plaintiff was still in possession. It only tended to show that defendants did not consider this action on the part of plaintiff as interfering with their possession of the land as now part of the larger tract; and as the removal of the stone was no detriment to the land, but a positive benefit, they were not adverse to its removal.

These are the principal points urged upon this appeal as grounds for a reversal and concerning which we deem particular consideration necessary. Additional points are also presented, which, however, we do not think are of sufficient importance to merit any particular mention.

We perceive no error in the record which would warrant a reversal, and the judgment and order denying the motion for a new trial are therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; SLOSS, J.; McFARLAND, J.

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3 Cal. App. 470

COOPER et al. v. BURCH et al.

(Court of Appeal, Second District, California. April 27, 1906. Rehearing Denied by Supreme Court June 25, 1906.)

MORTGAGES—SEPARATE ACTION ON NOTE.

In an action against one of the makers of a note, it appeared that it was secured by a mortgage executed by the same parties, and that without the knowledge of defendant plaintiff had released enough of the mortgaged property to satisfy the mortgage if the consideration recited in the releases had been paid, under an arrangement between the other makers and plaintiff, though the latter had not actually received the money. *Held*, that as the obligation of defendant was not to pay the amount of the note absolutely, but only the balance after the security was exhausted, and as the case was appropriate for the application of the rule that a separate action cannot be maintained on a note secured by mortgage, a judgment of nonsuit was proper.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 569, 944.]

Appeal from Superior Court, Ventura County; J. W. Taggart, Judge.

Suit by Rosana W. Cooper and others, as executors of one Wells, deceased, against John D. Burch and others. From a judgment of nonsuit, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Will D. Gould, for appellants. Geo. B. Patton, E. Edgar Galbreth, and D. Allen, for respondents.

PER CURIAM. The suit was brought on the promissory note of the three defendants, set out in the complaint, purporting to have been executed by defendant Patton, by Boal, his attorney. Judgment was entered against the defendants Burch and Boal on default, and against the defendant Patton on his subsequent appearance and answer. A new trial was granted, and was affirmed by the Supreme Court on appeal (Cooper v. Burch, 140 Cal. 548, 74 Pac. 37), and on another trial the plaintiffs were nonsuited. Under the decision of the former appeal, the only questions now before us relate to the defendant Patton's "liability on the obligation upon which the judgment was recovered." Code Civ. Proc. § 992. This liability is denied by him on the ground, among others, that the power of attorney under which Boal acted did not authorize him to execute the note; and this, we think, was the case. But it is claimed by the appellants that Patton was notified of the making of the note a few days after its date, and that having failed to repudiate the same, or to make any objections thereto, the action of his agent is to be regarded as having been ratified by him, or at least, that he is estopped to deny the due execution of the note; and, for the purposes of the decision, it may be assumed that such is the case. But it appears from the answer of the defendant Patton and the evidence offered by the plaintiffs, that the note was secured by a mortgage of the same date, executed by the same parties, and that, without the concurrence or the knowledge of the defendant Patton, the plaintiffs from time to time executed satisfactions and releases of the mortgage as to lots as they were sold until the amounts acknowledged to have been received were sufficient to satisfy the note and mortgage. It, indeed, appears that under an arrangement with the defendants Burch and Boal, proposed by the plaintiff's testator, the money was not actually received by the latter; but there is no evidence in the record that the defendant Patton concurred in or knew anything about this arrangement. Upon these facts, the nonsuit was rightly granted. The obligation of the defendant Patton was not to pay the amount of the note absolutely, but the balance remaining after the mortgage security was exhausted, only. The case is therefore peculiarly appropriate for the application of the rule that a separate action cannot be maintained on a note secured by mortgage.

The judgment and order will be affirmed.

3 Cal. App. 454

MORGAN v. SAN DIEGO COUNTY.

(Court of Appeal, Second District, California. April 25, 1906. Rehearing Denied by Supreme Court June 21, 1906.)

1. CORONERS — INQUEST — JURISDICTION TO HOLD.

Pen. Code, § 1510, provides that when a coroner is informed that a person has been killed or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must hold an inquest. *Held* that, in order to justify an inquest under such section, the killing must have been sudden and unusual, and of such a nature as to indicate a possibility of death by the hand of the deceased or through the instrumentality of some other person.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Coroners, §§ 12, 13.]

2. SAME — INQUEST BY JUSTICE — EXCLUSIVE JURISDICTION.

Where one inquest has been held on the body of a deceased person by a justice of the peace in accordance with the law, the coroner is not entitled to fees for the holding of a second inquest, in the absence of proof that the inquest held by the justice was unlawful.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Coroners, § 24.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Dr. A. Morgan against the county of San Diego. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Modified and affirmed.

Cassius Carter, Dist. Atty., and W. R. Andrews, Deputy Dist. Atty., for appellant. A. H. Sweet and Stearns & Sweet, for respondent.

GRAY, P. J. This action is brought by the coroner of the defendant county to recover compensation for his services in some 14 inquests, alleged to have been held by him. The findings and judgment were in plaintiff's favor, except as to one of said inquests; and the defendant appeals from said judgment and from an order denying its motion for a new trial.

It is objected by the respondent that the court has no jurisdiction of this appeal, because the amount in controversy is less than $300. The amount of the judgment is $597.17. The amount prayed for in the complaint is for the sum of $588.25, together with interest thereon, etc. It is conceded in appellant's brief that an amount is actually due plaintiff on his first cause of action of $121.25, and on his second cause of action of $127.50, and on his third cause of action of $62.25, making in all $311; and respondent contends that these concessions in the brief render the judgment, to the extent of said concessions, a consent judgment. This contention cannot be upheld. Nor do we think the concessions made in the brief of appellant have the effect to oust this court of jurisdiction of the appeal. If the superior court had jurisdiction of the case, this court has jurisdiction of the appeal. The jurisdiction of the superior court is to be determined by the prayer of the complaint; and it being for more than $300, and there being no admission in the answer that any portion of the amount claimed in the complaint is due, but, on the contrary, a denial that anything is due, there can be no question but that the superior court had jurisdiction of the cause; and it follows that this court has jurisdiction of the appeal. Nor do the admissions of appellant made upon the trial of the case, as we understand them, reduce the amount in issue to less than $300.

It was stipulated at the trial of the case between the respective parties, "that all the inquests referred to in the original complaint, and all those referred to in the supplemental complaint, were held in the manner and form required by law, provided the coroner had jurisdiction to hold the 14 inquests upon the bodies of the following persons [naming the 14 persons], and that the only dispute was the necessity and jurisdiction to hold these 14 inquests, and that as to all matters excepting the jurisdiction to hold said 14 inquests that the plaintiff have judgment by consent, and that all other questions were left out, and that plaintiff should have judgment by consent on the matters not disputed." As stated in plaintiff's testimony, and not contradicted, the facts surrounding the death of the deceased persons upon whom the several inquests were held are as follows:

(1) Sarah E. Dithelson: "I received word that she had died under very peculiar circumstances, was not supposed to be sick, not sick enough to have a doctor, and was found in the morning, hanging onto a dresser or chiffonier, dead. Her husband left her in the night about ten o'clock. She, not feeling quite as well as usual, had thought best to sleep near the stove; it being February. I was also informed that this woman had been very despondent. She was a second wife, and there had been a great deal of trouble with the children. They had lost some property, and the question was raised by the person informing me whether she had not committed suicide, so I held an inquest upon the body. * * * There was no physician in attendance, no death certificate given before the inquest, the case being referred to me immediately, and I relied upon the information that there was suspicions of suicide. A lady, whose name I have forgotten, told me before the inquest that she might have committed suicide. * * * I was informed there were suspicions of suicide, and I relied on the information."

(2) Maria Liara: "She was an infant in a Mexican family. The child was born in the morning without the attendance of any midwife or physician. Not even the neighbors were called in. It lived until late in

the afternoon, and nothing was done to succor it at all, to sustain it, and the question was whether it was not a case of infanticide, allowed to die by neglect. The testimony showed on the inquest that the child was simply left in the room. Nothing was done. It was a case of neglect, but whether it was intentional I do not know. I learned in advance of the inquest that nothing had been done for the treatment of the child, and the question was whether the child was allowed to die purposely."

(3) A. R. Wadsworth: "He was a man in full vigor of health. I was called in that case as physician, and saw the remains but a few minutes after death. It occurred in the block above my house, and about noon time I arrived there, and another physician also arrived just after we. Wadsworth was a man in full vigor of health, who had just returned from down town with a brother-in law—a man named Morgan, but no relative of mine—and the brother-in-law made the remark, calling him by his first name, and said: 'We just walked up town, and I do not know of anything that could have killed him unless he had been poisoned." That is the expression he used. The brother-in-law said this to me, with whom he had just walked up from town. He died a few minutes after his return. He simply seated himself in a chair and expired. He was in the chair when I reached the place. There was nothing externally to lead to the cause of death."

(4) William Le Grande Cannon: "He was a man 30 years of age, known to be a consumptive; been under the care of different physicians in this country and Europe, and was stopping at the Florence Hotel. He died on Sunday, and was taken with the hemorrhage in the morning. He was at that time under the care of a Christian Scientist, and Dr. Remondino was in the hotel at the time the hemorrhage took place. Some of the guests summoned Dr. Remondino. He learned that they did not require his services, as they believed in Christian Science, and after telling them that something ought to be done for the young man, the young lady treating him arrived and they went through their treatment, whatever it might have been, and, as I was told afterwards, they gave him to understand there was nothing serious about the matter. He was just as well as ever, and he sat up and chatted, and died about 10 o'clock Sunday night. His mother went to the undertaker to prepare the body and procure a certificate of death, and the health officer refused to grant one. And the president of the board of health had instructed that no death certificate should issue, unless it be signed by the Christian Scientist who had attended him, and she refused to sign such certificate, and the body was held there. I was met at the depot by Dr. Remondino, and Dr. Hearne and Dr. Remondino told me I must investigate this case, as it was a case of gross neglect."

(5) J. B. Getchel: "That inquest was held February 7th. Mr. Getchel was an elderly gentleman, having a daughter living in National City. He had been visiting her some little time. He had no acquaintances except his daughter and those he happened to have met over in National. He had not been sick at all; had left the house early in the morning after breakfast, and was out for a little walk, and going into a barber shop, did not say a word, except he nodded his head as he came in, and sat down in the barber chair and put his head back, and the barber went to put the apron over him and he gasped, and was dead. No one had been with him after he had left the house and before he went to the barber shop. He had been walking all alone. Some three hours had elapsed since leaving the house. I was informed he had been out alone some three hours, and then went to the shop. * * * Dr. Fly was called in, but he was dead when he arrived. I asked Dr. Fly if he knew any cause for the death, and he said, 'No.' He was not acquainted with him; never had seen him, knew nothing about him."

(6) Santiago Lopez: "This man was shot and killed at Picacho." It appears that a justice of the peace at Picacho held an inquest on the body of Lopez prior to the one held by the plaintiff in this case.

(7) Joseph H. Cowan: "Cowan was a man about 75 years old. He arrived with his wife to this city in the evening. He was an invalid; came here for his health and had some trouble, as I understood, with the heart. They secured rooms at the corner of Third and C that evening, and he was taken sick during the evening and died before morning. No one was called in to see the case and they told no one about it. The circumstances seemed to me to point to something a little wrong. It seemed as though a man who would travel as far as from Montana for his health, and then, when taken sick, no one was called in, there might be something suspicious about it, and so I held an inquest. That was all the information I had to hold the inquest."

(8) M. J. Russell: "I had a telegram from Constable Trotter, at Oceanside, calling me there. It stated: 'Come to Oceanside. Mrs. Russell found dead in bed. Trotter.' And I went and held an inquest. She died all alone in a house where she had been living, about 2½ miles out of the city. No neighbors were within a quarter or half a mile. I saw Dr. Nichols when I got to Oceanside, and he told me that she had died in some sort of convulsions, as her position after death showed it. * * * The convulsions would lead one to believe she had possibly taken some poison, or had been poisoned."

(9) Arthur Dye: "I received a telephone

from Mr. Dye, who lives at Witch Creek, to come out there and hold an inquest on his boy, who had been drowned, and I got nothing more of the circumstances. A telephone message came to Johnson & Connell to send the coroner to Witch Creek to hold an inquest on the body of Arthur Dye, who had been drowned, and I went out and held the inquest on the body of the boy. Before holding the inquest, I was informed that the boy had gone in swimming in a little pool in Witch creek, with another brother and sister, and that the boy died and was drowned."

(10) Juan Delgado: "I was called down to the government corral one night, and found there a person dead. The soldier who was on sentry duty said he had passed him as he was walking up the sidewalk, and he noticed he staggered a little bit, and he turned around to look at him. He went a ways beyond him and fell down. He went up to him and found he was dead, and called. He went back in the guardhouse and called an assistant, and they took the body and brought it into the guardhouse, and got the county physician, although the man was dead. The county physician found the man dead, and he called me up and I went down there. It was 6 o'clock, on the edge of dark, in September. Nobody had seen the man or knew anything about his whereabouts, excepting what the soldier said. It was very hard to find out who the man was, or learn where he came from. Nothing to indicate where he had come from, or what he had been doing."

(11) John Augustus Dowd: "He was found dead in a closet, back of a saloon. I thought that was circumstance enough to investigate, and held an inquest upon it to see what caused the death. No one saw the man go there. The man who occupied the saloon heard some one come in the saloon. I have no information except that he was found dead. * * * I knew him myself. He had gone in the closet some 20 minutes before the body was discovered. His condition as to sobriety was that he was able to walk around and about, though that morning he had fallen down and hurt himself. The man was a drinker right along. He was drinking all the time, and there had been months that he was never sober. That morning he was sober, however."

(12) C. T. Sheppard: "This was an infant two months old. I got my information from Dr. Parker, who was called into the case and had attended the child at its birth, and had not been called in since. Dr. Parker stated that he was called in the morning to see the little one, and found her dead. Upon examining it, he said the symptoms were that the child died from suffocation. He did not feel like giving a death certificate, and referred the case to me, as coroner, and said it was a case for me to hold an inquest. Upon that information I held the inquest. I spoke to the father about the matter, who said that they put the child to bed. About 9 o'clock it cried and he had tucked it away; and then again later it woke up and cried, and he tucked it up in its little baby carriage it slept in, and when he got up in the morning the child was dead. The child had been suffocated by the clothing. The father explained to me he put the child to bed, but said, of course, he hadn't done it with any intent. The child was very troublesome. The child being suffocated to death, it was a case I always thought coroners had to investigate, when anything of that kind occurred."

(13) C. C. Boyle: "This man was 77 years old, and was found drowned in the tank at Coronado. I thought it was a suspicious case by his being drowned in a tank like that, where there were so many people in the tank. The swimming teacher was in the tank at the time, and I held an inquest upon the body. The only information I had before holding the inquest was that he went in swimming in the tank and was drowned. They brought him out of the water and put him on the side of the tank, and found him dead. They worked over him; there was a physician among the spectators, who said to me he thought the man had some other trouble. The autopsy showed that he was drowned. There seemed to be no one implicated in it. It was a case of accidental drowning."

It is provided by section 1510 of the Penal Code that, "when a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means," he must hold an inquest. Upon the interpretation of the language of this section depend the questions submitted upon this appeal as to whether the coroner had jurisdiction to hold an inquest in the several cases referred to, and also as to whether it was necessary to hold inquests in the several cases. Of course, it is plain that the first thing the coroner is called upon to do, when a death is called to his attention, is to determine whether or not it is a case coming within the section quoted. In deciding this question some latitude should, of course, be allowed the coroner. It should not be held that, simply because at the conclusion of an inquest it has been determined that the deceased died a natural death, he had no right therefore to hold an inquest. Under the terms of the section referred to, he has a right to act upon information. When he is informed that a person has been killed, or has committed suicide, he is warranted in holding an inquest. In this connection, what does the word "killed" mean? Certainly, if a man falls off a house and is killed by striking the pavement, it is not improper to speak of him as having been killed by the fall. If he is drowned, in speaking of his death it is perfectly proper to say that he was killed by drowning. If an infant dies of neglect, the neglect is what kills the infant. We might even say that consumption killed one of the deceased persons mentioned herein. In its broadest sense, a person may be killed by anything that causes his death. We do not think, however, that the term "killed" as as used in the statute embraces every means of death, but that it is qualified by the other clauses used in the statute, and that the whole section should be construed together. We think the killing should be shown to have been sudden and unusual, and of such a nature as to indicate a possibility of death by the hand of the deceased, or through the instrumentality of some other person. Construed in this way and measured by this rule, we find it difficult to select any one of the foregoing 13 cases and say of it that it appears to us beyond controversy that there was no ground "to suspect" that the death, or the killing, was sudden and unusual, and the taking off of the party occasioned either by the act of another, by criminal means, or by the intentional act of the deceased himself. We think, therefore, that, for the purpose of determining whether the coroner shall have his fees for the services performed, we would not be warranted in deciding in any of the 13 cases that there was no reasonable ground for holding an inquest, or that the coroner went beyond his jurisdiction in so doing.

As to the case of Santiago Lopez, it appears that an inquest had already been held upon the body of Lopez by a justice of the peace, and, in the absence of anything to show otherwise, we will presume that that officer proceeded according to his duty in the premises. To be sure, he is a judicial officer of an inferior court, and ordinarily no presumptions are to be indulged in favor of the jurisdiction of the court over which he usually presides; but in this case he was acting in his special capacity to hold inquests, and this is not a direct proceeding to review his action, but is in the nature of a collateral attack upon his action, and, under a section of our Code, official duty is presumed to have been regularly performed. We hold that one inquest, duly and lawfully held in accordance with the law upon one body, is sufficient, and he who undertakes to hold a second inquest has the burden to show that the first inquest, for some reason, was not lawful; and unless he does that he should not be permitted to receive any fees for his services. We wish also to say that the circumstances detailed in the evidence were of such a nature that the justice of the peace had a right—indeed, it was his duty—to exercise his jurisdiction in the matter of holding this inquest.

The order denying a new trial is therefore affirmed, and the court below is directed to modify its judgment by reducing it in the amount of the fees claimed in the matter of Santiago Lopez.

We concur: ALLEN, J.; SMITH, J.

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3 Cal. App. 525

STOCKTON SAVINGS & LOAN SOCIETY v. SADDLEMIRE et al.

(Court of Appeal, Third District, California. May 15, 1906.)

1. Judgments—Res Judicata.

Where it had been previously determined by the Supreme Court, in a suit in which all the defendants were parties, that the property in controversy vested in S. on the death of her husband, who had declared a homestead in the premises in his lifetime, and that the other defendants, who were their children, had no rights therein, such judgment was conclusive of the rights of the children in a subsequent suit to foreclose a trust deed executed by S.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248–1251.]

2. Mortgages — Trust Deed — Deed by Trustees—Effect.

Where the title to the premises in question was vested in S. at the time she executed a trust deed thereof, the deed executed by the trustees, according to the terms of the trust, vested the title in the purchaser.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1102, 1103.]

3. Same—Fraud.

Where, prior to the death of a husband, he had declared a homestead on the premises in question, so that on his death they passed absolutely to his widow, fraud or deceit, if any, practiced by the widow on her children, who joined her in the execution of a trust deed on the property, was immaterial.

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by the Stockton Savings & Loan Society against Lavinia Saddlemire and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. F. Ramage and C. H. Fairall, for appellants. Nicol & Orr, for respondent.

McLAUGHLIN, J. The defendant Lavinia Saddlemire is the mother of the other defendants, who were parties to an action, wherein it was pointedly and distinctly held that they had no interest whatever in the property here in controversy. Saddlemire v. Stockton S. & L. Soc., 144 Cal. 652, 79 Pac. 381. It was there decided that the property vested absolutely in their mother upon the death of their father, who had declared a homestead on the premises in his lifetime. The facts upon which the decision in the case at bar depends are identical with the facts in the case cited, and hence it would be useless repetition to rehearse them here.

As the title to the premises was vested in defendant Lavinia Saddlemire when she executed the trust deed, it follows as a matter of law from the unquestioned facts that the deed executed by the trustees, according to the terms of the trust, vested the title in respondent.

We cannot see how fraud or deceit practiced upon the children, who joined their mother in the execution of such trust deed, or any misapprehension of law or fact by them could impair the title thus acquired. The law conserves rights by relieving parties from the result of fraud, deceit or mistake, but it does not dally with the complaints of those who were deprived of no right, and hence could not have been harmed by fraudulent practices, nor injured by any acts resulting from their own guilelessness. It results that the special defense pleaded by the children could not avail to defeat the effect of the deed executed and delivered by their mother.

There was no error in admitting the declaration of homestead. The foundation therefor was laid by proving every fact essential to the existence of the right evidenced by such declaration, which was duly executed, acknowledged, and recorded. Civ. Code, §§ 1262–1264.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 480

FOLSOM v. CONKLIN.

(Court of Appeal, Second District, California. May 7, 1906.)

1. MUNICIPAL CORPORATIONS — POLICE OFFICERS—NEGLECT OF DUTY—REMOVAL.

Pen. Code, § 772, provides that when a written verified accusation is presented to the superior court, alleging that any officer within the court's jurisdiction has been guilty of charging and collecting illegal fees within his office, or has refused or neglected to perform his official duties, the court must cite the party charged to appear, and must proceed to hear the accusation in a summary manner. Deering's Ann. Codes & St. 1886, Appendix, p. 830, § 852 confers on municipal boards of trustees power to appoint in their discretion such police and subordinate officers as in their judgment shall be deemed necessary. Section 880 (page 836) declares that the department of police shall be under the direction and control of a marshal. *Held*, that where a marshal, duly appointed under such section, obstructed and prevented a police officer from performing his duty, prevented him from having access to the jail, and collected license fees for which he failed to account to the city clerk, as required by city ordinance, he was guilty of misconduct in office, within section 772, justifying removal.

2. SAME—DEFENSES.

Where a city marshal omitted to make monthly reports of license fees collected and monthly affidavits required by law, he could not excuse himself on the ground that he did not know he was required to file such reports, and that it had not been the custom of marshals prior to his time to file reports and receipts for license fees.

3. SAME — MARSHALS — PUBLIC FUNDS—DUTY TO ACCOUNT.

Where a city marshal received money for licenses in his official capacity, it was his duty to report the same and account for the money received to the city, though it was received prior to the delivery of licenses by the city clerk to the marshal, as required by city ordinances.

4. OFFICERS—REMOVAL—PROCEEDINGS — TIME —WAIVER.

Pen. Code, § 772, provides for the removal of public officers, and declares that on the filing of the petition the court must cite the party charged to appear at a time not more than 10 nor less than 5 days from the time the accusation is presented, and on that day, or a subsequent day not more than 20 days after the accused was to appear, must proceed to hear the accusation in a summary manner. *Held*, that the limitation of time within which the proceedings should be heard was merely intended to guaranty to accused a speedy hearing, and hence, where he appeared on the day set for trial and proceeded to trial without objection on account of delay, he could not thereafter object that the court lost jurisdiction to try the cause by reason of delay.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Leslie W. Folsom against J. J. Conklin. From a judgment for plaintiff, defendant appeals. Affirmed.

Davis, Kemp & Post, for appellant. John E. Daly, for respondent.

ALLEN, J. This was an action under section 772 of the Penal Code for the removal of a public officer. Findings and judgment for plaintiff, and defendant appeals therefrom, and from an order denying a new trial.

The accusation filed by plaintiff against defendant alleged, among other things, the defendant's election and qualification as marshal of the city of Long Beach; the appointment of plaintiff by the board of trustees as a police officer; the refusal of the defendant to recognize such appointment, and his neglect and refusal to exercise any control over such officer; that defendant obstructed such officer in the discharge of his duties; further, that defendant has willfully refused and neglected at all times to file with the treasurer of the city an affidavit showing that the moneys paid by him to said treasurer were all of the funds he had collected, or received, during the months preceding the payment to said treasurer, or to report delinquent lists of licenses uncollected. The complainant avers, and it is not denied, that an ordinance of said city, No. 109, was in force, providing for the licensing of certain kinds of business transacted and carried on in said town of Long Beach. The answer denied all of the allegations of the accusation, other than the existence of the ordinance above stated, and defendant's delinquency in relation to the filing with the treasurer an affidavit and report, as in the complaint alleged. Upon the trial, the court found that ordinance No. 109 provides that licenses shall be issued, signed by the city clerk and president of the board of trustees; that after the same are issued the city clerk shall deliver such licenses to the marshal and the marshal deliver his receipt to the clerk; that the marshal, upon collecting such licenses, shall deliver to the city treasurer all sums collected by him therefor, and take the treasurer's receipt for all moneys turned over to him; and thereupon said marshal was to deliver such treasurer's receipts for said sums to the city clerk. And the court finds that he did not file with the city clerk treasurer's receipts for money which he claims to have paid the city treasurer on account of licenses collected by him. The court further finds that he did collect various sums as and for licenses without having the license then in his possession, or delivering the same, or accounting to the city in any way therefor, but gave his individual receipt for such sums, and appropriated the proceeds to his own use; that he has issued numerous receipts for licenses to various persons, and has not accounted to the treasurer or the city clerk for the moneys collected upon the same. While there is nothing in the record showing the provisions of the ordinance before mentioned, as found by the court, yet there is no specification of error on account of such finding, and it will be assumed that the court finding the contents of the ordinance had the same before it upon the trial.

Appellant's contention is that the accusation does not state a cause of action against the defendant under section 772 of the Penal Code. This section provides: "When an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented, and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation," etc. With this contention we do not agree. The municipal corporations act, by section 852 (Deering's Ann. Codes & St. 1886, Appendix, p. 830), confers upon the board of trustees the power to appoint, in their discretion, such police and subordinate officers as in their judgment may be deemed necessary. Section 880 (page 836) provides that the department of police shall be under the direction and control of the marshal. It was the duty, therefore, of the marshal to direct and control in a proper manner the official acts of this police officer. The court finds, and there is ample testimony in support, that, on the contrary, he obstructed and prevented the officer from discharging his duty, and prevented him from having access to the jail; thus neglecting and omitting to perform a plain duty devolving upon him by law. The record discloses that, without obtaining from the city clerk the licenses as by the ordinance provided, the defendant on several occasions collected from parties engaged in business in said city the amount of such license fees, giving his individual receipt therefor, keeping and appropriating the money to his own use, and making no return of any kind thereof to the proper officials. Defendant concedes that he omitted entirely the duty devolving upon him of making monthly reports, or filing the monthly affidavits required by law, excusing himself upon the ground that he did not know it was required of a marshal to file such reports, and that it has not been the custom of marshals in office prior to his time to file such reports and receipts. This ignorance of the law is no justification, and the finding of the court establishes that it was result, not of ignorance, but of improper motives in concealing from the officials money received by him in an official capacity. It mattered not whether the licenses were in his possession to deliver or not, if he received funds in his official capacity as marshal as and for licenses they thereupon became the property and funds of the city, and it was his duty to report the same whether the licenses had been delivered or not. Appellant insists that, notwithstanding these facts, the act of defendant was misconduct in office, punishable under the Penal Code, and is not cognizable in proceedings of this character under section 772, and cites as an authority Siebe v. Superior Court, 114 Cal. 552, 46 Pac. 456. The Siebe Case may be readily distinguished from this. In that case, Siebe undertook the performance of a duty, but neglected and failed to perform it in a proper way, and the court holds that it was not a refusal or neglect to perform his duty. In this case there was no attempt at performance, but an entire omission and neglect to do those acts which by law devolved upon him in his official capacity; and whether the act amounted to misconduct or not, it nevertheless was an omission and neglect under the purview of section 772.

It is further insisted that because the accusation in this case was filed June 16th and the case was not tried until the 17th day of July, the court was without jurisdiction to hear and determine the action. There was no demand upon the part of defendant to dismiss the proceedings. The court obtained jurisdiction of the person and of the subject-matter when the citation was served. The limitation of time mentioned in the section, within which the proceeding shall be heard, is obviously intended to guaranty to the accused a speedy hearing, not unlike the right to a dismissal on account of delay given by section 1382 of the Penal Code. This right, like any other statutory right, may be waived by competent parties. People v. Hawkins, 127 Cal. 374, 59 Pac. 697. The defendant appeared on the day set for trial, whether the same was so set by agreement or otherwise, and proceeding to trial without objection on account of delay, will not be heard upon this appeal to raise for the first time an objection to the jurisdiction of the court for the reason mentioned.

It is unnecessary to consider or notice the many other specifications of error and exceptions taken at the trial, inasmuch as the judgment is amply supported by the admissions and other findings not involved in the specifications. Nor do we perceive any error in the record warranting a reversal.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 489

WHITTIER v. GORMLEY.

(Court of Appeal, Second District, California. May 9, 1906.)

1. SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONTRACT—DEFINITIONS.

A contract reciting the receipt of $100 paid to bind the bargain and sale of a certain lot, said $100 to be considered and accepted as part purchase price of said lot, which is $5,500, less commission, signed by the party to be charged with the conveyance of the property, and accepted by the other, is sufficiently definite for specific performance; the amount of commissions being susceptible of ascertainment, and its certainty in amount not being disputed, and, under Civ. Code, § 1657, the money being payable on delivery of the deed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 83–85.]

2. VENDOR AND PURCHASER—TITLE—INCUMBRANCE.

A vendor impliedly agrees to furnish a good title, which is not done where part of the land, however small, has been sold for taxes, and there is an unsatisfied mortgage on it, though it is probably barred; it requiring litigation to remove it.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 250–254.]

3. SAME—PAYMENT OF PURCHASE MONEY—REMOVAL OF INCUMBRANCE—DEDUCTION.

The court, in an action by a purchaser for specific performance of a contract of sale, may give plaintiff credit on the purchase money for a reasonable sum expended by him to remove incumbrances, which the vendor refused to remove.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 360–363.]

Appeal from Superior Court, Los Angeles County; J. S. Noyes, Judge.

Action by Henry F. Whittier against Thomas Gormley. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Weller, for appellant. W. C. Batcheller, for respondent.

ALLEN, J. Action for specific performance. Findings and judgment for plaintiff. From the judgment and an order denying a new trial defendant appeals.

The case as presented by the record is this: Defendant, the owner of a lot in the city of Los Angeles, agreed to sell the same to plaintiff for the sum of $5,500, and as evidence of such agreement executed the following instrument: "Los Angeles, Cal., Mch. 26th, 1902. Received of Henry F. Whittier the sum of $100.00, one hundred & 00–100 dollars, being paid to grantor to bind bargain, and sale of lot 17, block 85, Feldhauser sub. of block 85 & 86, Ord's survey of Los Angeles, California, said sum of $100.00 so paid, to be considered and accepted as a part of the purchase price of said lot which is $5,500.00, less commission." It is conceded that the words "less commission" were intended to and did mean a commission of $150. Upon the faith of this, defendant put plaintiff into possession of the premises and authorized him to collect the rent of the tenant for the month of April, which he did. Thereafter defendant furnished to plaintiff a certificate of title, made by the Title Guarantee & Trust Company, which showed the title to said real property to be subject to the following incumbrances: (1) Two tax sales of the front vigintillionth part of said lot for delinquent taxes; (2) a tax deed to one Collins on account of a preceding delinquent tax sale; and (3) a mortgage, dated June, 1889, given to secure $14,806.72, in 30 monthly installments, commencing July 31, 1889, and duly recorded. The plaintiff objected to receiving such title, and afterwards the defendant notified him that the defects and incumbrances above mentioned had been removed; and, at plaintiff's request, defendant, on the 15th day of April, 1902, executed a deed in regular form and delivered the same to the Title Insurance & Trust Company, to be by them delivered to plaintiff upon the payment of $5,250, the balance of the purchase money. On the 17th of April plaintiff deposited with said Title Insurance & Trust Company an amount sufficient to pay such balance, with instructions to pay the same to defendant if said property was free and clear of defects and incumbrances. Defendant refused to correct or remove such incumbrances, or to allow the expense thereof, or to make any conveyance other than one subject thereto; and on the 24th of April withdrew said deed and destroyed the same. He never thereafter tendered any deed or demanded any of the balance of the purchase price. The plaintiff, after the refusal of the defendant to remove such cloud, obtained releases correcting the title to said premises in all respects, save as to the two tax sales first mentioned, at an expense of $67.50, and on the 26th of April, 1902, commenced this action. The court, by its decree, ordered the defendant, upon the payment to him of $5,250, to execute, acknowledge, and deliver to plaintiff a good and sufficient deed of conveyance to said land, free and clear of all defects, liens, and incumbrances, and providing that upon the defendant's default in that regard, a commissioner appointed by the court should execute such conveyance and receive the unpaid purchase money, and out of the same to repay plaintiff the $67.50 expended in clearing the title of certain defects, less $20.45, rents received, and to pay the necessary costs and penalties according to law to redeem said property from said two tax sales first mentioned, and to pay the balance to defendant.

Appellant's first contention is that the contract is too uncertain to be the subject of specific performance. We are unable to see anything uncertain in relation to this contract. It is signed by the party to be charged with the conveyance of the property and accepted by the other. Section 1657 of the Civil Code provides that if no time is specified for the performance of an act, if it consists in the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained. It follows, therefore, that the money was payable upon delivery of the deed. The amount of commissions is susceptible of ascertainment, and its certainty in amount is not disputed.

It is next contended that there was no agreement to furnish a certificate of title, which may be true. But it was the duty of the defendant to furnish a good or marketable title. The vendor in an executory agreement for the sale of land impliedly represents that he has a good title thereto as one of the considerations for inducing the vendee to enter into the contract, and that the conveyance therein agreed to be made will transfer such title. Wilcox v. Lattin, 93 Cal. 588, 29 Pac. 226. A title to be good "should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record." Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189. Applying these tests, the title evidenced by the certificate, which of itself was a representation and statement of defendant as to its condition, showed incumbrances and defects. While the portion of the property attempted to be sold at the two first sales mentioned is so infinitesimal as to be scarcely susceptible of computation, nevertheless it is a cloud upon the title which might affect its market value. The mortgage under certain facts may have been barred, and probably was, and yet it constituted an incumbrance in the sense that it would require litigation in order to remove it and quiet the title, and it was not incumbent upon plaintiff to accept a title thus incumbered. "In an action for the specific performance of an agreement to convey land, a court of equity has power, by its decree, as against the parties who are before it, to enforce all the terms of the agreement. * * * The court can direct the application of the purchase money to the satisfaction of those incumbrances, and for that purpose can cause the money to be brought into court, and disbursed under its direction." Grant v. Beronio, 97 Cal. 498, 32 Pac. 556. The plaintiff in this case having the right to have the court decree that these incumbrances should be paid out of the purchase money, certainly possessed the right to expend the very small sum so required to remove them; and while the court does not in terms find that the amount so expended was a reasonable sum, its order and judgment in relation thereto will be taken as impliedly finding such fact.

We perceive no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

SMITH, J. (concurring). In concurring in the opinion in this case I deem it proper to add that I do not wish to be understood as holding that either the two sales of the vigintillionth part of the front of the lots in question, or the mortgage thereon referred to in the findings, constitute any defect in the title. The case is substantially the same, whether we hold the affirmative or the negative of these questions, and therefore I deem it unnecessary to pass upon them.

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7 Cal. Unrep. 266

SAN GABRIEL VALLEY BANK v. LAKE VIEW TOWN CO. et al.

(Court of Appeal, Second District, California. April 28, 1906.)

1. Mortgages—Foreclosure—Note—Mortgage—Construction.

Where a note is secured by a mortgage, the note and mortgage are to be construed together as evidencing the intent and purpose of the parties.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 214, 215.]

2. Same—Maturity of Debt—Construction.

A note and mortgage securing the same provided that the principal should be paid in five years, that the interest was to be paid semiannually, and if not paid when due, it should be added to the principal and bear the like interest; but, if default was made in payment of interest for 30 days, then the "whole sum, principal, here promised, shall, at the option of the holder of the note, become immediately due, payable, and collectible." *Held* that, where an action to foreclose was commenced 30 days after default in payment of interest, the mortgage was subject to foreclosure at plaintiff's election for the whole amount thereof.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1163.]

3. Same—Election—Notice.

Where a mortgage provided that on default for 30 days in interest, the whole sum, principal and interest, should become payable at the option of the holder, the filing of a complaint, after 30 days' default in interest, seeking to recover the entire debt, constituted a sufficient notice of election by the mortgagee to claim the whole amount as due.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1209.]

4. Same—Pleading—Defense—Remedy.

An objection that a complaint in a suit to foreclose a mortgage was insufficient for want of facts in that no definite or separate amount was alleged to be due could be taken advantage of by special demurrer, and was waived by defendant's failure to so object thereto.

5. Judgment—Res Judicata—Conclusiveness.

Where, in a suit to foreclose a mortgage it was alleged "on information and belief" that M. had an interest in the said "premises or property mentioned" in said mortgage, but that the same was subsequent and subject to the mortgage interest, and M. made default, such default was tantamount to an admission that M.'s interest was subsequent to plaintiff's so that after judgment it was too late for him to assert that his rights were not adjudicated.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by the San Gabriel Valley Bank against the Lake View Town Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Cyrus F. McNutt and Joseph E. Hannon, for appellants. Wright, Bell & Ward, for respondent.

NOYES, Special Judge. Plaintiff filed complaint for the foreclosure of a mortgage executed by the defendant, the Lake View Town Company. The mortgage was given to secure the payment of a promissory note, likewise made by the said defendant to plaintiff for the sum of $5,000. The mortgage lien covers various subdivisions of land belonging to defendant, together with "one thousand shares of the capital stock of Lakeview Water Company; the said capital stock being in fact, and also mortgaged as, appurtenant to said land, on the plan of one share of the capital stock to each acre of said land." The stock was evidenced by certificate No. 475, which was owned by the corporation defendant and assigned to plaintiff as pledgee in pursuance of the mortgage contract. The note, or that part of it pertinent to the legal questions here raised, is as follows: "$5,000. Pasadena, Cal., April 10, 1901. Five years after date, excepting as herein otherwise stated, Lake View Town Company, * * * promises to pay unto San Gabriel Valley Bank, * * * the sum of five thousand dollars, with interest thereon at the rate of ten per cent. per annum, payable semiannually. If interest be not paid when due, it shall be added to, and become a part of, and thereafter bear like rate of interest with, the principal sum. If default be made in the payment of interest for a period of thirty days, then the whole sum, principal, here promised, shall at the option of the holder of this note, become immediately due, payable, and collectible." A copy of this note was inserted in the mortgage and made a part thereof, and the mortgage, in fixing the rights of the parties thereto, provided, inter alia, but with some particularity, that "the mortgagor will during the life of this mortgage, promptly pay all taxes that may be assessed against said mortgaged property, excepting the taxes upon the interest hereby created, and will pay all assessments that may be levied upon said water stock; that it will keep said land, or a large portion thereof, in reasonable state of cultivation; that it will promptly defend all adverse claims of title to, or lien against, such property. If the mortgagor fails to perform the tax, assessment, or defense covenants above stated, the mortgagee may perform the same and pay the expense of it, and the amount so paid, with interest thereon at the same rate named in said promissory note, shall be due and payable by the mortgagor to the mortgagee at the next interest due date therefor according to said note and be secured by said mortgage. * * * In case of default in making payments hereby secured, the mortgagee may cause the mortgage to be foreclosed and the mortgaged property sold in manner provided by law in foreclosure cases," etc.

The foregoing excerpts from the mortgage, together with the copy of the note, constitute that part of the record pertinent to the questions raised by the appellants. They pray for a reversal of the judgment on the following grounds: First, that the complaint does not state facts sufficient to constitute a cause of action, or, if the complaint is sufficient, to warrant a decree favorable to plaintiff; second, it is sufficient to entitle plaintiff to a judgment for overdue interest and costs only. In aid of these two points appellants cite the cases of Bank of San Luis Obispo v. Johnson, 53 Cal. 99, and the late case of Yoakam v. White, 97 Cal. 286, 32 Pac. 238. The language of the first case is as follows: "In case of default by the mortgagor in the payment of the said note or interest, or in the performance of any of the conditions hereof, then the mortgagee may, at its option, either commence legal proceedings to foreclose," etc. And in Yoakam v. White: "The mortgagor promises to pay said note according to the terms and conditions thereof, and * * * in default of the payment of note by its terms, the mortgagees or their assignees may foreclose this mortgage," etc. That a note, and mortgage given in security therefor, are to be construed together as evidencing the intent and purposes of the parties thereto, must be held as settled in this state. Being, as they are, essentially the indivisible parts of a single contract, their joint purport and meaning must control. Being thus construed together in this action, the contract between the parties, as concerns the amount due, is to the effect that the principal is to be paid within five years after April 10, 1901, and the interest is to be paid semiannually; that if not paid when due it shall be added to and become a part of the principal and bear the like rate of interest; but if default be made in payment of interest for thirty days, then the "whole sum, principal, here promised, shall, at the option of the holder of this note, become immediately due, payable, and collectible." This action was commenced more than thirty days after the default in interest, and under the well-considered cases of Sichler v. Look, 93 Cal. 600, 29 Pac. 220, and Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451, no separate or definite act of election was necessary as a prerequisite to commencing the case. The filing of the complaint is, for all the purposes of the case, to be considered sufficient notice of the election, and of the amount claimed as due. It was notice to all adverse parties that whatever legal and equitable rights the plaintiff claimed he proposed to obtain them in his judgment, and right here the first cause for reversal advanced by appellants may be settled. It is that the complaint does not state facts sufficient for a cause of action in that no definite or separate amount is alleged as due, etc. This point is not determinative for the reason that appellants might have taken advantage of the defect by special demurrer. The most extreme criticism of the complaint would be that in this respect it was uncertain and ambiguous, and appellants not having availed themselves of this advantage are deemed to have waived it. Reynolds v. Hosmer, 45 Cal. 630; Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964. Bank of San Luis Obispo v. Johnson and Yoakam v. White, supra, are not in point. The mortgage contract in both cases provides that the plaintiff may foreclose on the default of any of the conditions and terms thereof, and it was held that plaintiff in both cases was restricted to a foreclosure for only the sums and amounts thus defaulted, and that no option under such default, under the terms of the mortgage contract, could be exercised to declare the whole or any further amount due. The distinction, therefore, between the reported cases and the one under consideration, is this: The reported cases hold that judgment of foreclosure may be had only for the particular amount defaulted, the contract between the parties having thus restricted plaintiff's rights. In this case it is held that as the action was commenced 30 days after default, and as the contract between the parties permitted plaintiff to elect the "whole sum" as due after such default for 30 days, the filing of the complaint was tantamount to such election, and on trial thereof, no special demurrer having been filed alleging uncertainty, etc., plaintiff could legally demand the "whole sum" and interest, disbursements, and costs in making up his judgment.

The point made that the rights of defendant McNutt should not be concluded by the judgment is not good. It is not alleged that defendant McNutt has any particular interest in said real property, or in said stock. "On information and belief," it is alleged McNutt has an interest in said "premises or property mentioned in said mortgage," but that the same is "subsequent and subject" to said mortgage interest. The defendant McNutt by his default confesses such allegation, and it is now too late for said defendant to claim that any of his rights were invaded. He has been offered the opportunity provided by law to set up whatever interest he may have, if any, and to have them adjudicated. His failure is now a bar to further claim on his part. Before he can claim error on the part of the court he must, as the law requires, set up whatever rights he may have, and it is upon these rights that the superior court is to pass, if it does so, and if error is made then the same may be corrected by the Appellate Court. As the judgment was in conformity to the allegations of the complaint and entirely within the powers of the court, we do not see how a defaulting defendant can now claim error. Hutchings v. Ebeler, 46 Cal. 557.

The judgment is therefore affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 387

LOWE v. OZMUN.

(Court of Appeal, Second District, California, April 4, 1906.)

1. Judgments—Res Judicata—Collateral Issues.

Plaintiff, who was the owner of certain gas stock and bonds, after having pledged the bonds to defendant's testator, joined with other stockholders of the gas company in a suit to vacate a sale of their stock by the gas company for nonpayment of delinquent assessments levied thereon, on the ground that the directors had conspired to levy such assessments in order to increase the value of their bonds without any necessity therefor. Plaintiff alleged in this suit that testator converted $20,000 of such bonds, which were held as collateral to plaintiff's debt; that by such conversion the debt was satisfied; that certain stock belonging to plaintiff, sold at such delinquent assessment sale and theretofore held by testator for voting purposes until the debt was satisfied, was plaintiff's property; and that the certificates should be returned. Testator denied the conversion, and alleged the sale of the bonds under the pledge for a sum less than enough to pay plaintiff's debt, which allegation the court found to be true, and rendered judgment for testator. *Held*, that the issue of conversion of the bonds in such action was collateral only, and that such judgment was not res judicata of plaintiff's right to recover for conversion of the bonds in a subsequent suit.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1258.]

2. Pledges—Foreclosure—Public Sale.

A public sale of pledged property must be made at public auction, in the manner and on the notice to the public usual at the place of sale in respect to auction sales of similar property, and must be for the highest price obtainable, as provided by Civ. Code, § 3005.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 157–162, 171–179.]

3. Same—Right of Pledgee to Buy.

When pledged property is sold at public sale as authorized by Civ. Code, § 3005, the pledgee or pledge holder may purchase at the sale, as authorized by section 3010.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 162.]

4. Same—Notice—Waiver.

Notice of the time and place of sale of pledged property, required to be given by Civ. Code, § 3002, may be waived by the pledgor at any time, as authorized by section 3003.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 157, 178.]

5. Same—Sale at Public or Private Sale—Validity of Contract.

A contract of pledge, authorizing the pledgee to sell at public or private sale, with or without notice, is valid, and a sale at private sale without notice conveys title.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 157, 178.]

6. Same—Private Sale.

Where a contract of pledge authorized the pledgee to sell at public or private sale, the term "private sale" should be construed to mean, not merely a taking over of the property by the pledgee at such a price as he might elect to consider an offer, but a sale conducted in the manner usually and ordinarily followed in relation to private sales of property.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 161, 181.]

7. Same — Conversion of Pledged Property.

Where a pledgee of personal property renounced such relationship and notified the pledgor that he no longer held the property in pledge, but asserted ownership thereof, and acting on that claim thereafter sold the property as his own, his acts in repudiating the pledge amounted to a conversion of the property.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 86.]

8. Same—Payment of Debt—Tender.

Where a pledgee of securities, the value of which exceeded the debt for which they were pledged, converted the securities to his own use, such conversion amounted to a satisfaction of the debt, entitling the pledgor to recover the excess in value of the securities without a tender of the amount of the debt.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 94, 96.]

9. Appeal—Admission of Evidence—Prejudice.

Where, in an action against a pledgee's executor for the conversion of certain bonds, the judgment awarded plaintiff was one for the value of the bonds at the date of the conversion, without reference to the expense of the sale, defendant was not prejudiced by evidence of the account of the sale or of the value of the bonds after the conversion, which was admitted, but which was not considered by the court in determining the case.

10. Pledge—Conversion by Pledgee—Judgment.

In an action for conversion of certain bonds by a pledgee, a judgment for the value of the bonds at the date of the conversion, with a recoupment of damages by crediting the amount of the debt at the date of the conversion, was proper.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 94, 96.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by T. S. C. Lowe against Roy Wheeler Ozmun, as executor of the estate of A. M. Ozmun, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Russ Avery and F. W. Burnett, for appellant. E. S. Williams, Lynn Helm, F. C. Bailey, and Oscar A. Trippet, for respondent.

ALLEN, J. Action for conversion. Judgment for plaintiff, from which judgment, and an order denying a new trial, defendant appeals.

The complaint, which appears to have been filed May 9, 1900, alleges that in 1896 plaintiff was the owner of certain bonds of the Pasadena Consolidated Gas Company of the value of $20,000, and bonds of the Pasadena & Mt. Wilson Railway Company of the value of $10,000; that at that date he pledged the same with A. M. Ozmun to secure an indebtedness of $10,801.66; that said Ozmun, on the 10th day of May, 1897, unlawfully converted said bonds to his own use, at which date plaintiff's indebtedness to Ozmun was $11,230.86, and no more; that on the 11th day of May, 1897, plaintiff demanded from defendant the said bonds, or the value thereof, less the sum so due and owing from plaintiff; that Ozmun refused either to return said bonds or pay their value to plaintiff, to the damage of plaintiff in the sum of $18,769.14, no part of which has been paid; that Ozmun died in 1899, and defendant, who is the executor of the last will and testament of deceased, published notice to creditors, and thereafter plaintiff presented his claim duly verified for the above-named sum, which was rejected. A copy of said claim is attached to the complaint, which shows the indebtedness originally existing, the amount and value of the bonds, and the balance claimed to be due after deducting such indebtedness.

A demurrer to this complaint, which involved, not only its sufficiency as a pleading, but also the bar of section 339, Code Civ. Proc., was considered by our Supreme Court upon appeal in Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87, and the complaint was there held to state a cause of action, and that the claim therein set out was not barred by the provisions of the statute. After the coming down of the remittitur defendant answered, denying the material allegations of the complaint, and by way of a separate defense set up that the indebtedness mentioned in the complaint was evidenced by a note given by plaintiff to Ozmun in the year 1896, due in one day, which note contained a clause authorizing Ozmun to sell the collateral mentioned in the complaint at public or private sale, at the option of the payee, without advertising the same or demanding payment of the debt or giving notice, and authorizing the pledgee at such sale to become the purchaser. It is alleged that demand was made upon plaintiff for the payment of the debts, which being refused, on May 4, 1897, the pledgee caused to be published in the Evening Express of that date, a notice that on May 10, 1897, at 2 o'clock p. m., he would sell said collaterals at public auction to the highest bidder; that pursuant thereto he sold the same for $4,748, being the full value of the bonds, and credited the same upon the note, and that the balance remains unpaid. And for a further defense defendant sets up the pleadings and records in an action brought at some date not apparent of record, but before March 27, 1898, by plaintiff and other stockholders of the Consolidated Gas Company, a corporation, to vacate and annul a certain sale of stock of said gas company theretofore made on account of the nonpayment of a delinquent assessment levied upon such stock by the board of directors, basing their right of action in part upon the claim that the individual defendants to such action and directors of said corporation were the owners of a large amount of the bonds of said gas company, and that they had conspired together to levy such assessment for the sole purpose of increasing the value of such bonds, and without any other necessity for such assessment; and it was alleged in said complaint that Ozmun, on May 10, 1897, converted $20,000 of such bonds, the property of Lowe, to the use of himself, the said Ozmun, and that said bonds so converted were held as collateral to a debt of Lowe, and by such conversion all obligations of Lowe to Ozmun had been satisfied, and that certain stock belonging to Lowe, sold at said delinquent assessment sale and theretofore held by Ozmun for voting purposes until such indebtedness was satisfied, was the property of Lowe and should be returned to him and certificates issued therefor. In that action the defendants denied the conversion, and alleged that they had sold the bonds mentioned in the complaint as claimed by Lowe in the manner provided in the contract under which they were held as collateral, and that the proceeds were insufficient to pay such indebtedness. The court in its findings in that case found that the allegations of the defendants' answer were true, and that plaintiffs were entitled to take nothing by said action, and that defendants were entitled to their costs. As a further defense in this action, the defendant pleaded the bar of the statute under the provisions of subdivision 1 of section 339, Code of Civil Procedure.

Upon the trial of this case the trial court found that said Ozmun unlawfully converted the bonds mentioned in the complaint to his own use; that the plaintiff demanded their return, or their value, less the amount due on said loan, May 11, 1897, which was refused; that Ozmun, after demand for the payment of the debt secured by the collateral bonds, published a notice, as alleged in the answer, that he would sell said bonds on May 10, without specifying the year; that the space occupied by such notice was 2¼ by 2 inches, with over 100 words printed therein; that on the 10th of May, 1897, Ozmun sold the bonds to himself for $4,748, that being the only bid. The court further finds that said sale was not made at public auction in the manner and upon the notice to the public usual at the place of sale in respect to auction sales of similar property, and was not made for the highest obtainable price; that said pretended sale was not a good-faith public auction sale. The court further finds that Ozmun thereafter claimed to hold and own said bonds adversely to plaintiff, and claimed that plaintiff had no right to redeem the same from said sale upon payment of the amount due upon said note; that afterwards, in 1898, Ozmun sold said Pasadena & Mt. Wilson Railway Company bonds and received the price unto himself; that in July, 1902, defendant, the executor, sold the gas bonds and received the price unto himself; that the value of said bonds so pretended to be sold on May 10, 1897, and the value of said bonds belonging to the plaintiff converted by defendant and said deceased, over and above said indebtedness, was at the time of said conversion $2,489.27; and plaintiff was damaged at the time of said conversion by said conversion in said sum, the same being the value of said bonds over and above the amount of said indebtedness, together with interest thereon from the date of conversion, May 10, 1897, to date, making a total of $3,621.88. The court further found that none of the matters or things set forth in said complaint have been at any time the subject of litigation between the same parties in this action, or in any action, in any court, at any time; that there was an action brought, as alleged in the answer, and that the judgment therein rendered was as alleged in the answer, and is final; that plaintiff has not paid to the said defendant, or the said Ozmun, any money or property on account of the indebtedness recited in said amended complaint since or before the rendition of said judgment.

Appellant contends for reversal of the judgment upon various grounds: First, upon the defense of res adjudicata. This, we think, cannot be maintained. The action pleaded as an adjudication was essentially one to vacate a sale made by the corporation of certain stock belonging to the plaintiff, and incidentally as a basis to support their claim of bad faith in relation to such sale, and to establish that the officers making the assessment upon which the same was due were affected and controlled in their actions on account of their large holdings of bonds of the corporation, the value of which they were seeking to increase, and the allegation of the conversion of plaintiff's bonds was to establish the amount of the holdings of the bonds by the officers at the time of the assessment. In Chapman v. Hughes, 134 Cal. 654, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982, our Supreme Court has held that a judgment operates as an estoppel from further litigation only as to such matters as were necessarily considered and determined, and never upon immaterial or collateral issues; that the test proper to apply in determining the materiality of the issues is to inquire whether or not the judgment is dependent upon such issue. If the findings upon any issue were erroneous, and yet the judgment has support, then such issue is collateral. In this case the finding of the court that the assessment was properly levied and the sale regularly conducted was all that was required to support the judgment rendered; for it mattered not who owned the bonds or how they acquired them, if such delinquent sale transferred title to the stock the court was warranted in granting the relief given, and the judgment was fully supported by the findings, outside of any finding with reference to the bonds.

It is next contended that the sale of the bonds was made in pursuance of the contract contained in the collateral note. The finding of the court that the sale was not a public one, we think, has ample support in the testimony, lacking as it did any reasonable or customary notice of its time and place. A public sale of pledged property must be made by public auction in the manner and upon the notice to the public, usual at the place of sale in respect to auction sales of similar property, and must be for the highest obtainable price. Civ. Code, § 3005. By section 3010, when so sold, the pledgee, or pledge holder, may purchase at such sale. By section 3002 the pledgee must give actual notice to the pledgor of the time and place at which the property pledged is to be sold. By section 3003, notice of the sale may be waived by the pledgor at any time. Notwithstanding these provisions, our Supreme Court has determined in Williams v. Hahn, 113 Cal. 475, 45 Pac. 815, that the authority in a contract to sell at public or private sale, with or without notice, is a valid agreement, and that a sale of pledged property, at private sale, without notice conveys title. This contract gave an optional right to the pledgee to sell, either at public or private sale. All of the elements of a public sale being omitted, and there having been no public sale, then the only sale which he was authorized to make was a private sale. This contract, authorizing a private sale without notice, must have a reasonable construction. The term "private sale" comprehends something more than a mere taking over of the property by the pledgee at such price as he may elect to consider an offer. This is, in effect, but a declaration of forfeiture, an agreement for which is invalid under section 2889, Civ. Code. To give effect to the contract, if possible, is our duty. The agreement, then, that the pledgee may become purchaser at a private sale, must be taken as meaning at a sale conducted in the manner usually and ordinarily followed in relation to private sales of property. A sale of property is a contract, and, like every other contract, requires an agreement between two or more. A mere taking over of the property without any agreement with another competent to contract is not a sale, in our opinion.

It is next insisted that, there being no actual sale, there was no change of relation; hence, no conversion. Very eminent authorities have been cited by appellant which go to the extent claimed. In this state, however, the leading case of Dodge v. Meyer, 61 Cal. 420, and which is cited and approved in very many subsequent cases, establishes the doctrine that " 'it is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, this is in law a conversion, be it for his own or another person's use.' * * * A mere claim of dominion, an intention intimated to interfere with goods under a pretense of right or authority, amounts to a constructive trespass." Ozmun, on the 11th of May, 1897, occupied the relation of pledgee. On that date and thereafter he renounced that relationship and notified plaintiff that he no longer held the property in pledge, but asserted ownership therein, and, acting upon that claim, thereafter sold the property as his own. We think clearly that the acts and declarations of Ozmun on the 11th day of May, 1897, amounted to a conversion of the property so pledged and changed his relationship thereto.

Appellant's next contention is that no recovery can be had, because no payment or tender of the debt was proven. The court finds that from the 10th of May, 1897, Ozmun refused to account to plaintiff for said bonds, and claimed that plaintiff had no right to redeem the same from said pledge. The evidence as to the refusal of Ozmun to accept, on and after May 10, 1897, money due upon the obligation of Lowe and to turn over to him the securities, is very conflicting; but upon this appeal we must assume, as found by the court, that Ozmun refused to recognize plaintiff's right to redeem, and so asserted to him and his agents, which being true, under section 1515, Civ. Code, obviated the necessity of formal tender, even were such tender essential to maintain this action. In addition to all this, no tender of the debt was averred in the original complaint, and the facts upon which the claim of conversion was based—namely, that he had appropriated to his own use the bonds, the value of which was in excess of the debt, which in law amounted to a satisfaction of the debt—are clearly set forth in the original complaint, and were before the Supreme Court on the appeal mentioned, and that court held such complaint to be sufficient, not only in that regard, but also upon the question of the statute of limitations, and the same has become the law of this case.

We find no prejudicial error in admitted evidence of the account of the sale, or of the value of the bonds after the conversion. The findings of the court show that nothing established thereby was considered or had any weight in the determination of the case; the judgment being only for the value at the date of the conversion found to have been May 10, 1897, and without reference to the expenses of sale. Evidence in relation to the executor's acts after the conversion was not material, and the judgment is not dependent thereon for support. Nor do we see anything conflicting in the findings. It is true that the court in one finding says that the value of the bonds converted by defendant and said deceased was at the time of the conversion a certain sum, but the same finding shows the conversion to have been made May 10, 1897, years before the appointment of the defendant as executor; and hence reference to the executor's conversion may well be disregarded.

An examination of the many other specifications of error develops nothing which, in our opinion, would justify a reversal of the judgment. The judgment being for the value of the bonds at the date of conversion, with a recoupment of damages by crediting the amount of the debt at the date of such conversion, is, in our opinion, a proper judgment.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 427

GREENE v. OSCEOLA GOLD MINES CO., Limited.

(Court of Appeal, Second District, California. April 18, 1906. Rehearing Denied by Supreme Court, June 15, 1906.)

1. BILLS AND NOTES—ACTIONS — PLEADING—ANSWER.

Where, in an action on a note, the answer, for want of information and belief, denied its execution and nonpayment and set up want of consideration, it was insufficient to raise an issue on the question of the execution and nonpayment of the note as an entirety.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1590–1595.]

2. SAME—CONSIDERATION.

G. and others, as owners of a mining bond, contracted to sell it to a corporation thereafter to be formed for its entire capital stock. G. and others undertook to pay $3,000 due on the mining property and to procure a conveyance thereof to the corporation. On the same day, the corporation agreed to accept the assignment of the bond and the deed of the owner of the property and to issue therefor its whole capital stock. Anticipating such agreement, G. advanced to the corporation $3,000 due the owner of the property, but before that time G. had paid $2,000 to be used in developing the property and the payment of expenses already accrued in the development. This amount was credited to G. on the books of the corporation, as was the $3,000, together with $3,176, which was one-fourth of the previous expenditure in the purchase of the bond and the development of the property. The $2,000 was paid on the agreement that it should be refunded out of the first earnings of the mine, after which the corporation executed to G. a note covering all advances credited to her on the books, including the $3,176 expended before the promoter's agreement and the $3,000 paid for the acquirement of the mine. *Held*, that such note was not void for want of consideration, in so far as it purported to secure the $2,000, though it was without consideration as to the other advancements.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Henry A. Greene against the Osceola Gold Mines Company, Limited. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

Fred W. Heatherly and Powers & Holland, for appellant. Lynn Helm and Sidney J. Parsons, for respondent.

ALLEN, J. Appeal by plaintiff from a judgment in defendant's favor, and from an order denying a new trial.

The action is upon a promissory note, dated July 26, 1901, for $9,500, and interest. The answer, for want of information and belief, denies its execution and nonpayment, and further sets up as a defense a want of consideration. The answer being insufficient to raise an issue upon the question of the execution and nonpayment of the note as an entirety, the only question for consideration on this appeal is whether or not the note executed was without consideration. The case is this: On the 12th of June, 1900, Mary C. Greene, W. H. Fuller, T. R. Garnier, and G. W. Beck were the owners jointly of a mining bond conditioned for the conveyance to them, or their assigns, upon payment of $3,000, of a certain mining property. They had made various contracts in relation to the disposition thereof to a corporation thereafter to be formed; and on the date last mentioned, after the formation of such corporation, finally agreed in writing to convey their equity in the property to defendant corporation for its entire capital stock, and in such agreement Greene, Garnier, and Fuller undertook to pay the $3,000 due on said property and to procure a conveyance thereof to the corporation. On the same day the corporation, by resolution regularly adopted, agreed to accept the assignment of such bond and the deed of the original owner of such property and issue therefor the whole of its capital stock, one-fourth thereof to each of said holders of the bond. Anticipating this agreement, Mrs. Greene had already advanced and paid into the corporation, through Fuller, her attorney, the $3,000 due to the owner, and which, under the agreement, she, Fuller, and Garnier were to pay as a part of the consideration for the issue of the stock to them. Before this time, however, on the 31st of May preceding, Mrs. Greene had paid to Fuller $2,000, to be used in development of the mine and payment of expenses already accrued in its development. This money was credited to Mrs. Greene on the books of the corporation, as was the $3,000 before mentioned, together with $3,176, the one-fourth of previous expenditures in the purchase of the bond and the development of the property. The undisputed testimony is that this $2,000 was not paid or advanced, except upon the agreement that it should be refunded out of the first earnings of the mine before any dividends were paid, and the corporation seems to have received this $2,000 and to have expended it in payment for labor and materials before the incorporation, as well as for machinery, supplies, and development thereafter. After this $2,000 had been received by the corporation, and under the agreement before mentioned large blocks of stock were sold to various persons, and afterwards, in March, 1901, the corporation executed to Mrs. Greene a note covering all advances and sums credited to her upon the books, which included the $3,176 expended before the promoter's agreement and the $3,000 paid out for the acquirement of the mine, the renewal of which note is sued on in this action.

We are of opinion that the trial court was justified in finding that, as to the $3,176 and the $3,000, there was no consideration moving to the corporation. The stock was issued in consideration of the conveyance to it of the bond for a mine in its then existing developed condition, and a conveyance from the owner for the consideration of which the other parties, and not the corporation, were to pay. But as to the $2,000 the case is different. Mrs. Greene was under no legal obligations to pay any liens for labor, if any existed upon the mine, or to do any development work after its acquirement by the corporation; and the corporation having received from her the $2,000 and credited the same upon the books, even the payment of a portion thereof on account of debts due from the original promoters would not warrant a finding that there was no consideration for the note, even to the extent of such payment by the corporation on account of its previous debts; nor is there any offset claimed or demanded in the pleadings on account thereof. Subsequent to the conveyance of the property to the defendant, Mrs. Greene advanced $2,250 additional; but this seems to have been paid her with interest, and is not involved in the case. We think, therefore, that there is no testimony in the record supporting the finding of an entire want of consideration, but that, on the contrary, to the extent of $2,000, the original note was a valid and subsisting obligation of the corporation, and to such extent, with interest, is still an obligation evidenced by the note sued on in this action.

The judgment and order are reversed, and the cause remanded for a new trial.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, and also in what is said as to the sufficiency of the item of $2,000 referred to in the opinion to constitute a valid consideration to that extent. I am not prepared, however, to hold that the note was to any extent invalid for lack of consideration or otherwise. It was duly executed by the corporation in pursuance of a resolution of the board of directors and in consideration of an acknowledged indebtedness appearing on its books. I see no evidence of any fraud in the transaction on the part of the plaintiff, who, if not defrauded, was in some way induced to advance large sums of money for the benefit of the other corporators and the corporation, which she was under no peculiar obligation to pay. As to the question whether, under the agreements between the corporators, written or oral, and the agreement of assignment between the corporators and the corporation, she could, in the absence of any action upon the part of the corporation, have recovered the amounts advanced by her, I express no opinion. But she naturally and in good faith claimed the right to recover these sums, and it was competent for the board of directors to determine on the validity of her claim, and to issue the obligation of the company for its payment. Whether or not they were mistaken in their action, I am not prepared to say that the claim of the plaintiff did not consitute a sufficient consideration for the note. I deem it unnecessary, however, under the circumstances, to enter upon a particular examination of this point, or to express a definite opinion thereon; and I am therefore of the opinion that the judgment and order appealed from should be reversed, and the cause remanded for a new trial, without any special instructions.

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3 Cal. App. 416

PEOPLE v. STOFER.

(Court of Appeal, Third District, California. April 11, 1906. Rehearing Denied by Supreme Court June 7, 1906.)

1. LARCENY—INSTRUCTIONS—REQUESTS.

On a prosecution for grand larceny a request for an instruction that the stealing would not constitute grand larceny unless the property was taken from the person of another and relative to the two degrees of larceny constituted a request for an instruction as to what constitutes taking from the person.

2. SAME.

Where on a prosecution for grand larceny it appeared that prosecutor and defendant had been talking together, prosecutor holding his purse, and that defendant on leaving prosecutor took his purse from his hand, and that when he returned and gave back the purse some of the money was gone, and was found in defendant's possession, it was error to instruct that defendant was guilty of grand larceny or nothing, to fail to instruct on petit larceny, and to refuse a requested instruction as to what constitutes a taking from the person within the meaning of the statute.

Appeal from Superior Court, Butte County; J. C. Gray, Judge.

Frank Stofer was convicted of grand larceny, and he appeals. Reversed.

Frank Thunen and Wm. E. Duncan, Jr., for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was accused of the crime of grand larceny in that he did, on August 23, 1905, wrongfully and feloniously "steal, take, and carry away from the person and immediate possession of John Coleman, $20 in gold coin * * * and 50 cents in silver money," the personal property of the said Coleman. The jury found the defendant guilty of grand larceny, and the court adjudged that the defendant be imprisoned for the term of 10 years. Defendant appeals from the judgment and the order denying his motion for a new trial. Defendant was refused an instruction, the purpose of which was to inform the jury that the stealing of money less in value than $50 would not constitute grand larceny, unless it was taken from the person of another, and further to inform the jury of the two degrees in larceny, and that, although guilty of stealing the money, the jury should have been given the opportunity under proper instructions to determine whether the crime was grand or petit larceny.

The court instructed the jury as follows: "There are but one of two verdicts that you can find in this case. * * * They will be 'guilty of grand larceny,' or 'guilty as charged;' and 'not guilty.' There is no lesser crime in it; it is either 'guilty,' or 'not guilty.' The taking of money from the person of another, as I have read to you in the statute, is grand larceny; it makes no difference whether the amount be great or small." The instruction given by the court removed from the jury all consideration of the lesser offense of petit larceny, and not only assumed as proven the important fact that the money was taken from the person of Coleman, but that there was no evidence from which the jury might have reasonably drawn the inference that the money was not so taken. Respondent cites cases where the Supreme Court has held that in a prosecution for murder, the refusal of the court to instruct the jury that they may return a verdict of manslaughter is not error, if the evidence clearly shows that the jury would not have been warranted in rendering a verdict of manslaughter, and where the appellate court was able to say from an examination of the evidence that the crime of manslaughter was not involved. People v. Lee Gam, 69 Cal. 552, 11 Pac. 183, is among the cases so holding. The principle of these cases need not be questioned. It is nevertheless well established as a principle of criminal jurisprudence that where murder is charged and the facts and circumstances would warrant the jury in finding the defendant guilty of the lesser offense of manslaughter, it would be prejudicial error for the court to refuse an instruction as to what constitutes manslaughter. The rule applies in grand larceny cases. See subject discussed in People v. Comyns, 114 Cal. 107, 45 Pac. 1034. The question there was as to whether the defendant was guilty of a larceny of articles in value exceeding $50. Here the question of the value is not in dispute, but the equally important question is in dispute, namely, did defendant take the money from the person of Coleman with intent to steal it? If the facts and circumstances were such as to leave open to reasonable doubt whether the money was taken by defendant from the person of Coleman in the sense intended by the statute, the court erred in withdrawing the question from the jury and confining their inquiry to the sole question of defendant's guilt as charged in the information. The mere taking of personal property from the person of another is not in itself sufficient to constitute the crime, for the taking may have been without intent to steal the property and may have been with the actual or implied assent of the owner. The Supreme Court in People v. McElroy, 116 Cal. 583, 48 Pac. 718, after reviewing the cases, said: "In view of these authorities and the origin of the statute, we think its obvious purpose was to protect persons and property against the approach of the pick-pocket, the purse-snatcher, the jewel-abstractor, and other thieves of like character who obtain property by similar means of stealth or fraud, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession—such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from its person or out of his hands." It was held in People v. Appleton, 120 Cal. 250, 52 Pac. 582, not to be error for the court to omit an instruction as to what constitutes taking from the person, within the meaning of the statute, where the defendant asks for no such instruction. But here there was what must be regarded as a request for an instruction on the question.

It is not necessary to state the evidence at length. Coleman and defendant were both negroes, and whether former acquaintances does not appear. Coleman came to Oroville on the afternoon of August 22, 1905, and proceeded to get drunk; he hung around the saloon of one Thorp until midnight, but could not remember what befell him the balance of the night. The next morning about 9 o'clock he and defendant were together in Thorp's saloon; defendant had Coleman's valise and said he was "going to take Coleman up to the half past 12 train, and see that he went off on it." Coleman was still very much intoxicated. The two went out of the saloon together, and not long thereafter defendant went back and handed a purse to the barkeeper, stating that it contained Coleman's money. Later, defendant went back again and said to Thorp, who was then taking the place of one of his barkeepers, that Coleman had sent him for $5. Thorp refused to give it to him and defendant went out again.

Later both Coleman and defendant returned and Coleman said he wanted his money. Thorp prudently counted it out to him, to show that it had not been tampered with by him. He testified that there was "a twenty-dollar piece, two fives, two halves, and a few short bits" in the purse when he handed it to Coleman, who treated "all around" and the two then went into a back room together and sat down at a table; Coleman having his purse in his hand, and thumping it on the table at times. Witness Cherry was in this back room. He testified: "They sat that way, talking for about half an hour, and directly Coleman said it was time to go to the train. He said: 'Where is my valise? I want to go to Marysville on that train.' And Stofer said, 'I will get your valise.' It was in that little office in there. This man had the money in his purse, patting it on the table, and Stofer reached over and took the purse out of his hand and went into the place and got his valise; and he was in there two or three minutes, and came out and put the valise on the table, and gave him his purse, and said, 'It is all right; put it in your pocket and we will go to the train.'" Coleman soon after opened the purse and discovered that the twenty-dollar piece was gone and at once accused defendant of taking it. Thorp, hearing the loud talk, went into the back room, saw the purse on the table and found on examination that the twenty-dollar piece was missing. Shortly afterwards defendant went out back to a water-closet and Thorp followed him and took from his hand a twenty-dollar piece and a fifty-cent piece and brought the money to Coleman. Defendant was soon thereafter arrested.

It seems to us that under the circumstances disclosed defendant had opportunity to have secured the money without taking the purse from the person of Coleman for that purpose. They had been together since 9 o'clock of that morning and defendant had been given possession of the purse by Coleman and had himself deposited it with Thorp for safekeeping. When the two men went into the back room of Thorp's saloon and sat down together and were talking, as Cherry testified, for a half an hour, Coleman might have allowed defendant to handle the purse and the money might have been taken at such a time. Cherry did not know what money was in the purse when he testified to having seen defendant take it out of Coleman's hand. Besides, the jury were not bound to believe Cherry's testimony. Furthermore, conceding the truth of Cherry's testimony and that the stolen money was in the purse when defendant took it out of Coleman's hand, it was for the jury to say whether defendant intended at that time to steal the money or made up his mind to steal it while he was going to get Coleman's valise. It is not beyond reasonable probability or possibility that the money dropped out of the purse while Coleman was thumping the purse on the table. Coleman had intrusted the purse to defendant earlier in the day, and there is no evidence that he suspected defendant of foul play with him while sitting at this table, or that he kept the purse in his own hands all the time while sitting there. He was in a maudlin condition, and had no distinct recollection of what occurred except that on opening the purse he missed the twenty-dollar piece. The evidence may have been and apparently was sufficient to justify a verdict of guilty of larceny, but there was enough of doubt as to whether the larceny was committed in conjunction with the alleged act of taking the money from the person of Coleman to entitle defendant to the verdict of the jury upon this latter element of the alleged crime. Proof of the larceny of the money was not of itself sufficient to support the verdict. As instructed, the jury were not permitted to consider the probability, much less reasonable possibility, that the money was taken from the purse by defendant at some time while it was in defendant's possession by leave of Coleman. In our view of the law as applied to the facts and circumstances, the court erred in giving the instruction complained of, and in refusing to instruct the jury as to what constitutes the taking of property from the person of another, and also in not instructing the jury as to the lesser crime of petit larceny.

The judgment and order are reversed, and cause remanded for a new trial.

We concur: McLAUGHLIN, J.; BUCKLES, J.

3 Cal. App. 399

CHAPMAN v. BENEDICT et al. (STULL, Intervener).

(Court of Appeal, Second District, California. April 7, 1906. Rehearing Denied by Supreme Court May 23, 1906.)

1. PLEDGES — RIGHT TO REDEEM — OFFER TO PAY.

The right to redeem security given as collateral for a debt by reason of a seasonable and proper offer to pay is not affected by subsequent offers on such offer being rejected.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, §§ 118, 119.]

2. SAME—PLEADING—EFFECT OF PRAYER.

One who has seasonably offered to pay a debt, which offer is refused, and so under Civ. Code, §§ 1504, 1512, 1515, stopped the running of interest, is entitled to redeem her securities given as collateral for the debt on payment of the debt and interest to such date, and may do so, though in the prayer of her complaint therefor she, by reason of a mistake of law as to the effect of the offer, claims exemption from interest only from a later date.

3. SAME—REDEMPTION—JUDGMENT.

A judgment giving the right to redeem securities given as collateral should specify the time within which payment should be made.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 128.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William Chapman against

Charles E. Benedict and others; Gertrude Stull intervening. Judgment for intervener. Plaintiff appeals. Modified.

Harris & Swanwick and Charles Lantz, for appellant. C. C. Wright, for respondent.

ALLEN, J. The suit was brought by plaintiff as assignee of the intervener to foreclose a mortgage made by the defendants to one Wm. N. Holway, of date May 1, 1900, to secure a promissory note for the sum of $3,000. Judgment was rendered for the intervener, from which the plaintiff appeals.

The note and mortgage were assigned by Holway to the intervener to secure his promissory note to her for the sum of $2,400, and were assigned with Holway's note to the plaintiff by the intervener as collateral security for her note to the plaintiff of date May 20, 1901, for the sum of $1,500, with interest at the rate of 8 per cent., etc. These facts are alleged in the complaint in intervention, and it is further alleged: That this complainant paid the interest due on her personal note August 20, 1901; that thereafter three times she offered to Charles Lantz the money due on her personal note and demanded the reassignment of said securities; and that Charles Lantz has ever since refused to accept the money, claiming a fee not rightly belonging to him. Then there is a copy of a receipt given for the interest paid, which shows it to have been paid August 19, 1901. There were other facts alleged touching the intervener's right to make the assignment; but, in view of the proceedings on the trial and the findings of the court, these allegations may be regarded as immaterial. The complaint in intervention is duly verified, and its allegations are not specifically denied. The execution of the note and mortgage in suit, and its assignment, together with the execution of Holway's note to Mrs. Stull, and of her note to the plaintiff, are admitted. But it is found: (1) That Mrs. Stull did not assign to plaintiff the $2,400 note of Holway, for which she held the note and mortgage in suit as collateral, of which fact the plaintiff had notice; that she had no right to transfer the latter without also transferring the $2,400 note; (2) that said intervener, Gertrude Stull, paid to the said plaintiff the interest due on her said note to the 20th day of August, 1901; that on said 20th day of August, 1901, the said Gertrude Stull offered to pay Chas. Lantz her said note in full, including all amounts due thereon to date of said offer, and demanded of plaintiff a return of the said securities held by him; that said plaintiff, by his attorney in fact, Chas. Lantz, then refused and has ever since refused to accept said payment, assigning no reason for such refusal save that the amount tendered by said Gertrude Stull did not include an additional sum of $125 claimed to be due from said Gertrude Stull to the said plaintiff's attorney for services rendered in a prior action to foreclose said $3,000 Benedict mortgage. The conclusions of law were that the intervener was entitled to judgment for the possession of the papers and securities deposited with the plaintiff as security for her note, upon the payment to the plaintiff of the sum of $1,500, and judgment was entered accordingly.

These findings are attacked by the appellant as not justified by the evidence. As to the first, the note of Mrs. Stull in evidence discloses an assignment of the Holway and Benedict notes, and said first finding has no support in the testimony; but the error is of no materiality as affecting the rights of the parties upon this appeal. As to the second finding, there is testimony in the record to the effect that on the 20th day of August, 1901, intervener notified Lantz, who was the attorney in fact for plaintiff, that she was ready and willing to pay her said note of $1,500, and that said Lantz notified her that he would not accept the tender of the amount due Chapman, as principal, unless she paid him an additional sum, which was not a part of the note or connected therewith, and not due Chapman in any event. There is some little difficulty in bringing the findings within the issues tendered by the intervention; but taking the whole complaint in intervention together, from which it appears by the date upon the receipt that the payment of interest was on the 19th of August, and that thereafter she tendered the amount, it indicates that the pleader intended to say that interest was paid to August 20th, and not on August 20th, and reconciles what otherwise would be a discrepancy between the findings and the allegations of the complaint in intervention. It is true that intervener does not assert with any degree of positiveness that the 20th day of August was the exact date of the tender, but she says it was immediately after the note matured, and Lantz, who was offered as a witness for plaintiff, was not prepared to say that the 20th was not the correct date of the conversation referred to. The fact that several other offers of performance were made after the 20th of August in no wise affects the status of the parties, assuming a proper offer of performance to have been made on the 20th. That Lantz was the attorney in fact, and had full authority in the premises to act for plaintiff, affirmatively appears in the record. The notice given by Lantz to intervener of his refusal to accept the money rendered formal tender unnecessary. Civ. Code, §§ 1512, 1515. The money, however, does not seem to have been deposited in bank, whereby the obligation was extinguished, as provided by section 1500, Civ. Code; but such tender had the effect to stop the interest. Civ. Code, § 1504. We attach no importance to the prayer of the complaint in which the intervener claims exemption from interest from January 20, 1902. If, in fact, a tender were made and the interest stopped thereby, her mistake as to the effect of such tender would not prejudice her, especially where the pleading was drawn by one not learned in the law, as is indicated by the fact that the complaint in intervention was signed by the intervener in propria persona. We are of the opinion, therefore, that the finding of the court as to the tender cannot be disturbed. But the judgment is defective in not fixing a time within which the money due from Mrs. Stull to the plaintiff, $1,500, shall be paid, or providing for the contingency of nonpayment within the time specified. We are therefore of the opinion that the time should be fixed by the court within which the money is to be paid by Mrs. Stull, and that upon her failure to pay the same her complaint in intervention be dismissed, and the case left to proceed between the original parties.

There is a motion in the case to dismiss the appeal, but as the same motion was made and determined in the Supreme Court it cannot be further considered. It is ordered, therefore, that the judgment appealed from be modified by striking therefrom, at the end of the second paragraph thereof, the following words: "Whenever the said Stull pays or tenders to the said plaintiff the sum of $1.500, and thereupon that the assignment thereof from Stull to Chapman shall be void" —in lieu of what there shall be inserted: "Upon the payment to said William Chapman of the sum of $1,500 gold coin of the United States, within ten days after receiving written notice of the entry of the judgment, and that if the intervener shall fail to pay the said sum within the time so fixed, her complaint in intervention shall be dismissed, and the plaintiff have leave to proceed with the foreclosure of the mortgage in suit against the original parties;" and it is further ordered that the judgment so modified, and the order denying the plaintiff's motion for a new trial, shall stand affirmed.

I concur: GRAY, P. J.

SMITH, J. (concurring). I concur in the opinion on the ground that I am not satisfied that we would be justified in disturbing the finding of the court as to the date of the tender made to the plaintiff by Mrs. Stull. On this point I am satisfied from the evidence and from the allegations and prayer of the complaint in intervention, that Mrs. Stull herself, at the time of filing her complaint, did not believe that she had made any effectual tender prior to the date named, "Jan. 20, 1902," and that she then believed that she was entitled to exemption from interest only from that date. But it is suggested in the opinion that the court below may have been satisfied that she was under a mistake of law on this point, and upon this hypothesis the court, perhaps, was justified in its findings. Otherwise, I would think she should be charged with interest up to that date.

3 Cal. App. 606

KRAMM v. STOCKTON ELECTRIC R. CO.*

(Court of Appeal, Third District, California. May 15, 1906. Rehearing Denied by Supreme Court July 12, 1906.)

1. TRIAL—MOTION FOR NONSUIT—EFFECT.

A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, on which motion the evidence should be interpreted most strongly against the defendant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 352, 372, 399, 400.]

2. SAME.

Where there is a conflict in the evidence, some of which tends to sustain plaintiff's cause of action, a motion for a nonsuit should be denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 359-361.]

3. STREET RAILROADS—INJURIES TO PEDESTRIANS—CARE REQUIRED.

Though ordinary care is required on the part of persons crossing the tracks of both street and commercial railroads, what is ordinary care is widely different in the two cases.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 204-209.]

4. SAME — CONTRIBUTORY NEGLIGENCE — DEFENSE.

Where decedent was killed by being struck by a street car while crossing the track, the fact that he might have been guilty of contributory negligence would constitute no defense, if, by the exercise of ordinary care, defendant's agent could have avoided the accident after discovering decedent in a perilous position.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 219.]

5. SAME—EVIDENCE—QUESTION FOR JURY.

In an action for death of a pedestrian by being struck by a street car while crossing the track, evidence *held* to require submission of the street railroad company's negligence and decedent's contributory negligence to the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 253-257.]

6. SAME—PLACE OF DANGER.

Where decedent, at the time he was struck by defendant's street car and killed, was employed in the work of spreading gravel on the street on which the car was operated, and just prior to the accident went on the track to permit a sprinkler to pass, he was not guilty of contributory negligence as a matter of law in going on the track.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 205, 253-257.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Catherine Kramm, as administratrix of the estate of Philip Kramm, deceased, against the Stockton Electric Railroad Company. From a judgment in favor of defendant, dismissing the action on a nonsuit at the close of plaintiff's case, and from an order denying plaintiff's motion for a new trial, she appeals. Reversed.

Jacob & Flack, for appellant. A. L. Levinsky and Budd & Thompson, for respondent.

CHIPMAN, P. J. Action for personal injury to plaintiff's intestate resulting in his death. At the close of plaintiff's evidence the court granted defendant's motion for a nonsuit. Plaintiff moved for a new trial, which was denied, and plaintiff appeals from this order and from the judgment of nonsuit and dismissal of the action. The complaint alleged that defendant did carelessly, negligently, and willfully "run one of its cars upon, knock down, and kill Philip Kramm." The defense is a denial of plaintiff's complaint, and avers contributory negligence on the part of deceased.

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*For opinion on rehearing, see 86 Pac. 903.

There are certain well-established rules governing appellate courts in reviewing the action of trial courts in granting nonsuits which may be stated at the outset. The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. Goldstone v. Merchants' Storage Co., 123 Cal. 625, 56 Pac. 776. If there is any evidence tending to sustain plaintiff's action, the nonsuit should be denied, without passing upon the sufficiency of such evidence (Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408), and where there is a conflict in the evidence, some of which tends to sustain the plaintiff's case, a motion for a nonsuit should not be granted. Pacific Mutual Life Insurance Co. v. Fisher, 109 Cal. 566, 42 Pac. 154. Mr. Justice Temple, in Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651, said: "The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. * * * If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." In view of these well-established rules it is only necessary to look into the record sufficiently far to see whether there is any evidence tending to sustain plaintiff's cause of action. We have nothing to do with the question of the credibility of the witnesses, nor with testimony tending to create a conflict, nor with any apparent disagreement as to the facts among plaintiff's witnesses. The evidence, on this motion, must not only be viewed most strongly against defendant, but must be interpreted most favorably to plaintiff.

It appears that deceased was engaged in the work of spreading gravel on California street, in McCloud's addition to the city of Stockton. Witness Looper was employed as a driver of a four-horse sprinkling wagon being used to sprinkle the gravel on this street where deceased was at work. California street runs in a northerly direction (bearing westerly), at a curve of about 630 feet south of the place where the accident happened. There is a clear view of the track for this distance and from the point where the street makes the curve. Looper came along with his sprinkling wagon and passed deceased as he drove north. Reaching the end of the gravel, he turned his team back south, sprinkling as he went, and as he approached deceased the latter "stepped back west on the street car track," as he had done before, to let Looper pass, who, as he got about opposite deceased, had some conversation with him as to the quantity of water required on the gravel, his team moving and the water running from the sprinkler as they talked. At this time deceased stood facing northeast, with his back towards the south and towards the approaching car. Looper testified: "and, of course, I was talking to him about the amount of water, and all at once—I was not—my eye was turned to him—turned a little west, talking to him; and all at once I felt my line jerk, you know, and my wagon moved and my horses went pretty fast, you know—started up, you know. I could tell from my lines, you know, that my horses had shied. I throwed my eyes up; I seen the street car coming and my horses had kind of shied to the east. * * * I seen the car approaching. I just turned to him and said, 'Look out there!' 'Look out there!' I says, 'for the car, old boy,' and turned to my team again, and was drawing my team back straight. They kept moving along, but I straightened my team back on the gravel again and turned my head to see the old man—what had become of him. I looked kind of back for he had stepped in. As a matter of fact, I thought he would step in towards my wagon, as he was standing on that there rail. I thought he had stepped between my wagon, and I turned my head to see what had become of the old man. I knew he was in a pretty dangerous place. Of course, I seen his hat then, just behind the car. I stopped my team then. The car was stopped. His hat was just behind the car. * * * I saw the motorman and seen the old man lying under the car—the car wheel." Looper testified that his wagon was about four feet from the east track; that the water was running in full force on the gravel and made a little noise; that his "team was moving through the rocks or gravel as the car approached and as the water ran"; that when he "first noticed the car it was about 60 feet away from" him; that it "was coming pretty rapidly—pretty fast"; that he had seen the cars running on that line for a number of years, and he "thought at the time that the car was running at least 15 miles an hour." He testified that he stepped the distance from the point where deceased was struck by the car to the point to which his body had been carried by the car, and found it 15 or 17 feet. He "stepped it after the car had been moved away from there, and they had taken the old man away and the track was clear." He also testified that he heard no bell ring and heard no alarm, and that he heard no "one call out as the car approached, or give any alarm." Deceased was 57 years old, with good hearing and good eyesight; "a fleshy, heavy-set man" and "probably weighed 180, may be 200 pounds."

Witness Barnhart, a teacher in the public schools, resided on a lot west of California street and fronting on the railroad track where deceased met his death. He testified that he saw the car going north on the street at a point marked "G" on the map in evidence, which was about 180 feet from the point where the accident occurred. "The bell rang just then." Witness had come out of the cellar of his house to where he had gone for a can of oil. He testified: "I stooped and picked up the can and started up into the house, walking along the east side of the house, walking south. I had taken a couple of steps when I glanced again towards California street, and I saw the car apparently in the act of passing a man. There was just a streak of daylight that you could see between them. * * * I presumed the car would pass the man, but to my surprise the car hit him, struck him; and also at the same time my glance rested upon the car, it naturally—I saw standing where I did, I saw the motorman just in the act of putting on the brake. I watched the car for an instant * * * I watched the car until it came to standstill, which it seemed to do within a short distance —I suppose, its own length." He was asked if he saw the motorman as he looked at the car the last time and answered that he did. "A. The motorman was in the act of putting on the brake. Q. In what position was the brake lever at that time? A. Straight up and down—perpendicular. Q. Perpendicular; and he was in the act— A. Of pulling back on it. Q. What is that? A. He was in the act of pulling back on the brake. Q. When he was in the act of pulling back on the brake, as you have stated, how far from the car was this man? A. Well, it was at this time I expected the car to pass the man, and it was just as I said—a streak of daylight between the car and the man." He testified that at the point "G" where he first saw the car the gong gave a single stroke, and that the car bell did not ring after that until the car struck deceased, and of this he said he was positive. He stated that the car was running at the rate not less than 12 miles an hour, and did not appreciably slacken its speed from the time he first saw it and when he last saw it.

Mrs. Barrett testified: "The first I heard was the slowing down of the car and the applying of the brakes against the wheels. I heard an exclamation 'Oh!' almost the same time, as near, I would say, as you can make two sounds together. The applying of the brakes, as I would describe it, was a kind of grating sound, the brakes against the wheels." Witness assisted in getting deceased from under the car. She also testified that she heard no bell being rung just before she heard the grinding of the brakes. Mrs. Rosa Tulan was with Mrs. Barrett and testified to the same facts as did the latter, except that she took no part in removing the body from under the car.

The motorman who operated the car the morning of the accident testified: That he saw Mr. Kramm when he rounded the curve on California street talking to Mr. Looper on the water wagon (this curve was 630 feet south); that after he left the curve he saw Kramm start to back across the track as he rang his bell; that he was on the track all the time thereafter until the car struck him; that he had previously seen Kramm there and knew he was at work on the street spreading gravel. "Q. Did he, Kramm, seem to notice you when you rang the bell? A. Well, I could not say, the man backed across the track, started to back across the track and stopped. I could not say positively whether he noticed me or not. I did not see him look at me or look at the car. * * * Q. Did he, Kramm, seem to notice you when you rang the bell? A. I don't know. He seemed to me to be deaf." There was evidence tending to show that the motorman used the brake, and did not resort to what is known as the "reverse," the latter expedient being used for stopping quickly, and that the car might have been stopped going at the speed testified to within 12 or 15 feet. The motorman testified that he was within 10 or 12 feet of Kramm when he noticed that he stopped on the track, and he shouted to him and rang the bell, threw off the current, and applied his brakes, and he thought the car was running at about 8 miles an hour. The evidence was that deceased was injured in a way to show that the car struck him with considerable force, ran over his body, and dragged him "15 or 17 feet," and that he was taken out from "under the west front wheel." The motorman testified that the reason he did not put down the brakes sooner was that he thought Kramm would continue backing off and would get out of the way.

To our minds it is quite obvious that there was sufficient evidence in support of plaintiff's case to require that it be passed upon by the jury. It is contended, upon the authority of Green v. Los Angeles Terminal Railway Company, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, that the court was justified in taking the case away from the jury. And it is claimed that this case modifies, if it does not overrule, the case of Harrington v. Los Angeles Railway Company, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. The learned trial judge seems to have taken that view. The facts in the Green Case are in no wise similar to the facts here, and the principles governing that case are not necessarily applicable. There the question related to the conduct of the deceased in crossing in front of a steam railway train and at a railroad crossing. The deceased approached the track of defendant on foot and by daylight, at a point from which it was plainly visible for a distance of 800 feet to the eastward, beyond which it made a curve north. When she was 30 feet distant from the track, she was seen to look towards the east and then immediately advance in a northwesterly direction along the path which crossed the track at an angle of 30 degrees. When she looked to the east, the train had not rounded the curve and was out of view, "for she advanced slowly along the path, without again looking up, and when in the act of stepping on the track was struck by the locomotive and killed." It was held that she was guilty of culpable negligence, directly contributing to the fatal result. The court quoted approvingly from Herbert v. Southern Pacific Co., 121 Cal. 230, 53 Pac. 651, where the court said: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case must depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." In applying the principles relating to negligence, contributory or otherwise, the courts recognize a distinction between cases of injuries by street railroads and cases of injuries by "ordinary steam railroads running through the country at comparatively long intervals of time." It was said in Schneider v. Market Street Railway Company, 134 Cal. 482, 66 Pac. 734: "In either case 'ordinary prudence' is required on the part of persons crossing the track; but the question of what is ordinary prudence is widely different in the two cases." It will be noted that the motorman saw the deceased on the track engaged in talking with Looper. He must have known that the sprinkling wagon was in motion and that the water was escaping from the sprinkler, and that the moving of the wagon wheels in the gravel and the escaping water would make some noise. Deceased was standing with his back towards the car, which fact the motorman noticed, and gave no evidence of observing its approach, except that he stepped back as though to get off the track; but it is quite evident from Looper's testimony that neither he nor deceased noticed the approach of the car until it was so near as to make escape difficult, if indeed possible, at the speeu the car was moving. When Looper called to deceased to look out, he could not have stepped towards the wagon and there escaped, for the evidence was that the projecting steps of the car and the hubs of the wagon wheels would probably have caught him. He had not time to escape behind the wagon, where the water was rushing from the sprinkler, nor in front of the four horses attached to the wagon. Possibly an active young man with his faculties instantaneously alert and serving him could have jumped back and escaped. But the law does not require that a person thus endangered shall exercise every possible means of escape or suffer the consequences. There was evidence that the motorman did not apply his brake until the very instant of the collision, and there was evidence that no bell was rung or warning given shortly before the car struck the deceased. It is said in Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85: "It must be remembereu that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness, which are justly required of a careful and prudent man under ordinary cicumstances. The reasonableness of his effort to escape the injury after discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence." This we believe to be a correct statement of the law. Similar views were expressed by the court in Schneider v. Market Street Ry. Co., supra: "If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions or in making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise."

The deceased may have been guilty of negligence, but defendant cannot for that reason excuse itself if by the exercise of due care its agent could have avoided the accident after discovering the negligent party in his perilous position. Swain v. Fourteenth St. Railway Co., 93 Cal. 179, 28 Pac. 829; Lee v. Market Street Railway Co., 135 Cal. 293, 67 Pac. 765. There was evidence, whether true or untrue it is not our province to judge, that the motorman saw deceased in his perilous position when far enough away from him to have stopped the car before reaching him, or at least to have so reduced its speed as to have caused less injury; and there is evidence, which we must receive, that the motorman did not attempt to check the momentum of his car until the very instant—one witness testified simultaneously—the car struck the deceased. Clearly, under the circumstances shown, the facts ought to have gone to the jury.

Nor can defendant be heard to complain that deceased was standing upon the track. He had a right to be there, and, in the present case, his duty called him there. Shea v. B. V. R. R. Co., 44 Cal. 414; Swain v. Fourteentn Street Ry. Co., 93 Cal. 179, 28 Pac. 829.

Without further noticing the evidence or further comment, in our judgment the case should have gone to the jury, because, among other reasons, the jury as presumably "sensible and impartial" men might have decided that the deceased exercised ordinary care (Herbert v. S. P. Co., supra), or that the motorman "had the last clear opportunity to avoid the injury," in which case it was his duty to have done so. Esrey v. S. P. Co., 103 Cal. 541, 37 Pac. 500; Lee v. Market Street Ry. Co., supra.

The judgment of nonsuit and dismissal is reversed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 437

WARD et al. v. EASTWOOD et al.

(Court of Appeal, Third District, California. April 14, 1906.)

1. MINES AND MINERALS — CONTRACT — CONSTRUCTION—PAYMENT.

Where plaintiffs contracted to mine certain ore at $2.50 per ton, for ore deposited in the chutes ready for hoisting by defendants, a provision of the agreement that payment should be made on the 10th of the month for the ore hoisted the preceding month, the quantity of which was to be ascertained from the number of tons hoisted, did not preclude plaintiffs from recovering for ore mined and deposited in the chutes, which defendants failed to hoist because of the rise of water in the mine.

2. SAME—UNFORESEEN OCCURRENCES.

Where certain miners agreed to mine ore in defendants' mine and place the same in the chutes ready for hoisting at a certain price per ton, without assuming any risks concerning defendants' ability to keep water out of the mine, as they had agreed to do, the fact that water arose in the mine by reason of unusual rains, which prevented defendants from hoisting ore mined by plaintiffs and placed in the chutes, was no defense to plaintiffs' action for the price of mining such ore.

3. APPEAL—REVERSAL—IMMATERIAL FINDINGS.

Immaterial findings, which do not affect the correctness of the judgment, though erroneous, are not ground for reversal.

4. SAME—HARMLESS ERROR.

Failure of the court to find on all the material issues is not prejudicial error, where the court finds on an issue which was determinative of the judgment, and where findings in favor of appellant on other issues would not justify a contrary judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4239.]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by James Ward and others against A. B. Eastwood and another. From a judgment for plaintiffs, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Tabor & Tabor, for appellants. Lardner & Barnes and W. H. Slade, for respondents.

CHIPMAN, P. J. Action to recover on a contract for mining 200 tons of ore and quartz rock in defendants' mine. The cause was tried by the court sitting without a jury, and plaintiffs had judgment for $487, being the amount prayed for, less $13 for supplies furnished plaintiffs by defendants. Defendants appeal from the judgment, and from the order denying their motion for a new trial.

The contract was oral, and, as was alleged in the complaint, was that plaintiffs agreed to work for defendants, as miners, in the Hathaway mine, Nevada county, "in breaking down and abstracting ore and quartz rock in said mine, ready for hoisting for the agreed price of two and $^{50}/_{100}$ per ton; and said defendants agreed on their part, to keep the said mine free from water so that plaintiffs could perform said labor, and to pay plaintiffs said sum of two and $^{50}/_{100}$ dollars for each ton of rock and ore so extracted and to pay said $2.50 per ton as fast as said rock was broken down and ready for hoisting." It was alleged "that plaintiffs began work on January 2, 1902, and continued work under said contract down to the 6th day of March, 1902, when they were driven out of said mine by water, the defendants having failed to keep said mine free from water." It is alleged that plaintiffs broke down and extracted ore in said time to the extent of 639½ tons, for which there became due to plaintiffs the sum of $1,598.75, no part of which has been paid except $1,098.75. Defendants answered, denying the allegations of the complaint, and alleged that plaintiffs agreed to break down and mine out quartz rock at a certain level "and place the same in the chutes at said level at the agreed price of $1.25 per car"; that it was agreed that the ore thus mined in each calendar month should be paid for on or about the 10th day of the succeeding calendar month, "provided that the same had then been hoisted and milled, and not otherwise." Defendants averred that they did not employ any of the plaintiffs other than Emil Anderson and Henry Johnson, and that if plaintiffs, other than these two, were employed it was not by defendants, and that defendants had, prior to the commencement of the action, paid plaintiffs last above named in full for all ore broken down and placed in the chutes "which had been hoisted and milled, or which it was possible to hoist up from said level in said cars, or to measure and mill." Defendants averred that excessive rains during the months of January, February, and March, 1902, caused the 600-foot level on which plaintiffs were working to fill with water to such extent as to render it impossible to hoist cars therefrom, "and that no foresight or care on the part of defendants could have prevented the same," alleging that said level was flooded "by the act of God."

The court found the allegations of the complaint to be true and found against defendants as to their alleged understanding on the contract; and the court found that the ore was to be paid for when broken down and ready in the chutes to be hoisted, "that whether or not the mine became filled with water is no excuse for defendants in not paying the contract price for the ore delivered in the chutes," and that it was no excuse for not paying plaintiffs the contract price for ore delivered in the chutes that defendants "did everything in their power to keep the water out of the mine to the end that they might hoist the ore. Defendants challenge the sufficiency of the evidence to support the findings that defendants contracted with all the plaintiffs; that the contract was that defendants should pay for ore in the chutes, and not, as claimed by defendants, after it was hoisted, crushed and milled; that the ore unpaid for which was broken down and placed in the chutes ready for delivery was 200 tons. It is also claimed that the findings as to defendants' special defense arising out of the alleged excessive rainfall, and the flooding of the mine by an act of God, are not findings of fact, but are conclusions of law, and are contrary to the facts and against the law. It is further complained that the court erred in not finding specifically upon the facts set up by defendants as a special defense; i. e., the facts relating to the excessive rainfall as a reason for not keeping the mine free from water and for not hoisting the ore so that it could be milled and measured.

There is substantial agreement in the testimony of plaintiffs, all of whom were witnesses, that the understanding was that plaintiffs were to break the rock and place it in the chutes ready to be hoisted. They were to furnish their own material, powder, fuse, and candles, and defendants were to furnish the timber, keep the mine free from water, and to pay plaintiffs $2.50 per ton of ore. It was understood by plaintiffs that they were to be paid for the quartz produced during any calendar month, according to the prevailing custom, between the 10th and 15th of the succeeding calendar month. The amount of ore that was mined was ascertained by hoisting it in buckets, counting two buckets as a ton. Thus far there is no substantial conflict as to the agreement. Defendant Knoff, however, testified: "The ore was to be paid for after we hoisted it and cleaned up the mill." The testimony of plaintiffs was that they did not so understand the contract. It appears that plaintiffs were paid in February for the ore mined and hoisted in January, and no question then arose as to ore not hoisted. In March payment was made only for ore hoisted in February, and as the level on which plaintiffs had been working was under water, and they had been compelled to quit work, they demanded payment for the remaining unhoisted ore, some of which was mined in February and some in March. This was refused, and on March 22d they commenced the action. We do not think, because payment was to be made on the 10th of the month for the ore hoisted the preceding month, the quantity of which was to be ascertained from the number of tons hoisted, that it would follow that plaintiffs were to receive no pay unless the ore was hoisted. They had nothing to do with that part of the work and had no control over it. They consented to receive pay in the manner testified to by them, but, according to their testimony, they never agreed that they should receive no pay unless the ore was hoisted, crushed, and milled, as contended by plaintiffs. Plaintiffs' contract was performed on their part when they placed the ore in the chutes. The time and manner of payment and the means adopted to measure the ore did not affect the value of plaintiffs' services to defendant or plaintiffs' right to compensation therefor at the contract price.

Nor can we see that defendants are excused from paying for the ore that was mined and unhoisted because defendants were unable with their facilities to keep the water out of the mine. The only means adopted was by a hoisting bucket, and there is evidence tending to show that even this inadequate means was not used to the best advantage, and there was also evidence tending to show that much more ore could have been hoisted than was taken out before the water rose to the 600-foot level where plaintiffs were working. But, aside from these considerations, defendants were no more excused by the happening of unusual rains than they would have been had fire destroyed their mill and hoisting works, or than if an earthquake had caused the shaft to collapse and had made further hoisting impossible. Unless plaintiffs took these risks, which is contrary to the evidence, agreeing that they were to be paid only for ore to be hoisted and milled, the inability of defendants to avail themselves of plaintiffs' labor should not deprive plaintiffs of the compensation justly due them. It was not necessary for the court to find specifically upon the issue as to the alleged unavoidable cause which prevented defendants from hoisting the ore. Holding, as we do, that plaintiffs were entitled to pay for the ore delivered in the chutes, it was immaterial what cause prevented defendants from hoisting and milling it. If defendants, through their own fault or neglect, failed to hoist the ore, it could not for a moment be claimed that they would be excused from paying for it. If they were prevented from hoisting the ore through some unavoidable cause, which did not destroy the ore, but left it where plaintiffs had agreed to place it, the rights of plaintiffs would be unaffected, inasmuch as they had fully complied with their part of the contract, and hence it would be immaterial what the cause might be. Immaterial findings, which do not affect the correctness of the judgment, though erroneous, are not ground for reversal. Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683. Failure to find upon all the material issues is not prejudicial error, where the court finds upon an issue which is determinative of the judgment, and where findings in favor of appellant upon other issues would not justify a contrary judgment. Windhans v. Bootz, 92 Cal. 617, 28 Pac. 557. It is true that there was an understanding that the ore was to be measured by the hoisting bucket—two buckets to the ton—and payment was to be made upon this measurement at the time agreed upon. But as this means of measurement was no longer available, the ore being under water, plaintiffs had the right to show by other means the quantity of ore remaining in the chutes when they were forced to quit work. They had not agreed to do any given amount of work or continue for any stated time. They were to receive pay for the ore mined and placed in the chutes, and could cease work at any time. The testimony as to the quantity of ore remaining in the chutes is in conflict. Plaintiffs estimated it by arriving at the cubic contents of the ore piles, of which 22 cubic feet made one ton. They also estimated the amount somewhat from the day's work of each man, and what the previous work had shown was an average day's work per man. Defendants controverted this testimony by evidence tending to show that plaintiffs' estimate was too great. The court, however, accepted the testimony of plaintiffs, and with its conclusions we cannot interfere.

There was evidence that all the plaintiffs were equal partners in the net proceeds, each man to be paid according to the time he worked, less his share of the expenses. A statement was handed in to the defendants showing the amount due each, and by agreement among the plaintiffs each was to be paid separately, and he was so paid. There was no demurrer for misjoinder of parties plaintiff. There was evidence to support the finding that defendants recognized all of the plaintiffs as working under the contract alleged in the complaint.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 474

BROWN v. YARRAHAM GOLD MIN. CO. et al.

(Court of Appeal, Second District, California. May 2, 1906. Rehearing Denied by Supreme Court June 28, 1906.)

1. BOUNDARIES—ASCERTAINMENT—PRESUMPTIONS.

On an issue as to the location of the boundary line between two sections, it cannot be assumed that a line was not run on the ground by the surveyor who surveyed the township as described in his field notes.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 147, 148.]

2. APPEAL—REVIEW—FINDINGS BY COURT—CONFLICTING EVIDENCE.

Findings of the court on an issue as to the location of a boundary line, based on conflicting evidence, cannot be disturbed on appeal.

3. SAME—HARMLESS ERROR—CORRECT RESULT.

Where, in a suit for possession of a mining claim and for damages for the removal of ore by defendant, judgment was rendered against defendant on the theory that such amount was due from him under a contract between himself and plaintiff relative to the claim, though the contract did not warrant the judgment, defendant could not complain, where it appeared that plaintiff was entitled to such sum as damages for the removal of ore under any rule that could be adopted as to the measure of damages.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by William H. Brown against the Yarraham Gold Mining Company and others. Plaintiff had judgment, and defendants appeal from an order denying their motion for a new trial. Affirmed.

Geo. J. Leovy and Wm. Chambers, for appellants. C. F. Holland and Powers & Holland, for respondent.

SMITH, J. The suit is brought for the recovery of the mining claim known as the "Bryan Gold Mine," described in the complaint as situate in section 24, township 29 S., range 34 E., M. D. M., with damages, etc., and for an injunction. The plaintiff had judgment, and the defendants appeal from an order denying their motion for a new trial.

Section 24 is government land, unappropriated, unless by the plaintiff's claim. Section 13, adjoining it on the north, has been patented to the Southern Pacific Railroad Company, from which, under a contract of sale, the corporation defendant has derived a possessory title. The principal question in the case is as to the location of the boundary between the two sections named. According to the location claimed by the plaintiff, this line is to the north of the mine. According to the claim of the defendants, it is south of the mine, and about half a mile south of the location claimed by the plaintiff. The court adopted the plaintiff's location and found the mine to be in section 24.

The defendants claim that this finding is not supported by the evidence; but we are of the opinion that this contention is without merit. The township in question was surveyed by Carlton in the year 1876. The township next to the east (township 29 S., range 35 E.) had been previously surveyed and subdivided by Washburn in the year 1854, and again, presumably to correct errors, in the year 1855. On the line between these two townships no monuments have been found. But in the township in question (township 29 S., range 34 E.) monuments have been found at the common corner of sections 14, 15, 22, and 23, and at the corner of sections 3, 4, 33, and 34, and also at the quarter section corner between sections 3 and 4 and at the southwest corner of the township. These all connect and agree with the location of the northeast corner of section 24, or southeast corner of section 13, as claimed by the plaintiff and found by the court. The southeast corner of the township, as described in the field notes of Carlton, being 17.30 chains north of the intersection of Cottonwood creek with the meridian line, also agrees with this location, as is the case also with the corner of sections 3, 4, 9, and 10, of township 30 S., range 35 E., as shown by Carlton's field notes. These facts would seem to fix the location of the disputed corner of sections 13, 24, 19, and 18, beyond controversy, and, notwithstanding the conflicting facts developed by the defendants, would seem to be sufficient to support the finding.

It is claimed, however, by the appellants that by certain monuments and natural objects described in Washburn's field notes of township 29 S., range 35 E., and now found upon the ground, the true location of the disputed corner and line is indicated to be about half a mile to the south of the corner adopted by the court. But, assuming this to be the case (which, however, is not clear), we are of the opinion that the survey of the township in question by Carlton must control, and that the problem is simply to determine how the lines were run by him, and that according to his survey the location of the disputed line cannot be otherwise than as found by the court. The result is, assuming the subdivisions of the adjoining township 25 S., range 35 E., to be as claimed by the appellants, that the surveys of the two townships would not correspond, and that along the dividing line there would be two several sets of corners corresponding in the literal description. But this, we understand, is by no means an uncommon occurrence.

Another contention of appellants' counsel is that the line between sections 13 and 24, though described in Carlton's field notes as running nearly due east from the northwest corner of section 24, is to be construed as running to a point about half a mile south of the intersection of the easterly line with the meridian. But this construction, if otherwise admissible, would be admissible only upon the assumption that the line was not run on the ground by Carlton as described in his field notes; and this cannot be assumed. Assuming the true location of the southwest corner of section 18 in the adjoining township (range 35 E.) to be as claimed by the appellants, the only conclusion we could draw would be that Carlton mistook the quarter section corner on the west line of that section for the section corner. But, as it is with Carlton's survey of the township in question only that we are concerned, this would be immaterial. On the whole, the most that can be claimed in favor of the appellants is that the evidence of the location is conflicting; and it follows that the finding of the court cannot be disturbed.

Objection is also made by the appellants to the personal judgment against the defendants for damages to the mine, as to which it is claimed that the finding is not sustained by the evidence. There is, however, sufficient evidence to sustain the finding.

Objection is also made to the personal judgment against Hamman for $300, being one-fourth of the gold extracted from the mine. But this objection, also, we think, is untenable. From the allegations of the complaint and the findings, it appears that possession of the mine was taken by the defendants under a contract of sale made by the plaintiff to the defendant Hamman of date May 13, 1902, which was abandoned November 18th of the same year. Afterwards, on May 19, 1903, the plaintiff in the meantime having re-entered, the defendants forcibly entered and ousted him, and it is found by the court that between August 1, 1902, and the same date of the following year, defendants extracted from the mine gold of the amount and value of $1,200, of which, according to the contract between plaintiff and defendant Hamman, the former was entitled to 25 per cent., which is the amount adjudged, $300. There may be a question here as to the liability of the defendant Hamman under the contract for one-fourth of the gold extracted after the resumption of possession by the plaintiff. But upon the facts found, and in the absence of anything appearing to reduce the amount, the plaintiff would be entitled to recover as damages the whole sum of $1,200; and, under any rule as to the measure of damages that might be adopted, the amount of damages suffered by the plaintiff, upon the facts shown by the evidence, could hardly have been less than $300. The appellants, therefore, are not in a position to complain.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 485

PEOPLE v. CASTILE.

(Court of Appeal, Second District, California. May 7, 1906. Rehearing Denied by Supreme Court July 5, 1906.)

1. ROBBERY—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to sustain a conviction of robbery, where it appeared that defendant and his codefendant were in the vicinity at the time of the crime, that they had in their possession many articles stolen, and that the clothing worn by the robbers and the size and appearance of the men completely identified defendant.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, §§ 32-36.]

2. CRIMINAL LAW — TRIAL — INSTRUCTIONS—REQUESTS.

There is no error in refusing requested instructions substantially covered by those given.

3. ROBBERY—EVIDENCE—ADMISSIBILITY.

On a prosecution for robbery, evidence as to property taken from prosecutor by the robber and found in defendant's possession was admissible for purposes of identification, though not specified in the information.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 27.]

4. CRIMINAL LAW — TRIAL — INSTRUCTIONS — REQUEST—NECESSITY.

No request having been made for an order to limit the evidence to its legitimate purpose, defendant could not complain on appeal of the absence of such an order.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1999.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Silas Castile was convicted of robbery, and he appeals. Affirmed.

Johnstone Jones and H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

ALLEN, J. Defendant was convicted of the crime of robbery, and from the judgment thereon, and an order denying a new trial, he appeals.

The principal contention of appellant is that the evidence is insufficient to support the verdict. An examination of the record discloses that the robbery was perpetrated by two men answering the description of the defendant and his brother Jacob. That defendant and his brother were in the vicinity of the robbery when it occurred is unquestioned. That they had in their possession when arrested, or had sold between the date of the robbery and the arrest, many articles taken from Ellis, who was robbed, is established. The clothing worn by the robbers and the size and appearance of the men engaged in the robbery so completely identifies the defendant with such robbery that the jury could not well have found otherwise.

We perceive no error in the admission of evidence with reference to the personal property of Ellis, taken from him by the robbers and found in defendant's possession afterwards, notwithstanding such property was not specified in the information. This evidence was admissible for the purposes of identification. No request was made at the trial for an order to limit the evidence to its legitimate purpose, and on appeal, in the absence of such request, defendant will not be heard to complain. People v. Findley, 132 Cal. 306, 64 Pac. 472. Notwithstanding the absence of such request, however, the court did, by an appropriate charge, instruct the jury that such testimony was received for the purpose of identification only. No abuse of discretion is apparent in permitting a leading question to the witness Beja, and his evidence was proper in rebuttal.

The instruction refused, and on account of which refusal defendant complains, was substantially given by the court in other instructions, and there was no error in such refusal.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 487

PEOPLE v. CASTILE.

(Court of Appeal, Second District, California. May 7, 1906. Rehearing Denied by Supreme Court July 5, 1906.)

1. ROBBERY—EVIDENCE—ADMISSIBILITY.

On a prosecution for robbery, it was proper to admit evidence as to property found in defendant's possession and taken from prosecutor at the time of the robbery for the purpose of identifying defendant, though the property was not specified in the complaint as taken from prosecutor.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 27.]

2. SAME — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE.

An instruction that, if the property in question was not the property mentioned in the information and taken from prosecutor at the time and place alleged, such taking might be considered for the purpose of identification, but would not warrant a conviction, properly limited the effect of the evidence.

3. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

There is no error in refusing an instruction substantially covered by one given.

4. SAME—FURTHER INSTRUCTIONS—NECESSITY OF REQUEST.

On a prosecution for robbery, a charge defining the crime in the general terms of the statute is sufficient, in the absence of a request for an instruction more particularly charging the elements of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2005.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Jacob Castile was convicted of robbery, and he appeals. Affirmed.

Johnstone Jones and H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

ALLEN, J. The defendant was convicted of the crime of robbery, alleged to have been committed by him and his codefendant, Silas Castile, upon one Morris Ellis. From the judgment, and an order denying a new trial, he appeals.

In this case, as in the Case of Silas Castile, 86 Pac. 745, the contention of the appellant is that the judgment and order should be reversed on the ground of the insufficiency of the evidence in support of the judgment. The chain of facts and circumstances relied upon to establish the identity of the person, each material fact and circumstance so relied upon, was so established from the evidence as to justify the verdict of the jury. The court did not err in admitting evidence over the objection of defendant with reference to certain looking glasses, alarm clock, and piece of buckskin found in possession of the defendant and which witnesses testified were taken from Ellis at the time of the robbery. This evidence was admissible for the purpose of identifying the defendant, and, while they were not specified in the complaint as being articles so taken from him, evidence was properly received in relation thereto as tending to establish identification of the defendant with such robbery.

The court charged the jury properly that, if they found that such property was taken from Ellis, it could not find defendant guilty for the taking of such looking glasses and clock, yet it might consider the taking of the same for the purposes of identification, if they believed from the evidence that said looking glasses and clock were with the property mentioned in the information and taken from said Ellis at the time and place alleged in the information. This instruction properly limited the evidence to the purpose for which it was legitimately received. The instruction tendered by the defendant and refused was given, in substance, by the court in another instruction, which was more favorable to defendant than the instruction so refused.

The charge of the court defining the crime was in the general terms of the statute. "If defendant deemed it essential to his protection to have them more particularly charged as to what would constitute the offense it was his duty to ask it. In the absence of such request the defendant will be deemed to have been satisfied with the charge as given, and the omission will not be held error." People v. Appleton, 120 Cal. 252, 52 Pac. 582.

We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; SMITH, J.

(149 Cal. 429)

GOLDBERG, BOWEN & CO. v. STABLEMEN'S UNION, LOCAL No. 8,760, et al. (S. F. 4,194.)

(Supreme Court of California. July 12, 1906.)

1. Injunction — Grounds — Conspiracy — Strikes—Boycotts—Picketing.

A complaint alleged that, complainant having refused to pay its employés wages fixed by defendant local labor union, a strike was ordered, and for the purpose of injuring complainant's business defendant union and its officers and members maintained immediately in front of complainant's place of business representatives and pickets bearing placards and transparencies on which were printed: "Unfair firm; reduced wages of employés 50 cents per day. Please don't patronize"—and that by means thereof defendants intimidated complainant's patrons, and, unless restrained, would continue to do so; complainant having already sustained a loss of $500. The bill also alleged that defendants were financially irresponsible, and that, unless restrained, complainant would be irreparably damaged. *Held*, that defendants' acts were unlawful, and that the complaint stated a cause of action for injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 174, 175.]

2. Same—Statutes—Construction.

Pen. Code, p. 581 (Act March 20, 1903; St. 1903, p. 289, c. 235), provides that no combination between two or more persons to do or procure to be done any act in contemplation or furtherance of any trade dispute between employers and employés shall be deemed criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall any restraining order or injunction be issued with relation thereto, provided that nothing in the act shall be construed to authorize force or violence or threats thereof. *Held*, that such provision did not deprive the court of power to restrain a boycott of complainant's business during a strike by means of pickets and persons stationed in front of complainant's place of business bearing signs and transparencies derogatory to complainant.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 174, 175.]

3. Same—Injunction—Scope.

An injunction against a trade union and its members, restraining the boycotting of complainant's business, was objectionable in so far as it enjoined defendants from mere expression of opinion at any time or place as to complainant and its business, which expressions at most would only constitute a slander.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Suit by Golberg, Bowen & Co. against the Stablemen's Union, Local No. 8,760, and others. From a decree in favor of plaintiff, defendants appeal. Modified and affirmed.

Henry B. Lister, for appellants. Bush Finnell, for respondent.

McFARLAND, J. This is an action for injunction to restrain the defendants, who are members of the Stablemen's Union, Local No. 8,760, from doing certain alleged damaging acts to plaintiff, which acts are mostly connected with what is called a "boycott" of plaintiff's business by the defendants. A demurrer on the general ground that the complaint does not state facts sufficient to constitute a cause of action, and also on some special grounds, was interposed by defendants. The demurrer was overruled, and, defendants declining to answer, judgment was rendered for plaintiff. From this judgment, defendants appeal.

We see no merits in the special grounds of demurrer, and do not deem it necessary to specially notice them. The main question is whether the complaint states facts sufficient to constitute a cause of action. The plaintiff was a corporation, and at the time mentioned in the complaint was engaged, at its places of business, "in selling groceries and general household goods to various patrons and customers with whom it had established business relations, and with the public in general, upon whose patronage and trade plaintiff depends for its existence." Its places of business were No. 432 Pine street, and No. 232 Sutter street, in the city and county of San Fransisco. It also had a place at No. 965 Sutter street which was used as a stable, in which the horses and vehicles used in carrying on its business were kept and cared for. It is averred that in September, 1904, defendants notified plaintiff at its place of business, No. 432 Pine street, that plaintiff must continue to pay certain wages to its employés at said stable, or defendants would order a strike and cause all of the union stablemen employed by plaintiff, of whom there were many, to quit plaintiff's employment. On or about October 3, 1904, plaintiff notified defendants that it would not comply with said demand, but would exercise the right to pay its said employés what employés in the same kind of work were receiving from their employers. It is further averred that thereupon, and on or about said October 3, 1904, "the said defendants entered into a combination, confederation, and conspiracy for the purpose of coercing plaintiff to subject the control of its business to the said Stablemen's Union, Local No. 8,760, and the members thereof, by inaugurating and declaring a boycott on the said business of said plaintiff, and thereupon and on the 3d day of October, 1904, in pursuance of said unlawful combination, confederation, and conspiracy, placed and continue to place, representatives or pickets in front of the places of business of plaintiff, carrying placards or transparencies which are false in fact, bearing the words and figures as follows, to wit: "Unfair firm; reduced wages of employés 50 cents per day. Please don't patronize." It is further averred "that subsequent to the 3d day of October, 1904, and since the said boycott so ordered as aforesaid by said Stablemen's Union, Local No. 8,760, the said Stablemen's Union and the members thereof have conspired, confederated, and combined among themselves and with other parties to the plaintiff unknown, and will continue to conspire, confederate, and combine among themselves and with other parties to the plaintiff unknown, to provide means and methods for impeding the plaintiff in the conduct and transaction of its aforesaid business to interfere with employés, not members of said union, employed by said plaintiff, who are engaged in a line of work other than that of stablemen, and to greatly impede and obstruct the plaintiff in carrying on its aforesaid business, and by threats and intimidations by reason of maintaining pickets or representatives in front of the said places of business of plaintiff, compel and force said employés engaged in other lines of work than that of stablemen to quit the services of plaintiff." It is further averred "that the defendants, in furtherance of their said combination, confederation, and conspiracy, have placed and continue to place in front of the aforesaid places of business of plaintiff said representatives or pickets, and that said representatives or pickets are for the purpose of not only inducing but intimidating the nonunion employés of plaintiff to quit its service, and are for the purpose of intimidating patrons and customers of plaintiff who may desire or attempt to do business with the said plaintiff." It is further averred that by means of said representatives and pickets placed in front of plaintiff's said places of business bearing the placards and transparencies above described, "many patrons and customers of said plaintiff have been and now are frightened and intimidated from entering the places of business of plaintiff." It is further averred "that the said pickets or representatives are still engaged in the acts herein complained of, and threaten to continue the commission of the acts and each of the said acts to the irreparable damage and injury of this plaintiff, and that by reason of and by consequence of the acts herein set forth, plaintiff has already been damaged in the sum of $500, and if the said acts still continue, and the said defendants threaten to continue the said acts as hereinbefore alleged, plaintiff will be irreparably damaged, and his business will be greatly injured, if not destroyed." It is further averred that defendants and each of them are financially irresponsible and unable to respond in damages to any judgment against them on account of the commission of the acts alleged to have been committed and threatened to be committed by them.

We think that the complaint clearly states facts sufficient to constitute the cause of action alleged. It is not necessary here to undertake to define the limits within which a number of persons conspiring for the purpose of injuring the business of another may legally do acts tending to accomplish that result. It is averred in the complaint that in the case at bar, and for the purpose above stated, and with intent to threaten and intimidate employés and patrons and customers of plaintiff, the said defendants do keep immediately in front of plaintiff's place of business, and threaten to so keep there, representatives and pickets bearing the placards and transparencies above set forth, and that by said means they have intimidated patrons and customers of plaintiff from entering said place of business, and will, if not restrained, continue to so intimidate the said patrons. It cannot be successfully contended that the said acts of defendants committed immediately in front of plaintiff's place of business as aforesaid, could not, in the nature of things, have had the effect of intimidating plaintiff's patrons, and, as it is averred that they did have that effect, the fact of such intimidation must, for the purposes of this case, be considered as established; and such acts, having such effect, undoubtedly interfered with and violated plaintiff's constitutional right to acquire, possess, defend, and enjoy property. In many cases cited in respondent's brief a "boycott" was enjoined without reference to the means used to carry it into effect, as, for instance, in Oxley Stave Co. v. Coopers', etc., Union (C. C.) 72 Fed. 695, it was held that "a boycott by the members of trades' unions or assemblies (which term in law implies a combination to inaugurate and maintain a general proscription of articles manufactered by the party against whom it is directed) is unlawful and may be enjoined by a court of equity." But there is no necessity to go that far in the case at bar. Here the alleged acts tended directly to intimidate customers, and did intimidate them. That in such a case the threatened acts will be enjoined has been frequently held. In Allis Chalmers Co. v. Reliable Lodge (C. C.) 111 Fed. 264, the court said:

"That a conspiracy existed among a number of these officers and members to stop and thereby injure the business of complainant by intimidation and violence is evident. * * * These being the facts in the case, the law is clear and emphatic. The jurisdiction being established, is there any doubt as to whether the court should, in this case, grant the temporary injunction prayed for? I am clear there is not. As now presented, the court must grant the writ in broad and unmistakable terms, commensurate with the exigencies of the situation, as shown by the facts and evidence upon this proceeding. To do so will work no hardship, nor will it even hamper the actions of any law-abiding person. Indeed, no one without purpose to commit an unlawful act could be affected thereby." In United States v. Haggerty (C. C.) 116 Fed. 510, the court said: "This court, however, has heretofore, upon repeated occasions, recognized the power of the court to issue injunctions in cases where there is a combination and conspiracy upon the part of any class of people to prevent them from interfering with the business of others." In Frank v. Herold (N. J. Ch.) 52 Atl. 152, the court said: "Now, then, I think it is quite clear from what I have said that these defendants had no right to use the means which are forbidden by the restrained order now brought in question to prevent these operatives from continuing to work for the complainants, and that in doing so they are inflicting an injury upon the complainants, in respect to their private rights, precisely the same as they would if they broke, interfered with, or clogged the engine that drove their machinery, and that for such injury the complainants are entitled to a legal remedy by action. Now, this being so, the next question is, what right have the complainants here in this court asking for the restraining power of the court? Why, the answer to this is two-fold: First, it is quite clear that the relief in damages to be recovered in an action at law is entirely inadequate. It is quite absurd to say that they can sue each of these persons, and recover damages against them in separate suits, for every little act which, in the aggregate tends to result in injury. And, in the second place, the injury is continuing and irreparable, and not capable of admeasurement according to legal principles. So that at law the remedy is entirely inadequate. It is, therefore, a clear case for the interposition of a court of equity to exercise its preventive remedy, and that is the particular sphere at this day of a court of equity, as contradistinguished from a court of law." There are many other cases to the same effect decided in England and in many of the American states. Appellants cite Davitt v. American Bakers' Union, 124 Cal. 99, 56 Pac. 775; but in that case it was merely held that the complaint was defective because it dealt wholly in "generalities, presumptions, and conclusions," and stated no "specific overt acts" done for the purpose of carrying out the alleged conspiracy. That case, therefore, does not apply to the case at bar, for here the specific acts are alleged.

Appellants make the bare statement, without argument, that "an injunction in this case is also specifically forbidden by Pen. Code, p. 581." The section of an act of the Legislature there referred to (Act March 20, 1903; St. 1903, c. 235, p. 289) is somewhat difficult of construction; but, in the first place, it cannot, in our opinion, be construed as undertaking to prohibit a court from enjoining the main wrongful acts charged in the complaint in this action, and, in the second place, if it could be so construed, it would to that extent be void, because violative of plaintiff's constitutional right to acquire, possess, enjoy and protect property.

It is contended by appellants that the judgment rendered in this case is too comprehensive, and enjoins them from doing some acts which are not within the averments of the complaint, or within the principle, even if conceded to be correct, upon which the court below based its conclusion. We think that this contention must be sustained, to the extent, at least, as is hereinafter stated. Some parts of the judgment seem to enjoin appellants from the mere expression of an opinion at any time or place as to plaintiff and its business, which would, at the worst, consist only of slander, which could not be reached in this form of action and seem to restrain them from doing other things which do not appear to be connected with or incidental to the main acts and threatened acts done at and in front of plaintiff's said places of business as above stated. The judgment must therefore be modified, so as to eliminate those objectionable parts.

The judgment, after the first paragraph thereof, is amended and modified, so as to read as follows: "Now, therefore, it is ordered, adjudged and decreed that the Stablemen's Union, Local No. 8,760, of San Francisco, T. F. Finn, T. J. White, and all and each of the defendants herein, and each of their officers, members, agents, clerks, attorneys, and servants, be, and they are hereby, enjoined and restrained from interfering with, or harassing, or obstructing plaintiff in the conduct of its business at any of its said places of business No. 432 Pine street, No. 232 Sutter street, and No. 965 Sutter street, in the city and county of San Francisco, state of California, by causing any agent or agents, representative or representatives, or any picket or pickets, or any person or persons, to be stationed in front of or in the immediate vicinity of said places of business, with a placard of transparency having on it the words and figures as alleged in the complaint herein, or any placard or transparency (having words or figures) of similar import, and from, at said places of business, or in front thereof, or in the immediate vicinity thereof, by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons transacting or desiring to transact business with said plaintiff, or being employed at said place or places by the plaintiff." And as thus amended and modified the judgment will stand affirmed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

149 Cal. 392

Ex parte WEBER. (Cr. 1,331.)

(Supreme Court of California. July 9, 1906.)

1. CONSTITUTIONAL LAW—UNIFORMITY—PROTECTION OF CHILDREN.

Pen. Code, § 272 (St. 1905, p. 759, c. 568), provides that any person having the care, custody, or control of any child under 16 years of age, who exhibits, uses, or employs, or in any manner, or under any pretense, sells, apprentices, gives away, lets out, or disposes of any such child to any person, for or in any business, exhibition, or vocation, injurious to the health or dangerous to his life or limb, or for the vocation, occupation, service, or purpose of singing or playing on musical instruments, rope or wire walking, etc., shall be guilty of a misdemeanor; but that the act shall not prevent the employment of such child as a singer or musician in any church, school, or academy, etc. *Held*, that such act was not unconstitutional for nonuniformity, in that it discriminated against children under 16 years of age, in favor of those over such age.

2. SAME.

Such section was also not objectionable as making an unfair discrimination in favor of the employment of children as singers or musicians in churches, schools, or academies.

In Bank. Habeas corpus on application of Henry Weber. Writ denied.

W. F. Williamson, for petitioner. W. H. Langdon, Dist. Atty., and R. W. Harrison, Asst. Dist. Atty. (Jno. M. Ehleman, of counsel), for respondent.

SHAW, J. The petitioner was arrested and confined for an alleged violation of section 273 of the Penal Code. The return shows that he is in custody upon two separate complaints relating to different children. Each complaint charges that the defendant did willfully and unlawfully take, receive, hire, employ, and use a certain male child, naming him, under the age of 16 years, in the business of scaling the boilers of a steamer, the said business being then and there dangerous to the life and limb of said child. The petition for a writ of habeas corpus is based upon the proposition that the law under which the complaint was made is unconstitutional and void. Section 273 refers to the preceding section 272, and it is necessary to state the substance, at least, of both sections.

Section 272, so far as material, is as follows: "Any person * * * having the care, custody, or control of any child under the age of sixteen years, who exhibits, uses, or employs, or in any manner, or under any pretense, sells, apprentices, gives away, lets out, or disposes of any such child to any person, * * * for or in any business, exhibition, or vocation, injurious to the health or dangerous to the life or limb of such child, or in or for the vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging, or peddling, or as a gymnast, acrobat, contortionist, or rider, in any place whatsoever, or for or in any obscene, indecent or immoral purpose, exhibition, or practice whatsoever, or for or in any mendicant or wandering business whatsoever, or who causes, procures, or encourages such child to engage therein, is guilty of a misdemeanor. * * * Nothing in this section contained applies to or affects the employment or use of any such child, as a singer or musician in any church, school, or academy, or the teaching or learning of the science or practice of music; or the employment of any child as a musician at any concert or any other musical entertainment, on the written consent of the mayor of the city or president of the board of trustees of the city or town where such concert or entertainment takes place." St. 1905, p. 759, c. 568.

Section 273 is as follows: "Every person who takes, receives, hires, employs, uses, exhibits, or has in custody, any child under the age, and for any of the purposes mentioned in the preceeding section, is guilty of a like offense, and punishable by a like punishment as therein provided." St. 1905, p. 759, c. 568.

The contention of the petitioner is that these provisions contain an arbitrary and unreasonable classification, and, consequently, are not of uniform operation, and that the act constitutes a special law for the punishment of crimes, where a general law could be made applicable. It is said that only a certain portion of the minor children of the state are affected by the act, namely, those who are under 16 years of age, and that this is an arbitrary discrimination between those who are over that age and those who are under that age; that any child over the age may enjoy his natural privilege of working for his own support as he pleases, while those under that age are prohibited therefrom. There is no sound reason for any such criticism. The same reasoning might be applied to a large number of laws which are universally conceded to be valid and constitutional. The law providing that a male person under 21 years of age is a minor, subject to the legal disabilities of minority, might be rendered unconstitutional by the same process of reasoning. It is competent for the Legislature to provide regulations for the protection of children of immature years. The growth of a child is gradual and the age of maturity varies with different children. It is impossible for any person to fix the exact time when a child is capable of protecting itself. The legislative judgment in regard to the proper age at which such regulations shall become applicable to the child cannot be interfered with by the courts.

It is also stated that the law makes an unfair discrimination by allowing the employment of children as singers or musicians in churches, schools, or academies. The ground of this objection is that such employment, so far as the court can see, may be as injurious to the health or morals, or as dangerous to the life or limb of the child as those which are prohibited in the law, and that no prohibition is lawful under the Constitution unless it extends to all employments which are equally injurious. In matters of this kind the Legislature has large discretion. It must determine the degree of injury to health or morals, which the different kinds of employment inflict upon the child, and the corresponding necessity for protecting the child from the effects thereof, and, unless its decision in that regard is manifestly unreasonable, there is no ground for judicial interference. We do not think the law in question so unreasonable as to require us to hold it unconstitutional.

The petition is denied, and the petitioner is remanded to the custody of the officer.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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3 Cal. App. 591

JOHNSON v. LEVY.

(Court of Appeal. Third District, California. May 15, 1906. Rehearing Denied by Supreme Court July 12, 1906.)

1. Sales—Bill of Sale—Property Sold.

The bill of sale given by the lessee of a livery stable to the lessor, reciting that the former sells to the latter all his right, title, and interest to and in "the following described personal property," then after the words "to wit" enumerating the property sold, after which are the words, "and all and every kind of property of every name and nature now used in conducting the dray and livery business," transfers only the personalty used in the business, and not the lease.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 184.]

2. Damages—Evidence—Certainty.

Testimony consisting merely of a guess or reasons for a guess, unsupported by data, and on information derived from others of the most general and indefinite character, is insufficient to support a finding as to damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 502.]

3. Same — Withholding Real Estate — Profits of Business.

Damages for the wrongful withholding of real property leased for a livery business cannot include profits which might have accrued from the business, could plaintiff have procured teams in lieu of those he had surrendered with which to conduct it; defendant having in no way interfered with plaintiff as regards teams.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 72–88.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by C. E. Johnson against A. Levy. Judgment for plaintiff. Defendant appeals. Reversed.

Jas. F. Farraher, for appellant. Coburn & Collier, for respondent.

McLAUGHLIN, J. This action involves the right to the possession of certain real property in Dunsmuir, known as the "Lee Livery Stable." The court rendered judgment for plaintiff, and awarded him $300 damages, together with $60 per month as the rental value of the premises during the period of detention, and defendant appeals.

The court found on all of the issues, and the facts gleaned from such findings may be summarized as follows: The owner of the premises leased the same to one Beem for the term of three years, and the latter, about seven months later, assigned the lease to plaintiff, who at the same time purchased certain personal property, consisting of horses, buggies, wagons, harness, robes, blacksmith tools, and stock in and about the stable, from his assignor. At the time of such assignment and sale defendant held a chattel mortgage on the personal property sold, to secure a note for $600, with interest thereon amounting to $50. The verbal terms of the agreement of assignment and sale were to the effect that plaintiff was to execute and deliver to defendant a note for the sum of $650, secured by sureties, pay $150 in cash, and the balance of $1,500, as provided in a written agreement to be entered into between plaintiff and defendant. Pursuant to the advice of the attorney who prepared the papers, the bill of sale of the personal property was made to defendant, instead of plaintiff, and the other terms of the verbal agreement were carried out. Three days after the execution of the bill of sale, secured note, and agreement, Beem executed and delivered a written assignment of his lease to plaintiff. Plaintiff was placed in possession of the stable and personal property, and remained in possession thereof until the following spring, when he surrendered possession of the personal property to defendant, but refused to surrender the leasehold interest, and expressly agreed with defendant that the latter might keep the personal property surrendered in the stable for one day only. The defendant forcibly took and retained possession of the stable, to plaintiff's damage in the sum of $300, and the further sum of $60 per month, the rental value of the premises during the time defendant so retained possession. This appeal is from an order denying defendant's motion for a new trial.

The principal findings assailed as unsupported by the evidence are those relating to the cash payment and to damages and rental value, and the findings resting on the construction of the written instruments executed between Beem and defendant, and plaintiff and defendant. The sufficiency of the evidence to support the finding that Beem placed plaintiff in possession and assigned the lease to him is also disputed. All other findings are unchallenged and therefore we must accept them as true. We think the evidence is sufficient to sustain all the findings except those relating to damages. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647. The circumstances and conditions surrounding and accompanying the execution of the several writings to be construed stand confessed through the unchallenged findings reciting them, and, in obedience to the rule of law above quoted, such circumstances must be considered in determining the intention of the parties and the meaning of the language used. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Civ. Code, § 1642. "A contract must be so interpreted as to give effect to the mutual intention of the parties, and such interpretation must be reasonable." Civ. Code, §§ 1636, 1643.

The vital question to be answered by the construction of the several writings under consideration is whether plaintiff or defendant succeeded to the leasehold interest of Beem. The written assignment of Beem to plaintiff, indorsed on the lease, needs no construction, and it only remains to consider whether the leasehold interest passed to defendant by virtue of the instrument executed and delivered to him by Beem three days before such formal assignment to plaintiff was executed. By failing to challenge the findings in this regard, the appellant tacitly admits that there was a verbal agreement that the attorney suggested a bill of sale by Beem to defendant, instead of to plaintiff, and that the instrument under consideration was made pursuant to such verbal agreement and suggestion. This being true, it follows that the instrument was intended solely as a bill of sale of personal property, and this intention is very apparent on the face of the instrument itself. It is there recited that Beem sells, transfers, assigns, and delivers unto Levy "all his right, title, and interest to and into the following described personal property." Then after the words "to wit" is inserted an enumeration of the property sold. The clause "and all and every kind of property of every name and nature now used in conducting the dray and livery business known as the 'Beem Livery Stable,'" upon which the appellant relies, is found at the close of the descriptive paragraph, and is separated from the preceding words by a comma. It is patent from the context that this clause relates to and is qualified by the words "the following described personal property," and that there was no intention to transfer other property than the personalty used in conducting the business. The agreement between plaintiff and defendant is convincing on this point. In that instrument the words "all and every kind of property now used in the conducting of the dray, livery, and feed business of the Beem Livery Stable" are used in describing the property, and yet in that instrument the property to be delivered by plaintiff to defendant in the event of a forfeiture is specifically described in an inventory in which personal property only is listed. While there can be little question concerning the intention of the parties, as gathered from these two documents, all possible doubt vanishes when the language employed is construed in the light of the admitted purpose of the instrument executed by Beem to defendant. Civ. Code, § 1636. But, even if we accept the construction of that instrument contended for by appellant, we are still forced to the conclusion that he had no right to take or retain possession of the realty here in dispute. If it be admitted that the description of the property in the instrument executed and delivered by Beem to defendant is broad enough to include the leasehold interest, then it must also be admitted that the descriptive clause in the agreement between defendant and plaintiff is also broad enough to operate as an assignment of such interest to the latter. If this be the fact, and analysis of the two papers leaves no room for a contrary conclusion, then the specific inventory of property to be surrendered under the last-mentioned agreement certainly does not include the leasehold or any kind of an interest in the real property. The plaintiff only agreed to surrender possession of the personal property mentioned in such inventory, and its testimony alone is sufficient to support the finding that he surrendered nothing else.

The findings relating to rental value and damages are not supported by the evidence. While there is some vague and unsatisfactory evidence tending to show that the value of the rents, issues, and profits was $60 per month, there is no evidence whatever tending in the remotest degree to show that the rental value amounted to that or any other sum. The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross-examinations of the plaintiff, and even this is not supported by data or particulars, demonstrate that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character. It is well settled that such evidence will not support a finding as to damages. Hays v. Windsor, 130 Cal. 235, 62 Pac. 395. But, even if this evidence be accorded the utmost weight, it is still insufficient to support the finding. It clearly indicates that the estimated damages consisted of profits which might have accrued from the business, which plaintiff might have conducted if he could have procured horses, buggies, robes, wagons, etc., in lieu of the personal property surrendered. Under no rule of law known to us can damages for the withholding of real property include speculative profits which might accrue from the joint use of real property, the possession of which is withheld, and of personal property which has no relation to the real property or to the controversy. Had defendant unlawfully deprived plaintiff of the possession of the stable, horses, buggies, harness, etc., such damages might have been proper; but in the case presented respondent was simply entitled to damages resulting from the unlawful detainer of the stable.

The order is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 597

PARDEE v. SCHANZLIN et al.

(Court of Appeal, Third District, California. May 15, 1906.)

1. EVIDENCE—JUDICIAL NOTICE—NOTARIES—SEALS.

Courts take judicial notice of the seals of notaries public, as provided by Code Civ. Proc. § 1875, subd. 7.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 71.]

2. SAME — PRESUMPTIONS — NOTARIES — OFFICIAL ACTS—REGULARITY.

The performance of official acts of notaries public are presumed to have been regular, as provided by Code Civ. Proc. § 1963, subd. 15.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 105.]

3. PUBLIC LANDS — APPLICATION TO PURCHASE—AFFIDAVITS—EXECUTION.

A copy of an application for the purchase of state lands, purporting to have been sworn to before a notary public, with a seal attached, duly certified by the surveyor general, and indorsed, showing the action taken thereon in the surveyor general's office, introduced in evidence, established prima facie the due execution of the document.

4. SAME—SCHOOL LANDS — PURCHASE — AFFIDAVIT.

Pol. Code, § 3495, providing for the sale of school lands, declares that an applicant must make an affidavit that he is a citizen of the United States or has filed his intention to become such, and section 3500 provides that any false statement contained in the affidavit defeats the right of the applicant to purchase the land or to receive any evidence of title thereto. *Held*, that the fact that an applicant averred that she was a citizen of the United States, instead of that she had filed an application to become a citizen, which was the fact, was not such a defect in the application as would avoid her title based thereon.

5. SAME.

Where an applicant for the purchase of school lands made and filed her intention to become a citizen on the same day that she swore to the affidavit attached to her application, but the application was not filed with the surveyor general for five days thereafter, in which she stated she was a citizen, such facts were sufficient to support a finding that at the time of the making of the affidavit and application and at the time of filing the same the applicant had filed her intention to become a citizen, and that she was a resident, etc.

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by James A. Pardee against Antoine B. Schanzlin and the Western Pacific Land Company. From a judgment for defendants, plaintiff appeals. Affirmed.

J. E. Pardee, for appellant. H. D. Burroughs, for respondents.

CHIPMAN, P. J. Action on reference of the surveyor general of the state to determine the right to purchase certain school lands. The court found that defendant Mrs. Schanzlin made application to purchase the land in question on March 2, 1892, and on March 7, 1892, a certificate of purchase was duly issued to her, and that within 50 days thereafter, as required by the statute, on September 5, 1892, she paid the full purchase price of $800 and $3 fee, and on October 27, 1892, certificate of purchase No. 2,081 was duly issued to her, which remains in full force; that by mesne conveyances the defendant company, on March 13, 1902, became the owner of said land and is now entitled to all the rights acquired by the said Schanzlin by virtue of said certificate of purchase; that the land is timbered land and unfit for cultivation; that plaintiff on November 11, 1903, filed his affidavit and application in due form in the office of the surveyor general to purchase said land, and demanded that his affidavit of contest be referred to the proper court for adjudication, which reference was duly made, and on November 17th the action was commenced. Judgment passed for defendant company, from which plaintiff appeals on bill of exceptions.

1. It is claimed that there is no evidence that Mrs. Schanzlin made the affidavit required by section 3495 of the Political Code. This point arose on objection of plaintiff to the introduction of Mrs. Schanzlin's affidavit and application to purchase the land; the claim being that there was no evidence that the affidavit was subscribed and sworn to before any officer authorized to administer oaths. The evidence offered and received consisted of a copy, duly certified by the surveyor general, of the original application of Mrs. Schanzlin, purporting to be sworn to before Alvan Flanders, notary public, with his seal attached, and variously indorsed, showing the action taken thereon in the office of the surveyor general. Courts take judicial notice of the seals of notaries public (Code Civ. Proc. § 1875, subd. 7), and in the

execution of their official duties there is a presumption that they were regularly performed (Code Civ. Proc. § 1963, subd. 15). The introduction of the affidavit established prima facie the due execution of the document.

2. It is next claimed that the affidavit was false, in this: that the applicant, Mrs. Schanzlin, stated that she was a citizen of the United States, whereas the evidence shows that she had declared her intention to become such citizen. It may be admitted as well settled by the cases, too numerous to require citation, that the applicant to purchase state land must state in his application all the facts which the statute makes requisite for such purchase, and these facts must be shown to be true, and that, failing in this respect, the applicant must fail. The requisites to be stated in an application to purchase school land are found in section 3495 of the Political Code. Among other things, it is provided that the person desiring to purchase "must make an affidavit that he is a citizen of the United States, or has filed his intention to become such." Section 3500 provides that "any false statement contained in the affidavit * * * defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto." The contention of appellant is that the statute provides for two distinct and separate classes of persons who may apply to purchase: First, citizens, native or naturalized; second, persons qualified to become citizens who have declared their intention to become citizens. The argument is that Mrs. Schanzlin falsely declared herself to be in the first class, when in fact she knew that she belonged to the second and was not a citizen. Some analogy is sought to be drawn from the decisions in respect of the requirement as to occupancy. The statute requires a statement in this regard "that there is no occupation of such lands adverse to any he has, or if there is an adverse occupation the affidavit must show that the township has been sectionized three months and that the adverse occupant (giving his name) has been in such occupation more than sixty days since the plat was filed in the United States Land Office." Section 3495. It has been held that a statement in the affidavit that there is no occupancy, when in fact the land is occupied, will defeat the application, even though the occupancy has continued more than three months after the land has been sectionized. Pol. Code, § 3497; Plummer v. Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51. The provisions of the statute in respect of occupancy do not seem to us to be analogous. The statute as to citizenship prescribes a personal qualification, and the qualification is equally sufficient whether the applicant be a citizen or has declared his intention to become a citizen. In the case involving occupany the occupant who has failed to apply for three months after the land has been sectionized may still apply and contest the claim of another applicant. He does not loose his right, though he may loose his preference under section 3497, supra. The material fact required to be shown in the matter of citizenship is that the applicant "is a citizen of the United States, or has filed his intention to become such," in either of which cases he is a qualified purchaser. It was held in Fairbanks v. Lampkin, 101 Cal. 520, 36 Pac. 6, that a false statement as to certain subdivisions of the section of school land not being suitable for cultivation did not defeat the right to purchase other subdivisions as to which the affidavit was true. This was a departure from the general rule laid down in the cases as to false statements of statutory requirements. It seems to us that it would be an extremely harsh reading of the statute, as contended for by appellant, under the circumstances here disclosed, to forfeit an otherwise valid entry 10 years after the purchaser had paid in full for the land, during all of which time she was entitled to have a patent issue to her or her assigns.

3. It appeared that Mrs. Schanzlin made and filed her declaration of intention on the same day that she swore to the affidavit, and appellant makes the point that it does not appear which of these instruments was first executed. She was a lady 64 years old when testifying to an event happening 12 years earlier, and she could not remember whether she filed her declaration of intention before making affidavit to her application. But it appeared that the application was not filed with the surveyor general for some 5 days later. The court found "that at the time of making said affidavit and application * * * and at the time of filing thereof in the office of the register of the state land office * * * said Antoine B. Schanzlin had filed her intention to become a citizen of the United States and she was a resident," etc. If any presumption is to be indulged in, it must be against that which would imply perjury on the part of the applicant. The law generally rejects all fractions of a day, in order to avoid disputes. 2 Blackstone's Com. (Cooley) 141. Where, however, conflicting rights have accrued on the same day, to guard against injustice, the truth and fact in point of time when any particular act was done or event happened, may always be averred and proved. Id. note. No such situation is here presented. We think the evidence was sufficient to justify the finding.

4. Defendant Schanzlin made default, and defendant company pleaded the statute of limitations. Sections 315, 316, Code Civ. Proc. The court made no finding on this issue, and it is urged as prejudicial error. It is not necessary to decide whether or not these sections of the Code apply to this class of cases. The judgment of the court was supported by the findings, and a finding on this issue of the answer was immaterial.

Respondent makes the point that under the ruling in McCabe v. Goodwin, 106 Cal. 486, 39 Pac. 941, the title of the assignee of a certificate of purchase of this particular class of state land, for which payment in full has been made, after several years have elapsed, cannot be contested by a third person. It is not necessary to decide the question.

The foregoing disposes of all the points made in appellant's brief.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 431

PEOPLE v. GALLANAR.

(Court of Appeal, Third District, California. April 13, 1906. Rehearing Denied by Supreme Court June 11, 1906.)

1. Criminal Law — Trial — Conduct of Jury.

That one of the jurors in a prosecution for homicide drew on a blackboard hanging in the jury room a diagram from his recollection of the testimony of the front of the room in which the killing took place, for the purpose of expressing his view of the circumstances surrounding the homicide, was not objectionable as a reception of evidence out of court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2054-2062.]

2. Homicide—Manslaughter.

In a prosecution for homicide, evidence *held* to justify an instruction on manslaughter.

3. Same—Instructions.

Where, in a prosecution for homicide, there was evidence of a quarrel, it was not error for the court to charge that, while the purpose, the intent, and its execution may follow rapidly upon each other, it is proper for the jury to consider the shortness of the interval in considering whether such speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which may characterize offenses of a higher degree than manslaughter.

4. Same—Evidence.

An instruction that if the jury were in doubt as to the precise circumstances under which the homicide was committed, whether deceased at the very moment of the killing was in fact about to inflict on defendant great bodily harm, then the previous relations between them, etc., became important for the jury's consideration, which relations embraced every word, act, and circumstance bearing on the point of which evidence had been received, was not objectionable as authorizing the jury to disregard the direct evidence and base their verdict on circumstances and probabilities.

5. Same—Self-Defense.

In a prosecution for homicide, an instruction on self-defense, that it was not necessary to justify the killing that the danger be actual and that it was enough that the danger be apparent, such an appearance as would induce a reasonable person in defendant's position to believe that he was in imminent danger of great bodily injury, was proper.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 158-163.]

6. Same—Manslaughter—Evidence.

In a prosecution for homicide, evidence *held* sufficient to sustain a conviction of manslaughter.

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

George W. Gallanar was convicted of manslaughter, and he appeals. Affirmed.

See 79 Pac. 378.

J. H. Creighton, for appellant. U. S. Webb, Atty. Gen., and T. B. Brainard, Dist. Atty., for the People.

BUCKLES, J. The defendant was charged with murder in killing one A. Garman, a bartender in a saloon in the town of Keswick, in Shasta county, and was convicted of manslaughter. A motion for a new trial was denied, and defendant sentenced to state prison for a term of 10 years. The appeal is from the final judgment and from the order denying the motion for a new trial.

The first assignment of error, and the one mostly relied upon for reversal, is that after the case was submitted to the jury, and while in the jury room considering the verdict, one of the jurors drew on the blackboard hanging in the jury room a diagram of the front of the barroom in which the shooting took place, giving it the appearance of having the door closed. The diagram was made by the juror wholly from his recollection of the testimony and for the purpose of graphically expressing his view upon the condition of affairs at the scene of the homicide. No allusion was made by any of the jurors to this diagram during the time they were deliberating on their verdict, and it is charged that the jury thus received testimony on a material matter outside of the court and not on viewing the premises. We think any juror had a right to make a drawing or picture from his recollection of the testimony for the purpose of more fully expressing what he understood the evidence to be. Had the diagram been made from the juror's own knowledge, or from information which came to him through any other channel than through the testimony of the witnesses while testifying during the course of the trial, it might be said to be testimony received out of court. The testimony shows conclusively that before the defendant entered the barroom, just before the shots were fired, the door was closed; that he opened it, went in, and closed it after him; and that thereafter the deceased opened the door, when two witnesses standing on the porch in front saw a portion of what took place on the inside. The making of the diagram as it was made was not evidence received out of court, nor additional testimony to that which was given during the trial, and could not possibly have prejudiced the defendant. The several authorities cited by appellant go to the question of receiving testimony out of court, and therefore have no application here.

The next assignment of error is that the court instructed the jury on manslaughter, when it is contended the evidence did not indicate manslaughter, and under the testimony the verdict should have been either murder or acquittal. We find no error in this; but, had the court not given an instruction on manslaughter, it certainly would have been error. That the defendant shot and killed the deceased there was no dispute at the trial. At about 10:15 a. m. of the day of the killing the defendant was in the barroom holding a discussion with the deceased. When the witness Murdock went out, the defendant and deceased were left there alone, and no witness has attempted to testify to what took place between these two people in that barroom at the time, further than that the witness Murdock testified that as he was leaving he heard the defendant say to the deceased, "I have got to go down the road, and I will see that you go, too." Defendant left the barroom, and, according to the testimony of Murdock, defendant said to him at the depot, soon after Murdock had left the barroom, "Garman [deceased] run me out of the saloon with a bottle." Defendant returned to the barroom that day about 1 o'clock in the afternoon and immediately on entering said to deceased: "Have you got that bottle ready? Will you run me out with that bottle again?" To which deceased replied, "I don't want to have any trouble with you, nor I don't want you to come in quarreling with me or raising a disturbance." Defendant testified: "The first thing that happened after I closed the door was when Garman [deceased] got up and made a run for me. He got up and says: 'You son of a bitch get out.' * * * I stepped to the north to get out of his way. He went to the door and throwed it open. * * * I moved towards the north to get out of his way, because I did not know what he was going to do, after what had occurred in the morning." Deceased then came toward him with a bottle in his right hand, and was angry and grappled with defendant, when defendant drew his pistol and commenced firing, and killed the deceased, hitting him with at least three of the shots fired. While there was evidence tending to show that defendant had had a quarrel with deceased in the forenoon, and that defendant had returned to renew the quarrel, and that the killing was done with premeditation and therefore murder, still the evidence did tend to show a fight in which the killing might have been done under the heat of passion and so forth, and thus induce the jury to convict the defendant of manslaughter. Under the testimony in this case such instruction could not by any possibility have harmed the defendant. People v. Chun Heong, 86 Cal. 332, 24 Pac. 1021. As there was some evidence tending to show the killing to be manslaughter, the case of People v. Chames, 122 Cal. 140, 54 Pac. 596, has no application.

As the evidence in this case tends to show there was a quarrel, the following instruction was not erroneous: "But while the purpose, the intent, and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense." The instruction was certainly as favorable to the defendant as could be made consistent with the facts disclosed by the evidence. The defendant testified: "I am aware that I shot the man because he had a bottle raised and I thought he was going to kill me—thought he was going to hit me with the bottle. I don't know the position the bottle was in. He did not say he would strike me with it. I did not see from where he got the bottle. I have an idea he got it from the end of the bar, where he got it in the morning when he run me out."

The court instructed the jury: "If in this you are in doubt as to the precise circumstances under which the homicide was committed —that is, are in doubt as to whether the deceased, at the very moment of the killing, was, in fact, about to inflict upon defendant great bodily harm—then the previous relations between the parties and their previous conduct towards each other and defendant's knowledge of the deceased become important for your consideration; and those previous relations and that previous conduct and knowledge embrace every word and every act, in short, every fact and circumstance, bearing upon that point, of which evidence has been received. You are to place yourselves as nearly as possible in the situation of the parties, as respects each other, at the very scene and time of the homicide." Appellant contends that this instruction amounted to the advice of the court to the jury that it might discard the direct evidence in the case and arrive at the verdict on certain circumstantial evidence and probabilities. But such a theory cannot be maintained, for the jury was distinctly told that the previous relations, previous conduct and knowledge must be such as shown by the evidence in the case, and no intimation was given that appearances might be determined from probabilities arising from circumstances not in evidence. Besides, this instruction must be read with other instructions which were given upon appearances. The court had told the jury that it was not necessary to justify such killing that the danger be actual. "It is enough that it be apparent danger; such an appearance as would induce a reasonable person in defendant's position to believe that he was in imminent danger of great bodily injury." We see no error in the instruction. Appellant argues in his brief that when the prosecution closed its case, the testimony showed that defendant was justified in killing the deceased, and when the evidence was all in the state had failed to overcome the presumption of innocence. The defendant had testified to the killing and the acts and words of deceased, and his own acts, at the time of the killing, and it was the province of the jury to take all these matters into consideration as well as all the other testimony in the case and determine therefrom whether the appearances were such as to justify the defendant in killing the deceased. There was no conflict between witnesses' statements as to whether the defendant was justified in killing the deceased, for they could not be permitted to speak upon that. They could but detail the facts and leave the jury to draw the conclusion and declare the same by their verdict. The fact that defendant testified that "I shot Garman because I was afraid he would kill me or injure me" is not conclusive that such fear is genuine or well founded. Whether or not he had reason to entertain such fear, and whether he did actually entertain such fear, the jury must determine from the evidence detailing all the facts and circumstances, as well as it is for the jury to determine from all such facts and circumstances whether the killing was done in a quarrel and under the influence of the heat of passion, when there is evidence, tending, as we have seen, to show a quarrel, and that defendant acted in the heat of passion. The firing of the shots followed almost as closely upon the heels of the declaration by deceased that defendant was a son of a bitch as one thought follows another, and the jury doubtless believed that to be the real cause of the shooting and therefore convicted the defendant of manslaughter from this view, and ignoring the fact that defendant and deceased had quarreled in the morning, and deceased had run the defendant out of the barroom with a bottle, and that defendant returned later in the day armed with a pistol when he would be assured of a renewal of the quarrel, might tend in some degree to indicate premeditation to enter the combat armed with a deadly weapon and to use the same if opportunity offered. We think the verdict of manslaughter fully supported by the evidence.

There are many assignments of error as to the admission of testimony, all of which we have carefully examined, but are unable to find any prejudicial error in any of them.

Judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 478

SOUTHERN CALIFORNIA LUMBER CO. v. PETERS et al.

(Court of Appeal, Second District, California. May 2, 1906.)

Mechanics' Liens — Materials — Separate Buildings—Amount—Designation.

Where a materialman furnished lumber or a single order under one contract to be used in the construction of three houses, with nothing to show how much thereof was to be used in each building, he was not required, in his claim of lien filed on the three houses to designate the amount due him on each of the buildings, under Code Civ. Proc. § 1188, providing that in every case in which one claim is filed against two or more buildings at the same time the claimant must designate the amount due to him on each of the buildings, etc.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 259.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Southern California Lumber Company against Frank H. Peters and others. From a judgment for plaintiff, defendant California Title Insurance & Trust Company appeals. Affirmed.

Gavin McNab, for appellant. Borden & Carhart, for respondent.

GRAY, P. J. This action is brought by a materialman to foreclose a mechanic's lien upon three cottages situated upon three adjoining city lots. The houses were all constructed at the same time, and the lumber was furnished under one contract by plaintiff directly to the owner of the cottages, who is the defendant Frank H. Peters. On a trial without a jury the findings and judgment were for plaintiff, and the defendant California Title Insurance & Trust Company appeals from said judgment, and the record brought up consists of the judgment roll.

The appellant has a trust deed of the premises foreclosed, which deed was recorded after substantially all the materials were furnished, and it contends that the plaintiff's lien is postponed to the lien of its deed, for the reason that plaintiff's claim of lien failed to designate the amount due him on each of the buildings, as required by section 1188, Code Civ. Proc. This section reads as follows: "In ever case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens." Assuming, without deciding the question, that a trust deed constitutes a lien upon the property within the provisions of said section, we are still of the opinion that plaintiff's claim of lien does not come within the section. The lumber having been furnished upon a single order, and all under one contract to be used in all the buildings, and having been so used in all the buildings, without anything to show how much of it was used in each building, it was impossible to "designate the amount due to him on each of such buildings." Indeed, under such circumstances, there was nothing due him on each of the buildings. His claim existed against the buildings jointly and not otherwise. It will not be held that the Legislature intended to defeat the application of the lien law to a particular class of cases by requiring the performance of something impossible; but, on the contrary, the mechanic's lien law, being remedial in its nature, will be given a liberal interpretation to promote justice and carry out its general purpose, and it will be presumed that in enacting section 1188, Code Civ. Proc., the Legislature had in mind those cases only where it was possible to designate the amount due on each of several buildings, and did not intend that the section should apply to any other class of cases. To give the section the construction contended for by appellant would cut the throat of the mechanic's lien law as applied to a class of cases, and would render nugatory as to those cases the general provision of the Constitution giving mechanics, materialmen, etc., "a lien upon the property upon which they have bestowed labor or furnished material." Const. Cal. art. 20, § 15. Such a construction as that cannot be tolerated. Statutes must be either harmonized with the Constitution or wiped out entirely. This construction of the section is not new. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; James on Mech. Liens, §§ 243–251.

It was therefore proper to make the trust deeds of appellant subordinate to plaintiff's lien.

The judgment is affirmed.

We concur: SMITH, J.; ALLEN, J.

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3 Cal. App. 463

CLINT et al. v. EUREKA CRUDE OIL CO.

(Court of Appeal, Second District, California. April 25, 1906. Rehearing Denied by Supreme Court June 21, 1906.)

1. DEED—CONSIDERATION.

Delivery of stock pursuant to a contract to give it for a conveyance of land, which took the place of an unexecuted agreement to give it for a lease of the land, is a sufficient consideration for a deed of the land.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 26–37.]

2. SAME—CANCELLATION—OFFER TO RETURN CONSIDERATION.

The grantor, not having offered to return the consideration, may not have a deed canceled for fraud.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 212; vol. 8, Cent. Dig. Cancellation of Instruments, §§ 33–38.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Martin Clint and another against the Eureka Crude Oil Company. Judgment for defendant. Plaintiffs appeal. Modified.

Will D. Gould and James H. Blanchard, for appellants. Fred W. Heatherly, Geo. D. Blake, Telfair Creighton, and F. E. Davis, for respondent.

GRAY, P. J. This is an action to cancel a deed alleged to have been obtained from plaintiff Martin Clint and others by false and fraudulent representations and without delivery. On a trial without a jury the findings and judgment were in defendant's favor. The appeal is by plaintiffs from the judgment and an order denying a new trial.

It is reasonably clear from the evidence that the 18,750 shares of stock in the defendant corporation were agreed to be given, and were in fact transferred, as a consideration for the deed sought to be canceled herein, and that this was a sufficient consideration to uphold such deed. It is immaterial that the transfer of this stock may have also constituted the agreed consideration for a lease of the same property mentioned in the deed. We find nothing in the evidence to warrant the theory that two lots of stock of 18,750 shares each were ever agreed to be delivered to plaintiff Clint. The evidence shows that before any of this stock was delivered to Clint the previous lease was, in effect, canceled by an agreement to convey the same and also the property leased to the defendant. This agreement was executed to defendant by all the parties to the lease, including the plaintiff Clint, who was the lessor named in the lease. This agreement to convey the whole title took the place of the original agreement of lease and the agreement to transfer the 18,750 shares of stock, being still unexecuted at the date of the last agreement, constituted a sufficient consideration to support the agreement to convey the entire title, and especially was it a good consideration when the stock was thereafter delivered in accordance with the agreement. Furthermore, if it were admitted that the delivery of the stock was not a sufficient consideration to support the agreement to convey, still we have the signatures to the agreement to convey of the parties named as lessees in the lease, and their signatures agreeing to convey their valuable interest in the lease most certainly constituted a sufficient consideration for plaintiff's signature to the same instrument. We think, therefore, that the findings of the court as to the consideration, as well wherein they negative plaintiffs' allegation that the agreement to convey was without consideration, as also in the affirmative finding that the transfer of the stock was the consideration, are amply supported by the evidence.

There is no evidence that plaintiffs ever offered to return any portion of the stock received by them for this deed, and the court finds that no such offer was made. Of course, it would be inequitable to cancel this deed without a return of the stock which was given for it, even if the deed was obtained by fraud and a delivery also procured by fraud and without the consent of the grantors. This is an action in equity, and the plaintiffs cannot be restored to their rights in the property, and at the same time retain the consideration for it which they have received. It is therefore unnecessary to determine anything as to the question of fraud, and the finding of fraud in the transaction may be disregarded as immaterial to the support of the judgment. The judgment must stand for the defendant on the finding of no offer to return what was received by plaintiffs for the land, however fraudulent the transaction may have been. This failure to restore or offer to restore the consideration prevents a recovery by plaintiffs, whatever view may be taken of the other issues in the case, and we need not, therefore, consider any other issue. It is found that the land described in the complaint is the same land described in the agreement to convey, and no attack is made upon this finding in appellants' brief. A careful reading of the special findings will disclose that they dispose of every issue in the case. The finding to the effect that all the material allegations of the complaint are untrue, "except as hereinbefore found" and that the answer, except as hereinbefore found, is true, may be disregarded as entirely unnecessary and immaterial.

Some other objections are urged, but after an examination we do not find them of sufficient importance to require further discussion. The peculiar circumstances and facts surrounding this case and the transactions which led to its commencement and prosecution inclines us to the opinion that neither party should have been awarded costs.

Therefore, the order denying a new trial is affirmed. The judgment is modified to the extent of striking out that part thereof awarding costs and otherwise to stand affirmed.

I concur: ALLEN, J.

SMITH, J. I concur in the judgment, but for reasons that will require a somewhat extended explanation. The suit was brought to cancel or annul a deed, or document purporting to be a deed, of date December 21, 1900 (designated in the record as "Exhibit A"), between Martin Clint and others, of the first part, and the Eureka Crude Oil Company, an Arizona corporation, of the second part. The document is not signed by three of the parties named as grantors, but several months after the transactions involved in this case a similar deed was executed by them. The allegations of the complaint show a flagrant case of fraud perpetrated on the plaintiffs by the defendant through its secretary and agent, by means of which the plaintiff's signature to the instrument and its possession without delivery were obtained from the plaintiffs by the defendant; and these allegations are, in effect, found to be true by the court. There is, indeed, a finding by the court in general terms that the deed was delivered; but it is found specifically that the deed was placed by the plaintiffs "in the hands of [the defendant's agent, Kloeckner,] with oral instructions that he should show the same to their * * * attorney [Gould] and should not deliver the same to the defendant corporation, or to any person or persons, unless the same should be first approved by their said attorney," and other facts are found showing as matter of fact that there was no delivery. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556. And see, also, Tewksbury v. O'Connell, 21 Cal. 60; Emeric v. Alvarado, 64 Cal. 530, 573, 2 Pac. 418; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Center v. Davis, 113 Cal. 309, 45 Pac. 468, 54 Am. St. Rep. 352. The general finding is, therefore, to be regarded as a mere conclusion of law from the specific facts found, or as in conflict with those facts, and in either case is to be disregarded. Hidden v. Jordan, 28 Cal. 301; Warder v. Enslen, 73 Cal. 294, 14 Pac. 874.

The answer, besides denials of the complaint, sets up a previous written agreement between the same parties of date March 23, 1900, whereby the plaintiff Martin Clint and the other parties named as grantors in Exhibit A agreed to convey to the defendant all their right, title, and interest in and to "the Triumph, Jersey, and Venezuelan claims in the San Fernando mining district"; and it is alleged that the deed in question, Exhibit A, was made "in pursuance and performance of said" agreement; and the court finds these allegations to be true. It is also alleged in the answer, and found by the court, that at some date unstated there was issued to the plaintiffs 18,750 shares of the capital stock of the defendant, that this was received by them in consideration of the execution of the deed in question; and that said stock has not been returned to defendant or any part of it. But it appears from the evidence, without contradiction, that this stock had been issued to the plaintiff Martin Clint long before the date of the alleged deed, Exhibit A, in pursuance of the agreement of March 23d, and of the lease, of date March 8, 1900, therein referred to. This stock, therefore, could not have been the consideration of the deed Exhibit A, otherwise than indirectly as being the consideration of the pre-existing agreement of Martin Clint, of date March 23, 1900, to make a conveyance of the lands therein described. The finding is, therefore, to be construed simply as a finding that the deed, Exhibit A, was made in consideration of the obligation of the plaintiff Martin Clint to convey under the pre-existing agreement. Nor, as the stock was held by the plaintiff under a subsisting, unrescinded agreement, was it required of him to return it as a condition of the cancellation of the deed. It is also to be observed that the allegations of the answer and the findings thereon, in effect, find that there was in fact a delivery of the deed; but for the reasons already explained this part of the finding must be disregarded. The gist of the case, therefore, as found, is that the possession of the deed undelivered and the signature of the plaintiff Martin Clint thereto were fraudulently obtained by the defendant, as alleged in the complaint, and that the only defense is the pre-existing agreement of March 23, 1900, and the alleged fact that the deed, Exhibit A, though fraudulently obtained, was such a deed as the defendant had a right, under the agreement, to demand from the plaintiff Martin Clint.

Two questions are, therefore, presented: The one as to the sufficiency of the defense pleaded and found; the other as to the sufficiency of the evidence to justify the findings on this defense. As to the latter point, upon a comparison of the agreement and of the deed, Exhibit A, it will be seen that the descriptions are altogether different, and that there is nothing to indicate identity between them. Nor is there in the record any evidence tending to show such identity. On the contrary, it affirmatively appears from the evidence, and indeed from the specific facts found, that a part of lot 2 of the section referred to in the deed is not included in any one of the three claims described in the agreement. It is, therefore, clear that, as to the part of lot 2 improperly included in the deed, the defense altogether fails. This point, however, though raised by the specifications in the case, is not touched upon by the appellants in their brief, and it may, perhaps, be inferred in support of the judgment of the court below that the discrepancy between the description in the deed and the agreement was too slight to be material, or there may be some other explanation of the apparent discrepancy which was satisfactory to the court below, and would be satisfactory to us if brought to our attention. I therefore will assume, for the purposes of this opinion, that the finding as to the identity of the land described in Exhibit A and the land agreed to be conveyed by the agreement of March 23, 1900, is sustained by the evidence. But, even assuming this, the defense is plainly untenable. The signature of the plaintiff Martin Clint and the possession of the undelivered deed were fraudulently obtained by the defendant; and the case is, therefore, the same in principle as though the possession of the deed had been acquired by force and violence, or even by highway robbery or burglary. Cutler v. Fitzgibbons (Cal. Sup.) 83 Pac. 1075. The case cited is in point to this proposition. Ordinarily, therefore, the only course left to us would be to require the cancellation and delivery up of the deed. But, in view of the fact that the plaintiff Martin Clint is under the obligation incurred by the agreement of March 23, 1900, to convey to the defendant the lands described in that agreement, and that the corresponding obligation of the other grantors had been performed by the execution of proper deeds, equity would seem to require of him, as a condition of receiving this relief, to execute to the defendant a deed of conveyance according to the terms of the agreement, and as the result of such a requirement (upon the assumption that the finding is supported by the evidence) would be the same as a ratification of the deed in question, we see no reason why that course should not be followed. Civ. Code, § 3532. This, indeed, is to make a deed for the plaintiff, but it is competent for the court to do this directly, as by a commissioner. But under these circumstances, and in view of the admitted fraud of the defendant (which was of a most flagrant character), I do not think it should have recovered its costs; for this would be, as it were, setting a premium upon fraud. I am of the opinion, therefore, that the judgment of the court below should be modified by striking therefrom that portion thereof that allows the defendant costs.

There are some other findings in the case, upon which reliance seems to be placed by respondent as constituting a defense by way of estoppel, or as showing laches upon the part of the plaintiffs. But there is no plea of estoppel in the case; nor, were it otherwise, would the facts found be sufficient to support that defense. Nor upon the facts found are the plaintiffs chargeable with laches. The plaintiff Martin Clint continued in possession, "holding possesion according to his right" (Love v. Watkins, 40 Cal. 564, 6 Am. Rep. 624), and the defendant had notice of the fraudulent character, and nullity of the deed. And as to the purchasers of stock, assuming for the purposes of the decision that their case can be considered, it is not found that they made their purchase on the faith of the deed, nor do the circumstances indicate that such should have been the case; for the omission of a small part of lot 2 does not materially affect the consideration for the stock. We have deemed it unnecessary, therefore, to do more than merely to allude to this part of the findings.

I am of the opinion that the order denying the plaintiffs' motion for a new trial should therefore be affirmed, and the cause remanded, with instructions to the lower court to modify the judgment heretofore entered, as above indicated.

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7 Cal. Unrep. 265

SWEENEY v. DOYLE, County Auditor.

(Court of Appeal, Third District, California. April 16, 1906.)

OFFICERS—SALARY DURING CONTEST—REPEAL OF STATUTE.

Pol. Code, § 936, relative to payment of the salary of an office, title to which is contested by proceedings in court, is not repealed by the county government act, which contains no provision relating to the payment of the salary for the time of the contest.

On rehearing. Denied.

For former opinion, see 84 Pac. 1017.

McLAUGHLIN, J. In his petition for rehearing appellant insists that section 936 of the Political Code was repealed by the provisions of the county government act subsequently enacted. This point was made in the briefs, but was not noticed in the opinion filed, and hence we deem it proper to say that there is nothing in the point then and now urged. The county government act contains no provision relating to the payment of salaries in cases where an action to determine the right to an office is pending, and, as repeals by implication are not favored, the existing law relating to this particular subject was not repealed thereby.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 561

BANK OF YOLO v. BANK OF WOODLAND et al.

(Court of Appeal, Third District, California. May 15, 1906.)

1. APPEAL — FINDINGS — CONFLICTING EVIDENCE—REVIEW.

A finding based on conflicting evidence cannot be disturbed on appeal.

2. ASSIGNMENT — CONSIDERATION — PRE-EXISTING DEBT.

A pre-existing debt is alone a sufficient consideration for an assignment of moneys which might become due to the assignor as commissions or profits from certain charters of vessels for the shipment of grain to foreign countries.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, § 114.]

3. SAME — VALIDITY — CERTAINTY — AMOUNT DUE.

An assignment of commissions or profits to be derived from certain charter parties was not invalid because no particular amount was specified; the amount due thereunder being ascertainable in the method provided by Civ. Code, § 1610 et seq.

4. NOVATION—ASSIGNMENT.

An order requesting E. to pay any balance that might be due the drawer on final settlement of certain shipments of grain, including charter commissions collected for the drawer's account, to defendant bank, though not negotiable, constituted a valid novation, as provided by Civ. Code, §§ 1530–1532.

5. ASSIGNMENTS — CONSIDERATION — EXTENSION OF TIME.

Where the charterer of certain vessels executed an order requesting E. to pay any balance that might be due such charterer on final settlement, including charter commissions, to defendant bank, in consideration of a pre-existing debt owed by the charterer to the bank, the acceptance of such order by the bank operated as a conditional payment of a part of the drawer's debt, and as an extension of time of the payment thereof until the amount due to the drawer should be ascertained; and hence the order was based on a sufficient consideration.

6. SAME—SUBJECTS OF ASSIGNMENT.

Where a charterer of certain vessels for the shipment of grain entered into a contract with E. to finance the adventure, the balance due on a final settlement between the charterer and E. and the rights and things in action arising out of their agreement, including the profits to be derived therefrom, were proper subjects of assignment.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 19, 20.]

7. LIENS — COMMON-LAW LIENS—EQUITABLE LIENS—PURCHASE MONEY.

Where E. agreed with the charterer of certain vessels for the shipment of grain to finance the adventure, after which the charterer executed to defendant bank for a pre-existing debt an order directing E. to pay to the bank all profits, commissions, etc., which should become due to the charterer under such contract, a party furnishing grain for the loading of the vessels, and who, on receiving nearly the whole market value thereof from E., delivered to him every indicia of ownership and right to possession, had neither a legal nor an equitable lien on the proceeds of the sale of the grain, nor on the amount of commissions or profits due the charterer.

8. ASSIGNMENT—NOTICE—DUTY TO GIVE.

Where, after the making of a contract for the loading of certain vessels for foreign transportation, the charterer assigned all his interest in the commissions and profits to defendant bank, the latter was not bound to give notice of such assignment to complainant bank, which was furnishing grain for such adventure, of which fact defendant bank had knowledge.

9. APPEAL — FINDINGS — FAILURE TO FIND — PREJUDICE.

Failure of the court to find on a particular issue is not prejudicial, where under the evidence any finding that could have been made on such issue would have been adverse to the party complaining.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4239.]

10. SAME—ADMISSION OF EVIDENCE—PREJUDICE.

In a suit to recover the proceeds of an adventure for the shipment of grain, a large part of which had been assigned to defendant bank, evidence given by the president of the assignee bank that neither the cashier nor any other agent of the bank had been given authority to finance such shipment, or to buy wheat with which to load the vessels, was not prejudicial to plaintiff.

Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by the Bank of Yolo against the Bank of Woodland and others. From a judgment in favor of plaintiff for less than the relief demanded, and from an order denying plaintiff's motion for a new trial, it appeals. Affirmed.

A. C. Huston and E. R. Bush, for appellant. N. A. Hawkins, for respondents.

McLAUGHLIN, J. This action was brought to recover the sum of $2,713.65 from the defendant Evans, and to have it adjudged that the other defendants had no claim to or interest in said sum. Evans deposited the money in court to abide the result of the controversy between the banks, and the action as to him was dismissed. The Bank of Woodland, in its answer, denied the averments of the complaint, and by way of cross-complaint set forth its right to the money; and Simpson answered, denying generally the averments of both the complaint and cross-complaint. The court rendered judgment that the plaintiff was entitled to $183.54 of the sum so deposited, and the respondent bank to the remainder and to costs. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The following facts are gleaned from the evidence, construed, as it must be, in the light most favorable to the findings and judgment: The defendant Simpson made an agreement with defendant Evans, and through the agency of the latter, at some time prior to December 11, 1900, chartered two ships, named, respectively, the Anglessey and the Shenandoah, for the purpose of loading the same with cargoes of grain for sale and shipment to England. The terms of the charter party, as far as they relate to commissions to become due to Simpson, provided for a commission of 5 per cent., one half of which was payable at the time the charter party was executed, and the other half at the port of discharge. The first installment was called the "charter commission" and the second the "address commission." On December 10, 1900, Simpson executed and delivered to respondent an order requesting Evans to pay any balance that might be due him on final settlement of the Anglessey and Shenandoah shipments including charter commissions collected for his account, to the respondent. On the following day this order was presented to, and indorsed and accepted in writing by, Evans. At the time it was drawn and accepted Simpson was indebted to the respondent in the sum of about $20,000, the payment of all of which, save about $3,000, was secured. The order was taken as additional security for this indebtedness, and no money was advanced to Simpson at the time it was drawn. The indebtedness of Simpson to respondent at the time this action was commenced had been reduced to the amount of respondent's judgment herein. When the order was executed and delivered, there was no agreement between respondent and Simpson, whereby the former was to "finance the cargoes," or furnish money to buy grain to load the ship. Respondent had furnished the money to buy grain to load two other ships, which had been loaded before the Anglessey and Shenandoah, but refused to make advances to buy wheat to load the ships named. After the refusal to make such advances, and after the order was accepted, respondent, through its cashier, learned that appellant was helping Simpson on the cargoes of the Anglessey and Shenandoah. That official knew when the order was taken that it would be valueless unless the ships were loaded and cleared. He had no knowledge as to how Simpson was to load the ships, but thought Evans would see him through if nobody else did. He was shown a letter by Simpson, dated November 10, 1900, wherein Evans agreed to advance 95 cents per cental on wheat loaded, and to collect advances and "address commissions" for Simpson's account, through London friends, and to render a final account to him. Respondent never notified appellant that it held the order, and the latter knew nothing of its existence until after the wheat had been loaded on the ships. Respondent never "financed a cargo" for Simpson. In their dealings, the latter would buy the grain, and turn in the warehouse receipt to secure the amount of the check drawn in payment therefor, which was then paid by respondent. Simpson had some grain hypothecated to respondent which was loaded on the ships named. Of the grain loaded on the Anglessey respondent furnished 398,744 pounds, the appellant 2,219,332 pounds, and the Yolo County Savings Bank 473,854 pounds. Of the grain loaded on the Shenandoah respondent furnished 25,854 pounds, appellant 6,230,720 pounds, and one Cerkel 4,854 sacks. Early in December, 1900, Simpson agreed with appellant that, if the latter would advance the money necessary to load the two ships he had chartered, all moneys realized from the cargoes "except a small pro rata that might be due to the Bank of Woodland" would be paid to appellant. In buying wheat from the farmers, Simpson paid for the same by issuing checks, to which the warehouse receipts, indorsed by the holders, were attached, and the checks so given were honored by appellant upon delivery of the receipts. The wheat was shipped to Port Costa by appellant, in whose name it was held, and, as it was loaded on the vessels, the mate issued receipts therefor in lieu of the warehouse receipts. After it was all loaded appellant was paid 95 cents per cental on the mate's receipts, which were taken up by and delivered to Evans, who in turn surrendered them when the bill of lading was issued. Some of the wheat delivered by appellant cost more, and some less, than 95 cents per cental, but, freight charges and other expenses included Simpson was indebted to appellant in the sum of about $4,000 on account of the transaction after Evans paid appellant 95 cents per cental for the wheat furnished. After the "address commissions" are paid Evans had in his hands $2,713.60, which was payable to Simpson or his assignees. On January 8, 1901, the cashier of appellant bank mailed a letter to Evans in which he said: "I have given the Grangers' Business Association authority to collect 95 cents per cental on all mate receipts not yet delivered to you, and an additional 25 cents on each ton of our wheat on ship Shenandoah. Any payments yet to be made on account of ships Anglessey and Shenandoah to be made directly to this bank." Upon this letter Simpson, under his signature, indorsed his concurrence in such agreement. It does not clearly appear when the loading of the ships was commenced. The agent who acted for Evans in the matter could not state positively whether it commenced in November or December, nor could he state how far it had advanced when the order relied upon by respondent was presented. In one part of his testimony Simpson stated that he could not say whether any wheat had been loaded at that time, and in another that all the wheat from Woodland was loaded afterwards. It appears that on December 1st 4,854 sacks of wheat, worth $5,997.31, were purchased from one Cerkel; that this wheat was shipped on the Shenandoah and that the first wheat purchased by appellant for loading the ships was purchased on December 11th. There is nothing to show when the wheat purchased by the Yolo County Bank of Savings was purchased or loaded. The loading was completed during the first week of January, 1901.

It is contended that the evidence is insufficient to support the finding that the order given to respondent was supported by a sufficient consideration. This contention is based primarily on the proposition that respondent agreed to furnish money to purchase the grain for loading the ships if the order was given, and that it failed to fulfill such agreement. It cannot be doubted that Simpson's version of the understanding had with respondent at the time the order was given is at variance with the version of the respondent's cashier; but it is well settled that when the evidence is conflicting the finding cannot be disturbed. Astill v. South Yuba Water Co., 146 Cal. 57, 79 Pac. 594; Broder v. Conklin, 121 Cal. 284, 53 Pac. 699; Carteri v. Roberts, 140 Cal. 165, 73 Pac. 818; People v. Wong Chong Suey, 110 Cal. 121, 42 Pac. 420. It is argued in this connection that, as the order was given as collateral security for a pre-existing indebtedness, there was no consideration to support it. This court, however, is not at liberty to depart from the contrary rule, which has prevailed in this state for many years. Civ. Code, § 1606; Hart v. Church, 126 Cal. 480, 58 Pac. 910, 77 Am. St. Rep. 195; Frey v. Clifford, 44 Cal. 342; Payne v. Bensley, 8 Cal. 267, 68 Am. Dec. 318; Sackett v. Johnson, 54 Cal. 109; Russ v. Muscupiabe, 120 Cal. 532, 52 Pac. 995, 65 Am. St. Rep. 186. The order was an assignment of whatever moneys might become due to Simpson as commissions or profits from the charters he then held. The fact that no particular amount is specified does not affect its validity, for the method of ascertaining such amount clearly appears. Civ. Code, §§ 1610 et seq. True, it was not negotiable, but it is, nevertheless, a valid contract, having all the earmarks of a novation. Civ. Code, §§ 1530-1532; Wolters v. Thomas (Cal.) 32 Pac. 565; Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522. It was at least a conditional payment of a part of Simpson's debt, and respondent, by accepting it, impliedly agreed to extend the time of such payment until the amount of the balance due from Evans to the drawer could be ascertained, and this could only be after payment of the address commissions. Indeed, we do not see how the respondent could proceed against Simpson for any portion of the debt due by him to the bank until the balance was at least ascertainable, for it certainly could not prove that there was any balance due from the drawer until the third party, who was bound by his acceptance of the order, had received the address commissions and struck a balance, or had been afforded an opportunity to do so. We think the bank clearly suffered a detriment, and that a distinct benefit was conferred on Simpson, and this was a sufficient consideration. Civ. Code, § 1605. The burden was upon appellant to show a want of consideration, and this it did not accomplish, for the testimony of respondent's cashier is alone sufficient to show a subsisting indebtedness aside from the note introduced in evidence, notwithstanding Simpson's impression that he owed nothing. Civ. Code, § 1615.

It is next contended that, at the time the order was given, there was nothing in existence capable of transfer or assignment, and in the same connection it is urged that in no event could there then be an assignment of anything owing from Evans to Simpson on account of any wheat furnished by appellant. If it be conceded that no wheat owned by appellant had been loaded when the order was given, and that Simpson could not transfer any money which might thereafter become due to appellant on account of wheat furnished and loaded, still we think Simpson then had substantial, tangible property rights which could and did pass by assignment. The balance due on final settlement, including charter commissions collected on Simpson's account, alone was assigned, and certainly appellant could then have had no legal claim to such balance. Simpson then held the charters, and the Cerkel wheat, at least, had been loaded. The loading of the ships was practically insured by Evans' agreement to advance the approximate market value of wheat to whomsoever might furnish it. The charterer then had a vested interest in the charter and address commissions, and this was certainly a tangible, existing, substantive, assignable property right. Under his agreement with Evans, Simpson also had a vested interest in any profits realized on the sale of the cargoes, and this while in a measure speculative, was nevertheless an assignable interest. The rights and things in action arising out of the agreement with Evans, including the profits which would or might be derived therefrom, were in themselves capable of assignment. Civ. Code, §§ 954, 1458; La Rue v. Groezinger, 84 Cal. 282, 24 Pac. 42, 18 Am. St. Rep. 179; Simmons v. Zimmerman, 144 Cal. 260, 79 Pac. 451; Pierce v. Robinson, 13 Cal. 122; Bibend v. Insurance Co., 30 Cal. 86; Bergson v. Builders' Ins. Co., 38 Cal. 544. It mattered not by whom the wheat to load the ships was furnished, nor who furnished the money to buy it. Simpson would still be entitled to charter and address commissions as well as the net profits arising from the sale of the cargoes. In the absence of any levy of legal process, neither appellant nor respondent could have any claim to or lien upon such commissions or profits, save through a contract with Simpson. If there was no assignment to either appellant or respondent, then Evans would be bound to pay any balance in his hands to Simpson. This seems to be admitted; but, whether admitted or not, it stands out as a central, pivotal, incontrovertible fact in this case, from which it follows by simple force of logic that the party who first obtained a legal transfer of his claim or interest in such balance is entitled thereto. As respondent was first in time, it was first in right, unless by force of some legal or equitable rule its right was destroyed or postponed by virtue of the subsequent agreement and acts of appellant and the conduct of respondent with regard thereto.

This brings us to a consideration of the lien claimed by appellant. If we understand the agreement on this point, appellant claims a lien on this fund by virtue of the fact that it furnished the bulk of the cargo loaded on each ship. This fact alone certainly could not, and did not, create a lien on the charter or address commissions, nor on the proceeds of the sale of the grain, which it did not furnish. Nor can we conceive how it could operate to create a lien on any portion of the balance due Simpson from Evans as a result of the venture. Conceding that appellant retained a lien after the warehouse receipts had been surrendered, and during the time the mate's receipts were retained, we think such lien ceased to exist when appellant received 95 cents per cental for grain furnished and delivered the last-mentioned receipts to Evans. Having accepted the approximate market value of the grain, and clothed Evans with every indicia of ownership and right of possession, it retained no evidence or vestige of right to control the property or the proceeds of its sale. Not even the right of stoppage in transitu remained, and the grain was commingled in the common mass composing the cargoes. It was apparently sold in England with other portions of the cargo, indiscriminately, and there is nothing in this record from which it can be ascertained that any definite balance of the purchase price of any part of the cargoes of wheat remained unpaid. No particular portion of the balance in the hands of Evans has been or could be identified as the proceeds of the sale of appellant's wheat, or of the cargoes in bulk; for such balance is less than the charter and address commissions earned, and, inferentially at least, it appears that such balance consists of what remained of such commissions after payment of certain charges. Under such circumstances appellant could have no legal or equitable lien on such balance at common law or under the Code. Civ. Code, §§ 2872, 2875, 2988, 3049; Jones on Liens, §§ 800, 806, 811, 812, 818; Eads v. Kessler, 121 Cal. 246, 53 Pac. 656.

It is said that the agreement between Simpson and appellant gave the latter a contract lien on both cargoes; but our construction of such agreement, and the letter indorsed by Simpson subsequently sent by appellant to Evans, is that Simpson simply assigned to appellant the profits of the venture, less any pro rata due respondent, and that any sum received was to be applied to the satisfaction of a subsisting indebtedness. It is very evident that appellant did not rely on such agreement for security, for throughout the entire transaction it retained the receipts which evidenced its ownership of the grain, and only surrendered them when Evans paid a sum which, under the evidence, was apparently equivalent to the price paid therefor.

Finally, it is urged that respondent was bound to give appellant notice that it held the order, because it knew that appellant was backing Simpson in loading the ships. Our attention has been called to no law requiring such notice, unless the rule embodied in subdivision 3, § 1963, of the Code of Civil Procedure, has such effect. Respondent had seen the letter from Evans wherein he agreed to advance 95 cents per cental for wheat loaded, and was justified in assuming that appellant was pursuing the usual methods followed in such transactions, by taking the receipts as security for the money advanced, and that appellant would not surrender the receipts unless the sum paid by Evans was sufficient to reimburse appellant for money advanced on such security. Under these circumstances respondent was not charged with knowledge that appellant was altering its condition, or would suffer detriment by reason of assistance rendered Simpson in loading the ships, and hence the rule invoked has no application. Besides, appellant knew from the outset that respondent might claim a part of the balance due Simpson, and prudence dictated inquiry as to the nature and extent of such claim. True, it was suggested by Simpson that this claim would be for money due as a pro rata on a little wheat put aboard the ships by respondent; but appellant, having knowledge that there was a claim, cannot excuse its failure to make inquiry by setting up the fact that it was mistaken as to the basis upon which such claim would rest.

Reversal is asked on the ground that the court failed to find on defensive matter pleaded in the answer to the cross-complaint, but we think appellant was not prejudiced by any failure in this regard. The court found all the facts relating to the assignments made by Simpson to appellant and respondent, and it sufficiently appears therefrom that each assignment was supported by a sufficient consideration. We have seen that appellant's ignorance of the existence of the order did not affect respondent's rights under it, and that appellant did not retain possession of the wheat after the receipts evidencing possession and ownership were surrendered. What has been said also clearly indicates that, under the facts proven, the appellant had no lien on any part of the money due Simpson on final settlement, and that its lien on the wheat ended when the mate's receipts were surrendered to Evans. From this it follows that under the evidence any finding in this regard must have been adverse to appellant, and hence no injury resulted to it from a failure to find on such issues. People v. Center, 66 Cal. 564, 5 Pac. 263, 6 Pac. 481; In re Connors, 110 Cal. 413, 42 Pac. 906; Krasky v. Wollpert, 134 Cal. 342, 66 Pac. 309; Murphy v. Bennett, 68 Cal. 530, 9 Pac. 738.

Error is predicated on the admission of the testimony of the president of the respondent bank to the effect that neither the cashier nor any other agent of the bank had been given authority to finance the vessels or to buy wheat for the purpose of loading them. His testimony, as far as it related to any authority proceeding from him, was certainly competent, and, conceding that the portion of the answer relating to lack of authorization by the board of directors was not the best evidence, we cannot see how such answer resulted in prejudice to appellant. The cashier who dealt with Simpson did not claim to have any such authority. In fact, he denied in toto that any such agreement had been entered into. His authority, or lack of it, was not an essential fact in the case, and, if a finding in appellant's favor on this point was supported by uncontroverted evidence, the result would not be changed. Therefore the ruling, if erroneous, was harmless. Carter v. Meuli, 122 Cal. 367, 55 Pac. 138; Dauphiny v. Red P. Co., 123 Cal. 550, 56 Pac. 451; Duffy v. Duffy, 104 Cal. 607, 38 Pac. 443; Chapea W. Co. v. Chapman, 144 Cal. 373, 77 Pac. 996.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 414

BURR v. CROSS.

(Court of Appeal, Second District, California. April 10, 1906.)

Frauds, Statute of—Indemnity Contract—Principal Debtor.

Where plaintiff in attachment directed the officer to deliver the property levied on to the plaintiff's servant as keeper, agreeing to save such officer harmless from all liability for any damages that might be done to the property by reason of the keeper's negligence, carelessness, or breach of duty while in charge of the property, such indemnitor was "the principal debtor," within Civ. Code, § 2794, subd. 2, providing that, where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, the promise to answer for the obligation of another is deemed the original obligation of the promisor, and was not required to be in writing, as provided by Civ. Code, § 1624, subd. 2.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 18, 19.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by John Burr against A. P. Cross. From a judgment for plaintiff, defendant appeals. Affirmed.

Haas & Garrett and A. P. Thompson, for appellant. W. C. Petchner and Oscar A. Trippett, for respondent.

SMITH, J. This is an appeal from a judgment against the defendant for the sum of $1,069.30, with interest from August 16, 1900 and costs. There is a statement or bill of exceptions in the record containing the evidence given on the trial, which was that of the plaintiff only; the defendant declining to put in any evidence. The gist of the case as shown by the complaint is: In a suit of the defendant against Laing and others an attachment was issued to the plaintiff, who was then the sheriff of Los Angeles county, and by him levied on certain property of the defendants in the attachment case; and thereupon, on the proposition of the defendant, the attached property was placed in charge of an employé of the defendant as keeper, upon and in consideration of his promise to save the plaintiff harmless from all liability for any damages that might be done to the property by reason of the negligence, carelessness, or breach of duty of such employé while in charge of the property. The attached property remained in charge of the keeper thus employed until January 1, 1899, during which time, by the negligence or misconduct of the keeper, the property, or much of it, was lost, destroyed and otherwise damaged to the amount of $1,000. And thereafter, the attachment having been released, a suit was brought against the plaintiff by the assignee of Laing for damages on account of the loss, consumption, and destruction of the property as aforesaid, and judgment recovered against him for the sum of $1,000 and costs, aggregating $1,069.30, which was paid by the plaintiff.

It appears from the evidence, though not alleged in the complaint, that the defendant was notified of the pendency of that suit and undertook that his attorney should assist in the defense. The court finds that all the allegations of the complaint are true, and this finding, we think, though the contrary is contended by the appellant, is fully sustained by the evidence. The principal point urged by the appellant is, that the promise of the defendant, which was admittedly oral, was void under subdivision 2 of section 1624 of the Civil Code. But we are of the opinion that this contention cannot be sustained. The promise of the defendant was his own, made for his own benefit and upon a sufficient consideration moving to him, and he is therefore to be regarded as "the principal debtor." Civ. Code, § 2794, subd. 2; section 1605.

Numerous other points are made by the

appellant, but none of these, we think, are of any materiality.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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7 Cal. Unrep. 271

BILLINGS v. PEARSON.

(Court of Appeal, Third District, California. May 15, 1906. On Rehearing June 15, 1906.)

EJECTMENT—TRIAL—NONSUIT.

Where, in ejectment, plaintiff introduced no evidence tending to show her right to the land, that she had been ousted of her possession by defendant, or that she had any right to eject defendant, a nonsuit was properly granted.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 316.]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Ejectment by Miranda S. Billings against James Pearson. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Howard & Wharton, for appellant. J. Frank Brown, for respondent.

BUCKLES, J. This is an action in ejectment; the plaintiff seeking to eject defendant from a strip of swamp and overflowed land containing 3.19 acres and laying along the bank of the Sacramento river in front of land conceded to belong to the defendant. Appellant introduced her testimony, and when she rested respondent moved a nonsuit, which was granted, and from the order and judgment of nonsuit this appeal is prosecuted.

The defendant's land is in two descriptions, having received it from Johnson by deed at two different times. The calls in the first deed dated April 23, 1867, are as follows: "Commencing at a stake on the east bank of the Sacramento river * * * 150 feet north from the junction of the north bank of the old American river with said last bank of said Sacramento river." The line then runs thence east and thence north and "thence west" to the bank of the Sacramento river; "thence down Sacramento river with the meanderings of said river to the place of beginning, containing 15 acres more or less." There can be no doubt but what the west boundary line of this 15-acre tract is the east bank of the Sacramento river, and the grantor, Johnson, owned no land west of that boundary line. Defendant bought the second piece of 6 acres from said Johnson June 17, 1867, and this is described in the deed as follows: "Commencing at the center of a large oak tree on the edge of the east bank of the Sacramento river about 64 rods north from the junction of the old American river and the Sacramento river; running thence easterly * * * 40 rods; thence south 25 rods to Pearson's north line; thence west * * * to the bank of the Sacramento river; thence to the place of beginning." There is some controversy as to the point of commencement in this last description. The "large oak tree" mentioned as the point of beginning does not seem to have stood on the east bank of the Sacramento river at that time. But the grantor and grantee evidently believed it did, and so intended to include in this conveyance all the land up to the bank of the river. The west boundary of Johnson's land was the east bank of the Sacramento as it existed in the year 1867. From 1867 up to 1898 accretion had formed in front of these lands, and the bank of the river had receded sufficiently to form the land in controversy, as shown by the map introduced by plaintiff. The deed of said Johnson to the plaintiff, made April 16, 1885, contains exactly the same description of the land owned by Johnson prior to his deeds to Pearson, and excepts from such conveyance to plaintiff the land (15 and 6 acres) theretofore deeded to defendant Pearson, the west boundary line being fixed on the east bank of the Sacramento river. The map shows the 3.19 acres in controversy to be located along the east bank of the Sacramento river as it now exists, and immediately in front of the 15 and 6 acres of land of defendant, and is evidently accretions thereto as appears from said map. All these deeds were put in evidence by plaintiff.

The motion for nonsuit was made upon the following grounds: "(1) That the evidence, as introduced by plaintiff, does not show that the land in controversy has at any time ever been owned, or occupied or possessed by the plaintiff. (2) That the evidence does not show that defendant Pearson ever entered upon or ousted the plaintiff from the land in controversy. (3) That the evidence does not show that plaintiff is the owner or possessor, or entitled to the possession, of the land in controversy at the present time, or at the time of the commencement of this action." We do not think there was any testimony at all tending to show plaintiff's right to the land, that she had been ousted of her possession by the defendant, or that she has any right to eject the defendant. There being no testimony tending to show any of these essential matters, we think the nonsuit was properly granted.

The order and judgment are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

Petition for Rehearing.

BUCKLES, J. We see no reason for disturbing our former opinion in this matter. We think it is clear the west boundary line of defendant's deeds was the Sacramento river, and the calls in his deeds can have no other reasonable construction or meaning.

Rehearing is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 583

CONDE et al. v. DREISAM GOLD MIN. & MILL. CO. et al.

(Court of Appeal, Third District, California. May 15, 1906.)

1. APPEAL—EVIDENCE—PREJUDICE.

Where complainants assigned a note and mortgage of a corporation to secure money borrowed from a third person, and did not bring suit to foreclose the mortgage until more than a year after incurring the debt for which the note and mortgage were pledged, and until after such debt had been paid, the corporation was not prejudiced by evidence that the corporation was to pay the interest on the money so borrowed, nor by evidence that complainants agreed not to foreclose the mortgage for a year from the time the money was borrowed.

2. PAYMENT—DRAFTS—RETENTION.

Where the maker of a note forwarded a draft for the amount due thereon, which was received and retained by the payee's general agent without any notice that the draft would not be accepted in payment, the retention of the draft operated as payment of the note.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 78–85.]

3. PARTIES—MISJOINDER—REMEDIES—DEMURRER.

Under Code Civ. Proc. § 430, providing that a defect or misjoinder of parties plaintiff may be taken advantage of by special demurrer, and section 434, declaring that if no objection be taken by demurrer or answer, the defendant must be deemed to have waived the same, except as to jurisdiction and insufficiency of facts, defendant waived an alleged misjoinder or nonjoinder of parties by failing to take advantage thereof by special demurrer or answer.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 167–177.]

4. JOINT TENANCY—CREATION—SECURITIES—SURVIVORSHIP.

Civ. Code, § 683, declares that a joint interest is one owned by several persons in equal shares, acquired by a single will or transfer, when expressly declared to be a joint tenancy; and section 686 provides that every interest created in favor of several persons in their own right is an interest in common, unless declared in its creation to be a joint interest. *Held* that, where a note and mortgage were executed in favor of several persons, they held as tenants in common, so that on the death of one the entire title did not vest in the others by right of survivorship.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Joint Tenancy, § 1.]

Appeal from Superior Court, Tuolumne County; Geo. W. Nicol, Judge.

Action by James E. Conde and others against the Dreisam Gold Mining & Milling Company and another. From a judgment for complainants, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

John J. Roche, for appellant company. Benj. Healey, for appellant Moulton. J. F. Rooney and Fred Fette, Jr., for respondents.

CHIPMAN, P. J. Foreclosure of mortgage executed by defendant company to plaintiffs, the Condes and Leonardini, deceased, in his lifetime, to secure the payment of a certain promissory note for the sum of $9,000, payable to them and made by defendant company. Plaintiffs had judgment, from which, and from the order denying their motion for new trial, defendants appeal.

The court found the following facts: That on May 24, 1899, defendant company executed the note and mortgage in question, payable 30 days after date. James E. Conde's intestate died December 1, 1900, and on March 15, 1902, said Conde was duly appointed administrator of Leonardini's estate. On March 9, 1901, plaintiffs, James E. and Mary K., his wife, borrowed from defendant Mrs. Moulton the sum of $1,500, and executed and delivered to her their promissory note therefor, payable one year after date, with interest at 7 per cent. per annum, and to secure the payment of the same assigned to her the said promissory note and mortgage first above mentioned. On October 5, 1901, the said Condes paid in full to defendant Moulton the said promissory note for $1,500 and demanded that she execute to them a reassignment of said promissory note and mortgage executed by defendant company, but she neglected and failed to do so. The court further found that defendant Moulton had, at the commencement of the suit, no right or interest in or to said promissory note and mortgage so assigned to her as security, and that plaintiffs are the lawful owners thereof, on which there is due and unpaid the sum of $6,460, with interest from June 24, 1899; that the estate of Leonardini is the owner of one-half the amount of said promissory note and mortgage. The conclusions of law were such as logically followed the facts found, and judgment passed accordingly.

The errors alleged as grounds of the appeal arise out of a rather unusual state of facts not fully disclosed by the findings. It appears that Benjamin Healey was the attorney and general agent of Mrs. Moulton and authorized to act for her as fully as she could act for herself in the matters in controversy. He was also a director and large stockholder in defendant company, and was its attorney at the time mentioned in the transactions involved. In March, 1901, the Condes found themselves in need of money and went to San Francisco to see if they could not induce the defendant company to pay its note or some part of it, then long past due. They went to Mr. Healey, as representing the company, and made known their desire to get at least $3,000. After some delay and some inquiry on his part he informed them that the company could pay them no money, but that he had a client, Mrs. Moulton, who would let them have $1,500, which would tide them over for the present. The Condes were threatening foreclosure of the company mortgage, and Healey was anxious to avoid that and wanted further time. The Condes refused, according to their testimony, to agree to abstain from foreclosing or granting further time, as that would require the execution of new papers. Leonardini was then deceased, and as yet no administrator of his estate had been appointed. The upshot of the matter was the giving by the Condes of the $1,500 note, secured, as found by the court; but it was understood between them and Mr. Healey that they were to pay no interest, which latter was to be paid by the company, and the company did by resolution authorize its payment. It was further understood, according to Conde's testimony, that they might pay the $1,500 note at any time. They returned to their home, and on October 3, 1901, they sent to Mr. Healey for Mrs. Moulton, by their attorney, Mr. Rogers, the draft of the Tuolumne County Bank drawn on the Western National Bank of San Francisco for the sum of $1,500, payable to the order of Mary S. Moulton, which Mr. Rogers stated was in payment of her note, and to meet this draft the Condes deposited with and Tuolumne County Bank this amount, which they never after withdrew. Mr. Rogers also sent Mr. Healey a blank reassignment of the company note and mortgage and requested its execution and return to him with the $1,500 note. Mr. Healey received the draft on October 5th; but, failing to acknowledge its receipt, Mr. Rogers wrote him October 21, 1901, calling attention to the matter. On October 25, 1901, Mr. Healey wrote Mr. Rogers, acknowledging the receipt of the draft and blank assignment, and stated that Mrs. Moulton was out of town, and on her return he would write Rogers. He informed Mrs. Moulton of the draft and talked the matter over with her; but for some unexplained reason Mr. Healey communicated no further, so far as the record shows, with Mr. Rogers or with plaintiffs, but retained the draft, without, however, presenting it for payment, and on March 18, 1902, more than one year after the Conde note was given to Mrs. Moulton, plaintiffs commenced this action to foreclose the company mortgage. Mrs. Moulton was made a party defendant, presumably because she still had possession of the company note and mortgage and was claiming some interest in it. Mr. Healey testified in explanation of the loan by Mrs. Moulton to the Condes as follows: "One object I had then, in furnishing the loan of $1,500 from Mrs. Moulton, so the company could have further time to pay the mortgage, and I bound Mr. Conde, certainly in my own mind, that he could not foreclose inside of 12 months. I had two motives—one to befriend Mr. Conde and the other to befriend the Dreisam Gold Mining Company, of which I was a director and attorney; otherwise, I would not have acted as I did." He testified that the Condes were to pay no interest, and the only material conflict in the testimony was as to the agreement to defer foreclosure of the company mortgage. When pressed to explain why he retained the draft and did not return it, if he did not propose to apply it in payment of the Moulton note, he replied that he could not explain with due consideration for Mr. Rogers, who had died. "Q. You kept it in your possession from October till this day? A. I did not keep it in that sense. It was in my possession. I had it in my possession all the time from the time I got it until I brought it into court (at the then trial). Q. You never said a word to Mr. Conde about returning it, or offered to return it? A. I object to answering that question, on the ground the conversation in regard to that matter occurred with a gentleman now passed away." He also declined to answer whether he had ever offered to return the draft to Mr. Rogers. Being further pressed for an answer, the extent of his reply was: "I have had the check in my possession up to this time. I had no legal duty to perform in returning that check. * * * I considered the security Mrs. Moulton had for the loan of $1,500 was good. * * * I was not anxious about Mrs. Moulton getting her money back. It was not due. We didn't want it. * * * I was acting for the Dreisam Mining Company in this transaction, and it was for its benefit that this transaction occurred."

Mr. Roche, attorney for the company, objected to the evidence of an agreement that the Condes were to pay no interest on the Moulton note. Mrs. Moulton's agent and attorney testified to the fact and made no objection to the evidence. We cannot see of what concern the question was to the company, or, conceding error, how it was injured by the evidence, and without injury there can be no prejudicial error. Nor can we see how either of the defendants was injured by the testimony as to any agreement to defer foreclosure until the time named in the Moulton note had expired, which was one year. The foreclosure suit was commenced March 18, 1902, more than one year after the Moulton note was given. So that every object Mr. Healey had in "befriending" the Condes and the company had been accomplished and the Condes kept faith with Mr. Healey's understanding of the agreement. When this action was brought the Moulton note was past due, and the draft in Mrs. Moulton's hands was available to pay it, and had been for five months. Mr. Healey brought it into court and after the trial obtained leave to withdraw it, indicating that he then, as well as theretofore, expected to make use of it for payment in his own time. Inasmuch as he refused to explain why he retained the draft, or why he did not notify the Condes or Rogers of his unwillingness to accept it as payment, we can only surmise that he wanted the note to run the full year for Mrs. Moulton's benefit, as he regarded the loan as a safe and good one for her. Under all the facts and circumstances disclosed, we think that the draft constituted a payment, and that the court was justified in finding that the Moulton note was fully paid. If the drawer and drawee of the draft should fail before its presentation, after so great a lapse of time, it would hardly be contended that Mrs. Moulton could come back upon the Condes.

It is claimed that there was no legal duty on Mr. Healey to return the draft; citing section 1505, Civil Code, which provides that "if anything is given to a creditor by way of performance which he refuses to accept as such, he is not bound to return it without demand." But in this instance the creditor did not refuse to accept the draft by way of performance. Unless the draft was refused, the duty was on the creditor to return it. Instead of doing so, her conduct indicated its acceptance.

It is further claimed that a draft or check is only conditional, and not absolute, payment of the debt for which it is given, and does not extinguish the debt, unless it is expressly agreed that it shall constitute payment. This is undoubtedly the rule in this state. Comptoir d'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28; Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790. But the purpose of the rule is the protection of the creditor, who, if the check be dishonored, may still recover from his debtor. It was said in Blair v. Wilson, 28 Grat. (Va.) 165: "Ordinarily it is only a means of payment, and the debt will not be extinguished unless the check be paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer, either upon the debt or upon the check, at his option." Mr. Benjamin thus states the rule: "A check is accepted as a particular form of cash payment, and, if dishonored, the vendor may resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken." Benjamin on Sales (7 Ed.) pp. 755, 772. We do not, however, understand the rule to require that there should be express words or writing of the parties agreeing that the check should be absolute payment. The circumstances and the conduct of the parties taken together may show an express understanding that the check is taken in satisfaction of the debt or estop the creditor from claiming the contrary. As here, for example, the check was sent for the express purpose of payment and was retained under circumstances implying that it was so accepted. It has been held that unreasonable delay in returning a check may make it equal to payment. Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Mehlberg v. Tisher, 24 Wis. 607. So far as the company is concerned, it has nothing to do with the draft, and is in no wise interested in it or in any question arising out of it. Its sole concern is in the right of plaintiffs to bring the action to foreclose their mortgage.

Upon this branch of the case but one point is made deserving notice, and this goes, not to the merit of the case, but to a technical rule of pleading. The contention is that the company note was owned jointly by James E. Conde, Mary K. Conde, and Luigi Leonardini, and upon the death of Leonardini the cause of action did not pass to his representatives, but vested in the other two by right of survivorship. Section 1431, Civ. Code, is cited, which provides that "a right created in favor of several persons, is presumed to be joint, and not several. * * * This presumption, in the case of a right, can be overcome only by express words to the contrary." Defendant company did not demur to the complaint, and in its answer raised no issue as to the misjoinder or nonjoinder of parties plaintiff. Defendant Moulton demurred only on the ground of insufficient facts and as to the pendency of another similar cause of action, as to which there was no evidence. By section 430, subd. 4, Code of Civil Procedure, a defect or misjoinder of parties plaintiff is made ground of special demurrer. By section 434 of the same Code it is provided: "If no objection be taken by demurrer or answer, the defendant must be deemed to have waived the same," except as to jurisdiction and insufficiency of facts.

Grounds of special demurrer which were not presented in the trial court will not be considered by the appellate court. Gale v. T. C. Water Co., 44 Cal. 43; Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97; Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, 42 Pac. 822. See, also, as to misjoinder of causes of action, Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16. See, also, Pomeroy's Code Remedies, *206, *207. Mr. Pomeroy says that a misjoinder of plaintiffs is no defense in an equitable action. Id. *211. See, also, Freeman on Covenants, § 367. Furthermore, the point is not well taken, because the court found, on sufficient evidence, that Leonardini owned a half interest in the mortgage note. We know of no principle by the operation of which his interest would pass to the other payees of the note by right of survivorship. If we should give section 1431 of the Civil Code the interpretation claimed for it, which we should be loath to do, as applicable to an ordinary form of promissory note, still the presumption therein referred to may be rebutted, and, in the present case, the presumption was rebutted by the evidence that Leonardini had a one-half interest in the note and mortgage. Besides, section 683 of the Civil Code provides that "a joint interest is one owned by several persons in equal shares, by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy," etc.; and this section applies to all kinds of property. Denigan v. S. F. Savings Union, 127 Cal. 142, 59 Pac. 390.

Section 686 of the Civil Code declares that "every interest created in favor of several persons in their own right is an interest in common, * * * unless declared in its creation to be a joint interest." Speaking of section 1431, Civ. Code, on which appellant relies, it was said in Denigan v. S. F.

Sav. Union, supra: "This provision has reference, however, merely to the relation between the parties in whose favor the right is created, and the party against whom it is created. It is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves." Mr. Pomeroy says: "Where two or more persons are jointly interested in the money secured by a mortgage—that is, according to the law prevailing in this country, when they are joint mortgagees, or joint assignees of a mortgage—they must all unite in a foreclosure." Pomeroy's Code Remedies, *255, § 169.

From every viewpoint, as we see the case, the judgment and order should be affirmed; and it is so ordered.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 657

BEST MFG. CO. v. COHN.

(Court of Appeal, Third District, California. May 25, 1906. Rehearing Denied by Supreme Court; Beatty, C. J., dissenting. July 23, 1906.)

FIXTURES—ENGINE CONDITIONALLY SOLD TO LESSEE OF LAND.

An engine sold to the lessee of land, the note for the price providing that title should remain in the seller till the price was paid, is personalty, and not a fixture, as between its seller and the lessor of the land, it being removable from the realty without destroying it, and not being necessary to the support of any part of the realty, though it was placed on a solid foundation of cement and bolted thereto and inclosed in a building erected by the lessee, and the lease, providing for the placing of the machinery on the land by the lessee, and for the reversion of the improvements to the lessor in case of breach of covenants, was on record when the engine was furnished to the lessee.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 12, 29.]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by the Best Manufacturing Company against P. C. Cohn. Judgment for plaintiff. Defendant appeals. Affirmed.

M. S. Wahrhaftig, for appellant. J. J. Scrivner and A. H. Cohen, for respondent.

BUCKLES, J. This is an action in trover for the conversion by defendant of a gas engine and its attachments and for the recovery of the value of the same.

The action was tried before the court without a jury upon an agreed statement of facts and other evidence, and the court gave judgment in favor of plaintiff for the sum of $1,400, the value of the engine, and $50 expenses. The findings show that one E. B. Bullock, who was the superintendent of the Prosperity Mining Company, procured of plaintiff one forty-horsepower crude-oil engine, together with the fixtures thereof, consisting of one sparkling dynamo, battery, pulley, shafting and boxes, the price, $2,100, to be paid for in installments, the title to remain in plaintiff until the purchase price was fully paid, and then plaintiff was to sell and convey to Bullock. The agreement was in writing and not recorded. The engine and its attachments were received and set upon land belonging to the defendant but which was then under lease to Prosperity Mining Company. That this machinery was affixed to the said mining land in the following manner: "A solid foundation of concrete or cement was constructed mostly below the surface of the ground. Upon this concrete foundation the said crude-oil engine was placed and securely and solidly bolted thereto and the whole inclosed within a certain portion of a wooden building erected by the said Prosperity Mining Company on the land of defendant." That said machinery could not be removed from the position in which it was placed by said Bullock without the partial destruction of said building and without the removal of said bolts, and consequent injury to said cement foundation. That defendant had no notice or knowledge of the terms and conditions under which said engine and attachments were purchased, and had no knowledge the same was not paid for. The lease between the defendant and said Prosperity Mining Company provided for the erection of certain mining improvements by the lessee, among which was the placing thereon of a mining plant and machinery. The lease also provided that in case of breach of covenants by lessee, the lease might at the option of the defendant terminate, and that the leased land and all the improvements placed thereon revert to the defendant. This lease had been duly recorded prior to the furnishing and setting up of said machinery. That plaintiff directed the placing of said machinery which was placed on said land for mining purposes, and was being so used when this action was commenced. That prior to beginning this action the said Prosperity Mining Company broke some of its covenants in said lease and the defendant terminated the lease and took possession of the land and all the property in controversy. This defendant then commenced proceedings to quiet title to said premises, and procured a judgment, which judgment is now final. That plaintiff here was not a party to said action, as the defendant here did not know plaintiff claimed any interest. That default was made in the payment of the purchase price of said machinery, and on October 17, 1903, the defendant being in possession of said machinery, the plaintiff demanded its return to him, which defendant refused, claiming title thereto and a right to retain possession thereof. The court found the title was in the plaintiff and the value of said property where it is located was $1,400 and that plaintiff had expended $50 in the pursuit of said property.

From these facts and findings it appears that said machinery could have been removed from the realty without destroying it, and that it was not essential to the support of any part of the realty. It was the intention of both the plaintiff and Bullock that this machinery should remain personal property, and there can be no doubt that as between the plaintiff and Bullock the engine and its attachments remained personal property. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107. The question arose in that case just as it does in this case, can this machinery be regarded as personalty in the hands of the defendant? The court in that case held that such machinery must be so treated, in the hands of the defendant. The facts in Hendy v. Dinkerhoff were identical with the facts in the case at bar, with this exception. In the Hendy Case the plaintiff leased a steam engine to one Lampson with which to run the mining operations on the land of the defendant with whom Lampson had an agreement to purchase the said mining land. At the time plaintiff leased the engine to Lampson he knew nothing of the agreement Lampson had with defendant to purchase the land, and the defendant never knew, until after he had taken possession of the mining land on default of Lampson, of the lease between plaintiff and Lampson, while in the case at bar the lease of the land made by defendant to Bullock was of record when plaintiff furnished the engine and its attachments to Bullock. In Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061, which was an action to foreclose a laborers' and materialmen's lien on a mine and the mining machinery which had been placed there under an agreement with the right to remove the same. At page 567 of 126 Cal., page 1062 of 58 Pac., the court said: "It is settled law that this personal property cannot be treated as part of the realty so far as the owner of the mine and the defendants are concerned," and quotes Hendy v. Dinkerhoff, supra, as authority. But appellant here claims that as plaintiff caused the engine to be placed in the mine in the manner above found and took a note for deferred payments, it thereby consented to the change of the property from personal to realty. But this cannot be, for the note referred to contains the following: "It is admitted and agreed that the said property so intrusted is the property of the Best Manufacturing Company and the legal title thereof is in the said Best Manufacturing Company and shall remain in them until they shall make the aforesaid sale and transfer after the principal and interest aforesaid shall be paid." Whatever may be said by Ewell on Fixtures as to annexation of chattels to realty, can have no application here, where the rule in California seems so well settled. Nor is the rule so harsh a one as appellant seems to think. The defendant recovered back from Bullock all he had given him when he leased him the mine, and in justice could have no right to anything more. If any injury was done to the realty by reason of attaching the engine to it and then severing and taking away, he had his remedy against his tenant. We do not think the suit to quiet title brought by defendant, to which plaintiff was not a party, could affect its right to recover its personal property. Plaintiff at no time made claim of any interest in the premises. Under the rule in the Hendy Case, his property was not a part of the realty, and, therefore, it was not necessary that he should have come into said suit for any purpose.

Judgment affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 712

EVARTS et al. v. SANTA BARBARA CONSOL. RY. CO.

(Court of Appeal, Second District, California. June 1, 1906. Rehearing Denied by Supreme Court July 30, 1906.)

1. MUNICIPAL CORPORATIONS — EXCAVATIONS IN STREETS—WARNING LIGHTS—NEGLIGENCE —INJURIES TO TRAVELERS—LIABILITY.

Where deceased drove into an excavation in a public street at night, which excavation had been made by defendant street railroad company, and left open without signal, warning lights, or guards of any character to notify the traveling public of its existence, defendant was guilty of negligence justifying a recovery for deceased's death proximately resulting from the injury so sustained.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1688, 1689.]

2. DEATH—DAMAGES—ELEMENTS—LOSS OF SOCIETY.

In an action for death of plaintiff's husband, plaintiff is entitled to recover for loss of deceased's society.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 116.]

3. SAME — SUPPORT OF FAMILY — PRESUMPTIONS.

Where, in an action for death of plaintiff's husband, it was proved that the domestic relations of plaintiff and her husband for the last 20 years of their married life had been the happiest that could exist, it would be presumed that decedent performed his duty to support his family.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 77.]

4. SAME—EARNING CAPACITY.

While, in an action for wrongful death, decedent's earning capacity may properly be considered in determining the amount of the verdict, it is not determinative thereof.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 96, 108, 109.]

5. SAME—EXCESSIVE DAMAGES.

In an action for the wrongful death of a regular practicing physician 44 years of age, a verdict in favor of plaintiff for $12,000 *held* not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125–130.]

6. SAME—EVIDENCE—ILL HEALTH OF WIFE.

In an action for wrongful death of plaintiff's husband, evidence as to plaintiff's ill health was admissible as tending to establish pecuniary loss.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 91.]

7. SAME—EVIDENCE—COMPLAINTS OF PAIN.

In an action for wrongful death, evidence of complaints, made by deceased of suffering and pain, were admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 81, 82.]

Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Annie T. Evarts and others against the Santa Barbara Consolidated Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. H. Trowbridge and Henley C. Booth, for appellant. W. S. Day, E. W. Squier and John Squier, for respondents.

ALLEN, J. Action for damages on account of alleged negligence. Judgment for plaintiffs, from which defendant appeals. The case was tried by a jury upon the testimony of the plaintiffs' witnesses alone; the defendant submitting no evidence. The evidence on the part of plaintiffs tended to show that defendant has caused an excavation to be made in a public street in the city of Santa Barbara, and suffered the same to remain open and unguarded and without signal lights to warn travelers of the danger. That Dr. Evarts, a man about 44 years of age, a practicing physician, who had engaged in such practice for 22 years, while driving upon such public street after dark on the evening of September 18, 1903, was precipitated into such excavation and received injuries from the effects of which death ensued on the 2d day of October following. Dr. Evarts is shown to have been a man of good health previous to the accident, and to have been a kind and indulgent father and an attentive husband to the wife, who was an invalid, and whose physical condition required much personal care and nursing from the husband. The jury rendered a verdict in favor of plaintiffs for $12,000, for which judgment was rendered.

Appellant's chief contention is based upon specifications as to the insufficiency of the evidence to support the verdict. An examination of all the evidence discloses ample evidence to warrant a verdict in plaintiff's favor. There was positive testimony and ample facts and circumstances tending to establish that defendant caused the excavation to be made, and there is nothing in the record indicating any authority of the municipality in relation thereto; and, from the record, defendant appears to have made such excavation as a trespasser upon a public street. In addition to this, were we to assume the grant of a privilege for such excavation, no signal or warning lights are shown to have been placed, and no guards placed or precautions taken to notify the traveling public of such excavation; but, on the contrary, their absence is shown. The fact that a witness heard a sudden crash as of "something falling from a height," that there was heard at the same time exclamations and language usually employed by men in the management and driving of horses, and that immediately thereafter deceased, the horse, and a portion of the buggy were found in such excavation, were facts from which the jury might well determine that the deceased had been precipitated into such excavation. Further, that he was in a dazed condition when so found in the excavation; that soon thereafter he complained of pain and injury, was pale, trembling, and unable to attend to his professional duties; that the following day he complained of pain in his left side, of having a smothered feeling, was coughing and spitting up blood; that afterwards, and before his death, bruises about the left side were discovered; that these pains and difficulties increased and continued until his death, which resulted from acute pericarditis, which is shown to be an ailment frequently arising from an injury. From these facts, and from the expert testimony based thereon, it is clear that this man's death was directly attributable to the injury. The jury was fully justified in determining that the death of this man was proximately caused by the negligence of the defendant as charged in the complaint. There is no lack of evidence showing a causal connection between the negligence and the death, as was the case in the numerous authorities cited by appellant.

There was no error in striking from a proposed instruction the words, "nor for loss of the comfort of his society as such." The court had already properly instructed the jury that the loss of his society might be considered in estimating pecuniary damages. The proposed instruction, which was modified, could only be understood as saying that the loss of his society as such was not part of the damages allowable. That such loss of society is a part of pecuniary damages is determined in Dyas v. Southern Pacific Co., 140 Cal. 296, 73 Pac. 972, and by our Supreme Court in many other cases.

It is also insisted that the amount of the verdict is based upon a mere surmise, conjecture, and guess, and is excessive. This arises from the fact that the actual earning capacity of the deceased was not shown; and it is claimed that it was not shown that he supported his family. As to the last claim, the fact that "the domestic relations for the 20 years of married life had been of the happiest that could exist" certainly indicates that the obligations of support had been performed. As to the question of earning capacity of the deceased, while it may properly be considered in determining the amount of the verdict, the same is not determinative of such amount. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72. In this case, as in that of Cederberg v. Robison, 100 Cal. 96, 34 Pac. 625, and Butler v. Ashworth, 102 Cal. 663, 36 Pac. 922, there was not presented to the jury the value of the services of the deceased to his patients, or the amount of his earnings, yet there was evidence that he was a regular practicing physician, that he possessed a number of patients, some of whom he was attending at the time of his injury, and that he was a strong man in the prime of life; from which facts alone the jury would be authorized to give substantial damages. The amount of the pecuniary loss to the family was for the jury to decide. We cannot say that it was excessive. "It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." Harrison v. Sutter Street Ry. Co., 116 Cal. 164, 47 Pac. 1019. The appellate court is bound by the same rule. Mize v. Hearst, 130 Cal. 630, 63 Pac. 30; Skelton v. Pacific Lumber Co., 140 Cal. 512, 74 Pac. 13.

The evidence admitted as to the ill health of the wife was not improper. Her situation and condition tended in some degree to establish the pecuniary loss sustained. Cook v. Clay Street Hill R. Co., 60 Cal. 609; Lange v. Schoettler, 115 Cal. 390, 47 Pac. 139; Keast v. Santa Ysabel G. M. Co., 136 Cal. 260, 68 Pac. 771. The damages to be assessed are plaintiffs' damages; compensation to themselves for pecuniary injury. Webster v. Norwegian Mining Co., 137 Cal. 400, 70 Pac. 276, 92 Am. St. Rep. 181.

There was no error in admitting testimony of witnesses as to complaints made by deceased of suffering and pain. None of the testimony referred to a statement of past condition. Lange v. Schoettler, 115 Cal. 390, 47 Pac. 139; Green v. Pacific Lumber Co., 130 Cal. 440, 62 Pac. 747.

There was no evidence of contributory negligence to which instruction 25 was applicable, and it was, therefore, properly refused.

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 648

PEOPLE v. ELDRIDGE.

(Court of Appeal, Second District, California. May 24, 1906.)

1. HOMICIDE—INFORMATION—CONSTRUCTION.
Where an information charged the unlawful murdering and killing of a human being, to wit, the infant, unnamed female child of defendant and his wife, "the said infant child being the child born to said" defendant and his wife on or before a specified date, the information sufficiently charged that the child was born alive, and was, therefore, not objectionable for uncertainty as to whether the child was killed before or after birth.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 203–207.]

2. CRIMINAL LAW—CONFESSIONS—EFFECT.
In a prosecution for infanticide, defendant's admission or confession of guilt was insufficient to sustain a conviction without independent evidence sufficient to establish beyond a reasonable doubt that the death of the infant was caused by a criminal or unlawful act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1225, 1226.]

3. HOMICIDE — INFANTICIDE — CORPUS DELICTI.
In a prosecution for infanticide, evidence *held* insufficient to prove the corpus delicti.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 475.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Glover H. Eldridge was convicted of manslaughter, and he appeals. Reversed.

Alfred Daggett and Chas. G. Lamberson, for appellant. U. S. Webb, Atty. Gen., Daniel McFadzean, Dist. Atty., and R. F. Roth, Deputy Dist. Atty., for the People.

ALLEN, J. The defendant, under an information charging him with murder, was convicted of manslaughter. From the judgment and an order denying a new trial, he appeals.

Appellant contends that the information under which he was tried was uncertain as to the offense charged. This information charged the unlawful murdering and killing of a human being, to wit, "the infant, unnamed female child of said Glover H. Eldridge and Mabel Eldridge, wife of said Glover H. Eldridge, the said infant child being the child born to the said Glover H. Eldridge and said Mabel Eldridge on or about said twentieth day of February, 1905." And it is insisted that such charge might include the killing before birth, and therefore it cannot be determined from the information whether murder or abortion was intended to be charged. The only reasonable construction which can be given to the language employed in the information is to say that it charges that a child born to the defendant was by him unlawfully killed and murdered. That it was born is clearly stated; that it could be killed after birth of necessity implies that it was born alive, and we think the charge of murder was set forth with the degree of certainty required.

Upon the trial of the case, the court properly instructed the jury as follows: "Without independent evidence which satisfies the minds of the jury beyond a reasonable doubt that the death of the infant referred to in the information here was caused by a criminal or unlawful act, the confession or admission of the defendant of his guilt would not be sufficient to law to warrant the jury in finding the defendant guilty." A minute examination of the record, keeping in mind the rule of law above stated, discloses that, independent of the alleged confession, the following facts only were established by evidence which, in any sense, can be termed satisfactory, namely: That a child was born of defendant and his wife; that it died; that before it died, defendant, for the claimed purpose of alleviating the apparent pain of the child, at the instance of his wife, but under protest, administered not to exceed four drops of chloroform, which he dropped upon a handkerchief and placed the handkerchief for a few seconds on the child's face and then removed it; that a moment thereafter the mother requested to see the child, and when the defendant undertook to lift it found it was dead; that thereafter the defendant placed the child in a crude box and buried it in the garden adjacent to the house; that afterwards the body was exhumed and a handkerchief was found over its face, not the same handkerchief, however, used in administering the chloroform. No trace of chloroform was discovered upon the handkerchief found upon the child's face. It is in evidence and undisputed that the amount of chloroform placed upon the handkerchief would not produce death. A post mortem examination revealed nothing as indicating a violent or unnatural death. A few weeks before the birth the mother received an injury from which she suffered pain until the birth of the child. This child had been begotten before marriage. When confinement was imminent, a physician was summoned, but did not arrive until after the birth and burial of the child. An attendant, who was a sister of the defendant, told the physician upon his arrival that it was a premature birth and that the placenta had been removed. The physician, however, visited the sick room and removed what appeared to be a fully developed placenta, or one nearly so. It does not appear that the defendant, although present in the same room, was in a position where he could hear and understand what was said by the attendant to the physician. The foregoing being substantially all of the independent testimony introduced by the people, we are of opinion that the same falls short of establishing the commission of a crime, without the establishment of which no conviction could be had.

Entertaining these views, it is not necessary to discuss the points involved in the admission of the alleged confession, nor of its scope or sufficiency to justify a conviction; nor the many other points raised by the specifications of error. There being no satisfactory evidence of the corpus delicti, the verdict and judgment as a matter of law are erroneous.

Judgment and order reversed.

We concur: GRAY, P. J.; SMITH, J.

3 Cal. App. 472

Ex parte MUNDELL.

(Court of Appeal, Second District, California. April 30, 1906.)

INFANTS—CUSTODY—GUARDIANSHIP.

St. 1905, p. 44, c. 43, § 1, relating to the care of dependent children, defines the words "dependent child" to include any child under 16 years of age "found wandering," and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person, in whose care it may be, is unfit for such child; and section 3 requires the petition to contain a statement of the facts constituting such dependency, etc. *Held*, that the fact that a child was without guardianship was only material under such sections as applied to a child found wandering, etc., and that a statement in the petition that her home was an unfit place for her, unsupported by any other statement of negligence, cruelty, or depravity on the part of the person in whose care she was, was insufficient to confer jurisdiction on the court to place her in the custody of another.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 19.]

Application by Edward Mundell for a writ of habeas corpus to regain possession of his infant child. Writ granted.

Hester & Ladd, for petitioner. D. Allen, Deputy Dist. Atty., and J. C. Rossiter, for respondent.

ALLEN, J. Petitioner, the father of a female child, alleges that she is restrained of her liberty by one Dodds, which restraint is unlawful in that the child is so restrained under an order of the superior court of Los Angeles county sitting in special session as a juvenile court under the law of the state relating to dependent children, and that such child is not a dependent child under such act. The return of Dodds shows that, upon the filing of a petition in which it was alleged that said child was of the age of 15 years and was a dependent child under the act approved February 26, 1903 (St. 1905, p. 44, c. 43), in this, "that the said child is without proper guardianship and her home is an unfit place for such child," a warrant was issued, and subsequently upon the hearing the court found said child to be under the age of 16 years, and accordingly ordered the child into the custody of the respondent, as probation officer, to be by him placed in the Home of the Good Shepherd for six months, or until further order of the court; that under such order, and not otherwise, was he restraining such child of her liberty.

The act of the Legislature before mentioned provides (section 1) that "the words 'dependent child' shall mean any child under the age of sixteen years, * * * found wandering and not having any home or any settled place of abode, or proper guardianship, or visible means of subsistence; * * * or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child." The affidavit upon which the proceedings and order were based is insufficient to confer jurisdiction upon the superior court. Section 3 (page 45) of the act requires that the petition shall contain a statement of the facts constituting such dependency and shall be verified. The fact that the child was without guardianship is only material under the act as applied to one found wandering. The statement that her home is an unfit place for such child is not supported by any other statement of neglect, cruelty, or depravity on the part of the person in whose care it was. The petitioner's affidavit being insufficient to confer jurisdiction, the order of the court is no justification upon the part of the respondent.

The child, Nellie Mundell, is discharged from the custody of the probation officer, and those in whose charge she has been placed by the said order of the superior court are directed to release her.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 502

PEOPLE v. SULLIVAN.

(Court of Appeal, Third District, California. May 15, 1906.)

1. Criminal Law — Evidence — Statements of Third Persons.

In a prosecution for homicide, statements of deceased accusing defendant of inflicting the wounds from which deceased subsequently died, made in defendant's presence, were admissible, not as evidence of the truth of the facts stated, but to show what it was that called for a reply from defendant, and that his silence indicated an acquiescence in the truth of the statements.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 968.]

2. Same—Restraint.

That accused was under arrest at the time the statements were made, and that the police officers refused to permit him to communicate with his companion, who was charged with the same offense, was no excuse for defendant's failure to reply to deceased's accusatory statements.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 949, 968–972.]

3. Same—New Trial—Evidence.

Evidence of accused, given on the trial of his companion, charged with the same offense, after accused had been convicted, was unavailable, on a motion by accused for a new trial, to rebut evidence of witnesses given on his trial.

4. Homicide—New Trial—Newly Discovered Evidence.

Where, in a prosecution for homicide, accused and his companion were jointly charged with the same offense, but separately tried, and, though accused testified that he did not shoot deceased, he did not testify that his companion did the shooting, it was not an abuse of discretion for the trial court to refuse to grant accused a new trial for newly discovered evidence, consisting of the affidavit of the companion, after he had been convicted of manslaughter, that he shot deceased in self-defense, and that accused did not aid or abet therein, and was not present, and did not know by whom the shooting was done.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 687.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Charles Sullivan was convicted of murder in the second degree, and he appeals. Affirmed.

Nathan C. Coghlan and W. T. Hume, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of murder in the second degree and was sentenced to imprisonment during his natural life. He appeals from the order denying his motion for a new trial and from the judgment of conviction.

Joseph M. Sullivan testified: That about midnight of August 10, 1903, defendant and his codefendant, Powell, were fighting one Delehanty near the corner of First and Folsom streets in the city of San Francisco, when Officer Sample came up and separated them, and defendant and Powell went away along Folsom street in the direction of Second street. Sample followed them a short distance, and came back to where he first encountered the parties, and said to witness, "What I should have done was to use my club." The witness told him the affair was over and the best thing to do was "to drop it as it was." Sample said "No," and started after them again. This was the last this witness saw of them. Witness Shanberger, a lodger at No. 545 Folsom street, south side, testified that he heard a noise on the street shortly after 12 o'clock; that he got out of bed and looked out of the window and saw two men standing on the opposite sidewalk; that one of these men shot a pistol twice, and both men ran together along the same side of Folsom street towards Second street and towards the election booth on the street; that one crossed to the south side of the street and the other man on the north side to the election booth, where he lost sight of them. After they had run away witness looked where he first saw them, and he saw a man lying on the sidewalk on the north side of Folsom street. This man was Sample, the deceased, alleged victim of defendant and Powell. There was evidence tending to show that the two men seen by this witness were defendant and Powell, one of whom must have fired the fatal shot. Both were arrested within a very short time after the shooting, and while near to, and in the act of running away from, the scene of the homicide, and were taken to the place where the wounded man was lying. Policeman Nobmann, one of the arresting officers testified without objection that when the prisoners were brought there he asked Sample who shot him, and he replied: "'A man by the name of Sullivan and another man whose name I don't know.' He said: 'The other man I don't know attacked me first.' We asked him—I says to him: 'Are these the two men?' And he says: 'Yes; Sullivan, the smaller man, shot me, and the other man, whose name I don't know, attacked me first.'" This conversation was within hearing of both defendants—standing within four or five feet of Sample—and Nobmann testified that "neither man said anything in response to that." Officer Clark, who arrested Sullivan, gave similar testimony. When first arrested, Sullivan, as Clark testified, pointed to Powell as the man who fired the shots. There was sufficient evidence, as the record stands, to support the verdict, and we do not understand defendant to claim otherwise. His claim is, rather, that the record contains prejudicial error, and particularly that the affidavit of Powell that he, and not defendant, fired the fatal shot, entitles defendant to a new trial, the refusal of which is claimed as error.

1. Immediately following his injuries Sample was removed to the Harbor Receiving Hospital. He was then placed under examination by Dr. Millar, who testified: "I heard a statement by the wounded man in the presence and hearing of the two defendants, while the wounded man was on the operating table. The defendants were in such a position that they must have heard it." Upon being asked what was said by Sample respecting his injuries and by whom caused, in the presence of Sullivan, the defendant, objection was made on the ground that the proper foundation had not been laid, and that the testimony of Police Officer Nobmann "shows clearly it is incompetent." The objection was overruled, and exception taken by defendant. The witness answered: "He said that he went there, was attacked by the two defendants, that they knocked him down and took his revolver away from him, and that Sullivan shot him twice. I don't remember any statement made by the defendant Sullivan, when that statement was made in his presence and hearing. The codefendant Powell, in whose presence and hearing the statement was made, did not, that I remember, say anything." On cross-examination he testified: "Sample talked in an audible voice, distinctly. There could be no misunderstanding of what he said." Witness Flood, assistant warrant and bond clerk in the district attorney's office, was present and endeavored to take down Sample's dying statement. This witness testified somewhat fully to the particulars of the encounter between Sample and both defendants as narrated by Sample. He testified that Sample "positively identified both of the defendants as being the men that were engaged in the struggle with him and the man that shot him. He said, while the grappling and struggling was going on, that Sullivan had shot him. Neither of the defendants made any answer to these statements made in their presence." Witness Duke, lieutenant of police, was present and testified that he heard Sample say that Sullivan shot him and that "Sullivan said nothing in response to that declaration." Officer Nobmann testified to having heard Sample make the statement referred to by the other witnesses and that neither defendant made any reply in response to the accusation of Sample. Defendant does not seriously contend that these witnesses misstated the facts. His contention is that he was under restraint and was not allowed to speak; that he and his codefendant had been roughly admonished by the police officers not to speak; and that the evidence was highly prejudicial as tending to show guilt by remaining silent under circumstances when he was called upon to deny the accusation.

Officer Nobmann was called by defendant as his witness, and, testifying as to Sample's statement and defendant's silence, further said: "I would not permit him or the other defendant to talk together in a whisper or anything I could not hear. These were my instructions from Lieut. Duke, not to allow them to talk in a tone of voice I could not hear. I don't think Lieut. Duke added to these instructions the words 'nor to anybody else.' I told defendants that I would not let them speak among themselves when I could not hear it. Q. Let me refresh your memory upon this point. Page 96 of the testimony in the police court in this case, commencing with the first question at the top of the page: 'Mr. Nobmann, is it not true that Sullivan said, "Hold on, Bob, hold on?" [referring to Sample]. And did you turn around and state: "You shut up, or I will break your face?" A. No, sir. Q. Was anything of that kind said? A. No, no. Q. Nothing at all? A. Nothing at all. Didn't Mr. Sullivan at any time undertake to stop Mr. Sample when he was talking about who shot him? A. No, sir. Q. Did Mr. Powell? A. No, sir. Q. Did Mr. Sullivan or Mr. Powell say anything to any other person there while he was making this statement? A. I couldn't say. Q. You had them in your charge? A. Yes, I had them in my charge certainly; but we wouldn't let them say anything, in fact, to anybody. Lieut. Duke ordered me not to let them talk to themselves.' Did you testify that way in the police court in this city? A. I must have; yes, sir. It was undoubtedly true." Cross-examination (to Mr. Ferral): "As a matter of fact neither I, nor anybody at all, did interfere with their speaking at any time while the statement was being made by the wounded man. Q. (By Mr. Eddy.) Did you, in the court below, testify as follows: 'I had them in charge, certainly; but we would not let them say anything, in fact, to anybody. Lieut. Duke ordered me not to let them talk even to themselves.' Did you so testify in the courtroom? A. I must have. Q. Was it true? A. Yes, sir. Mr. Ferral: Q. Did you in point of fact interfere with them, or either of them, in speaking or saying or doing anything whatever when Robert Sample, the wounded man, was making his statement in their presence and hearing? A. No, sir. The Court: Let me have that testimony. Listen to this, officer: 'You had them in your charge? A. Yes, I had them in my charge, certainly; but we would not let them say anything, in fact, to anybody. Lieut. Duke ordered me not to let them talk to themselves.' You have stated what is down here is true in answer to the question of Mr. Eddy. In reply to the inquiry of the district attorney, you say that you did not prevent them from talking to anybody, except that you would not allow them to talk to themselves. Did you prevent them from talking to any other person? A. Nobody else wanted to talk to them. Q. What do you mean when you say this statement is true: 'Yes, I had them in charge, certainly; but we wouldn't let them say anything in fact to anybody. Lieut. Duke ordered me not to let them talk to themselves?' A. I don't know I don't remember that part of it. The court: Q. Do you modify your statement, then, that you don't recall if they would not let them say anything to anybody? A. The fact is, they were together and Lieut. Duke said: 'Don't let those men talk to each other, except in a tone of voice that you can hear.' Mr. Ferral: Q. Did anybody in any way interfere with them when the statement was made by the wounded man in their hearing? A. Not to my recollection. Q. Would you not recollect it if it occurred? A. I would not be sure as to that—as to whether anybody tried to talk to them or not. Q. Have you any memory of anybody interfering with them or trying to stop them from talking? A. Excepting myself talking between the two of them. Q. I say, in regard to talking in response to what the wounded man said, did you or anybody else interfere with them in any way, shape or manner from answering that? A. Not that I remember; no."

Lieut. Duke was at the bedside of Sample when the statements above referred to were made. He testified: "I asked Sullivan what he knew about this case, and he declined to talk, and shortly after I asked these men the defendants stepped slightly to one side and commenced to talk in an undertone, and I said to officer Nobmann: 'Don't let these men talk unless you know what they are talking about, and, if they have anything to say, let them say it in the open. If they won't speak so that you can hear them, don't let them talk at all.' Officer Nobmann followed that instruction. I then spoke to Officer Sample, and he told me how the thing occurred. It was substantially the same as the statement that he made. He told me in the presence and hearing of these two defendants. I know they were near enough to hear it and did hear it. I took the precaution to tell them, if they could not hear every word that was said, to let us know so that they might hear it. They were seated opposite the body and nearer to the deceased than I was; that is, within a foot or so nearer. I was at the edge of the bed, and Officer Sample's head was at the head of the bed, and they were between Officer Sample and myself. Sample stated that he had received information that a fight was in progress near First and Folsom streets, and he went there; but I don't remember whether he got there before the fight was over or not. But at any rate he felt that it was his duty to place the defendants Powell and Sullivan under arrest, and he was grappling with Powell when the defendant reached for his pocket and took something out of his pocket, and very shortly after that he was shot, and I asked him if it was possible for anybody else to have done the shooting but Sullivan—he mentioned Sullivan's name—and said: 'Do you know Sulivan personally?' and he said: 'Yes.' He said very little else in regard to the shooting. He simply stated that he had been shot and that he knew that Sullivan had done the shooting. He said that Sullivan took something out of his (Sample's) pocket. He did not say anything as to with what pistol he was shot. He did not say anything as to that to me. But his pistol, or rather the pistol, was there in the possession of Officer Nobmann, and I showed him that pistol, and asked him if that was his pistol, and he said that it was, and that it had been in his pocket shortly previous to the time of the fight or the trouble. I can identify the pistol shown me as the same pistol that was shown to Officer Sample, and which he identified as his pistol. I noticed its condition, and there was one empty chamber. I mean to say by that there was no shell in it, and there was three chambers with shells and no bullets, and two chambers with the bullets in that had not been discharged, * * * Sample said that while he grappled with Powell, Sullivan took something out of his pocket and then shot him. When the wounded man made that statement in the presence and hearing of Sullivan, he (Sullivan) said nothing in response to that declaration, and Powell did not say anything to the statement that he (Sample) had grappled with Powell."

Witness Rosa Cozens was a witness for defendant. She testified that, when the defendants were brought to the place where Sample was lying when shot, she heard one of the defendants say that he "didn't do the shooting," and asked an officer if he (defendant) "couldn't send word home," and the officer replied, "No, shut up." Defendant testified that at that time he said to the officer: "I didn't do it. I don't know anything about it"—and was told "to shut up." This, however, occurred some time before the statement was made at the hospital. In his testimony at the trial, defendant said nothing in chief or on cross-examination as to what took place at the hospital. We have only the uncontradicted testimony of the witnesses Duke, Nobmann, Millar, and Flood, who were at the bedside of Sample. On the cross-examination of defendant, the attorney for the people asked him if he did not "hear the officer make any statement that he (Sullivan) shot him while he was grappling with Powell," but defendant's counsel objected, and the objection was sustained, probably because not proper cross-examination.

Powell's trial followed after the conviction of Sullivan and at this latter trial Powell did not testify; but Sullivan, his codefendant, was called as a witness for Powell and gave the following testimony: "Q. Do you remember on the morning of the 11th day of August last? A. Yes, sir. Q. That you were at the Harbor Hospital? A. Yes, sir. Q. During the time that a purported statement came from the lips of Sample—deceased—I will ask you whether or not you were allowed to remonstrate or say anything for or against that statement? A. No, sir; I was not allowed. Q. What was it that the officer said to you? A. They told me to shut up. Mr. Coghlan (Defendant's Attorney): That is all." Why defendant did not give this testimony at his own trial is not explained. The other witnesses, present at the hospital, denied that defendant was told to "shut up." The testimony of defendant given at Powell's trial cannot be considered as rebutting the testimony of the other witnesses as to what took place at the Harbor Hospital. The testimony stands uncontradicted.

We have given this testimony in full, inasmuch as defendant places his claim for a new trial in considerable degree upon the inadmissibility of Sample's statements. Passing, for the moment, the element of restraint alleged to be present in the question, the statements were admissible, not as of themselves evidence of the truth of the facts stated, but simply to show what it was that called for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statements. People v. McCrea, 32 Cal. 98; People v. Ah Yute, 53 Cal. 613; People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Philbon, 138 Cal. 530, 71 Pac. 650. It has been held that silence, when a party is under arrest, does not sustain the hypothesis of acquiescence, because the party is not free to speak. But our Supreme Court holds that an accusation of crime does call for a reply, even from a person under arrest. In People v. Amaya, supra, the question is fully considered by Chief Justice Beatty. So held, also, in People v. McCrea, supra, and People v. Ah Yute, supra.

It remains, then, to consider whether the defendant was prevented from denying the accusation made by the dying officer because of any command to defendant to keep silent by Officer Nobmann, or because of any threatening conduct by Nobmann from which it may be reasonably inferred that defendant did not feel himself at liberty to deny the accusation so circumstantially made against him. It must be remembered that the tragedy occurred some little time before Sample was taken to the hospital. Defendant had full opportunity to reflect upon the course of conduct he would pursue while under arrest. It was not the case of an accusation made by an excited complaining party to an officer in the act of arresting or placing the accused party in confinement, when the circumstances might have accounted for the latter's silence. The wounded officer spoke with the shadow of death resting upon him, and his assailant stood by with all his faculties unimpaired and so situated as to make it most natural for him promptly to deny the charge made against him. He evidently was not a timid person, easily cowed into abject submission or frightened into guilty silence. According to his own testimony, Sample had assaulted him and Powell with a club, and he knocked Sample down just before the latter was shot. The testimony does not show that he was prevented from denying the statement of Sample, or protesting his innocence of having fired the fatal shot. He was forbidden to speak to his codefendant, so as not to be heard by the officers; but we see nothing in the evidence from which it can be inferred that he was prevented from avowing innocence, or denying that he did the shooting, or making any other statement he might have wished to make. He was, on the contrary, invited by Lieut. Duke to state "what he knew about the case, and he declined to talk." His testimony at Powell's trial, that he was told "to shut up," at most is in conflict with the testimony of the other persons present, and is not given in connection with all that occurred at that time, or as to when during the time or in what relation to the attending circumstances he was told "to shut up," if it be admitted that he was so told. And, as above stated, his testimony at Powell's trial has no bearing upon the question here presented. We think the testimony objected to was rightly admitted.

2. It is strenuously urged that a new trial should be granted on the affidavit of codefendant Powell that he, and not defendant, shot Officer Sample. The affidavit of Powell was made after his trial and conviction for the same crime as that charged against Sullivan, and after he was under the protection of the rule of once in jeopardy. He stated that he himself, and not Sullivan, fired "into the body and person of Sample"; that Sullivan "did not aid or abet in any way

in the firing of the shots which caused the death of said Sample"; that he did not disclose this fact to any one until after Sullivan's conviction, and that no person knew, prior to Sullivan's conviction, that he, Powell, "would state that he (affiant) did fire the shots that caused the death of said Sample"; that he fired "said fatal shots in self-defense"; that no person other than himself "knew, or could know, that he (affiant) did fire the said shots"; and "that said Sullivan was not there present at the time and place when he (affiant) fired said shots as aforesaid, and could not have known that he (affiant) did fire the said shots." Joseph Mann, bailiff in charge of Powell during the latter's trial, testified that he heard Powell state in the presence of his attorneys that he (Powell) grappled with Sample and in self-defense took his pistol away from him and shot him; that he was asked by his attorneys what he would testify to in his own behalf if he went upon the stand, and thereupon made the above statement. He very prudently refrained from testifying, and was convicted of manslaughter, and when arraigned for judgment requested immediate sentence. At Sullivan's trial, Sullivan testified to the circumstances as they occurred before and after the shooting, as he understood it, and he testified that he and Powell were together when Sample assaulted them; that in the encounter he knocked Sample down, and thereupon he and Powell ran away together; and that the shooting occurred after they had gotten some distance away, as he inferred by some men he saw approaching the place where the officer lay. There can be no doubt but that each of these men knew every circumstance and fact of the affair known by the other. Sullivan testified that he did not shoot Sample, and, whether true or false, he knew whether or not Powell did it. Having this knowledge, it cannot be said that Powell's statement is newly discovered evidence. Powell was intrenched behind his judgment of conviction for manslaughter, which he quickly accepted without moving for a new trial, and was safe from further punishment in his endeavor to serve his codefendant. The trial court was in better position to judge of the truth or falsity of Powell's affidavit than we can be, and the affidavit was to be judged of by the court in connection with all the evidence in the case. People v. Merkle, 89 Cal. 82, 26 Pac. 642.

Defendant's motion for a new trial was addressed to the sound discretion of the trial court, and the presumption is that this discretion was properly exercised in denying the motion; it appearing that Powell's affidavit was in conflict with the testimony of Sullivan and other testimony in the case. People v. Holmes, 126 Cal. 462, 58 Pac. 917. A motion for new trial on the ground of newly discovered evidence is looked upon with suspicion and disfavor, and a party who relies upon this ground must make a strong case, both in respect of diligence on his part in preparing for the new trial and as to the truth and materiality of the newly discovered evidence. If he fails in either respect, his motion must be denied. People v. Rushing, 130 Cal. 449, 62 Pac. 742. It is true that, with knowledge of what Powell knew, still defendant was in no position to compel Powell to testify, as it would have tended to convict himself. This was an embarrassing situation for Sullivan, and in some respects was similar to the case where a witness is incompetent and subsequently his competency is restored. But the courts have held that in this latter case the disability of the witness subsequently removed would not conclusively entitle the party to a new trial. As was said in People v. Merkle, supra: "Undoubtedly it was the duty of the court below, in passing upon the appellant's motion, to give most careful consideration to those affidavits, and if, when weighed in connection with the evidence given upon the trial, there would be in the mind of the judge a reasonable doubt as to the justness of the verdict, a new trial should have been granted." Each case must be determined by its circumstances, and the new trial granted or refused according to the view taken of the whole evidence, in connection with the alleged newly discovered evidence, as in this case. Granting or refusing a new trial must necessarily rest largely in the discretion of the court in which the trial has been had, and we cannot say, from the record before us, that the court failed to exercise a fair and reasonable judgment in denying the motion.

There are some other assignments of errors in excluding or admitting testimony, but they do not seem to require notice.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J; BUCKLES, J.

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3 Cal. App. 572

CEDERBURG v. DUTRA.

(Court of Appeal, Third District, California. May 15, 1906.)

1. Waters and Water Courses — Superior Land Owner—Easements.

The owner of upland has an easement over the land of the lower adjacent proprietor to discharge surface waters over the same, as it is accustomed naturally to flow; the owner of land lower down having no right to interrupt such flow to the injury of the upper proprietor.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 127, 128.]

2. Same—Water Courses—Sloughs.

Where water flowed in a slough having well-defined banks leading from a river to a creek, such slough constituted a water course, though at some points the channel spread out and the water was quite shallow.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 30.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by S. S. Cederburg against Manuel Dutra. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Bradley & Farnsworth, R. J. Hudson, and J. F. Pryor, for appellant. Irwin & Irwin, for respondent.

CHIPMAN, P. J. Action for perpetual injunction restraining defendant from constructing or maintaining a dam in and across a certain channel. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, defendant appeals.

The court, among others, made the following findings: "(4) That there is a water course having its source in Kings river at a point about five (5) miles north of the lands of plaintiff, extending in a southerly direction down to the lands of plaintiff, thence in a southeasterly direction over and across the lands of plaintiff, and down to and over and across the lands of defendant, and thence emptying the waters which flow therein into Cross creek at a point about two miles southeast of the lands of defendant. That at the source or head of said water course, it has precipitous banks ranging from two to five feet in height, and said water course has a well-defined channel from its said course down to and over and across the lands of plaintiff, and down to and over and across and beyond the lands of defendant. (5) That during the irrigating and winter and spring seasons of each year large quantities of water run into and flow along and in and through said channel, and over and across the lands of plaintiff, and thence along and through said channel down to and over and across the lands of said defendant, and that said water course has been in existence and maintained over and across the premises of plaintiff and the premises of said defendant for more than six years last past. (6) That in the northeast corner of said quarter of land owned by said plaintiff there is a depression or swale, and that during the irrigating and winter and spring seasons of each year large quantities of percolating water accumulates and has accumulated in and upon said premises of plaintiff, and that this swale is connected with and forms a part of the channel mentioned and described in finding 4 herein, and that the said plaintiff, in or about the year 1896, for the purpose of draining and freeing his said lands from said percolating waters, and causing the water that flows in the said channel which spreads out in said swale on said plaintiff's land to flow in a more direct and speedy manner over plaintiff's said land and by a shorter route, dug and constructed an artificial ditch, beginning at the east line of his said premises and from a point in said depression or swale extending in a southeasterly direction over and along the lands of one Dorman, connecting said artificial ditch with said water course hereinbefore described, at a point about 200 feet north of the north line of the lands of said defendant, and that said artificial ditch has been kept and maintained by said plaintiff openly, peaceably, continuously, uninterruptedly, and adversely to the defendant and to the whole world for more than six years last past, for the purpose of conducting said percolating water so accumulated in said depression or swale down to and into said water course hereinbefore described. (7) That the defendant threatens to unlawfully, and without the consent of plaintiff, erect, build, and construct across said water course a large dam extending across the entire width of said water course, and of such size and strength and material as to completely obstruct the flow of water running, or which might and will run, in, through, along, and down said water course."

Appellant contends that the evidence fails to show the existence of a natural water course. The court did not, in terms, find the existence of a natural water course, but did find that the channel involved was a water course. The pleadings were framed and the trial seems to have proceeded on the theory that the channel referred to is a natural water course. The distinction is not material, for the definition of a water course, such as is here in question, calls for such a drainway or runoff channel as is the result of natural causes. There was much testimony tending to show that the channel in question has been known in past years as "Burris Slough," and that it formed a natural drainage from Kings river to Cross creek. Witness McQuiddy testified: "I have known that slough for more than 28 years. The head of the slough is on the south bank of Kings river. Its course for a distance is almost south, and then it bears off to the southeast for a mile or so, then runs pretty nearly due south to Cross creek. It [Cross creek] is a natural stream that lays a few miles south of Kings river. Kings river is also a natural stream. This slough received its waters from Kings river and emptied into Cross creek. When I first knew this slough it was a well defined channel." It appeared from the testimony of this and other witnesses that in its course the channel spread out in places and was quite shallow, and again would narrow down to a few feet, with well-defined banks, and so continue on its course to Cross creek, varying in width, but always confining the water in a more or less plainly defined channel to Cross creek, into which it discharged the flood waters coming from Kings river and the rainfall and seepage water which drained into this slough. Many years ago a levee was constructed at the head of the slough on Kings river, which practically shut off the flow into the slough from that river, except in seasons of extreme flood waters; but the slough still remained as a natural drainage for the rainfall and for water seeping or percolating from the bordering land which was being irrigated by artificial ditches. The general character and the natural uses of the slough for drainage purposes were not changed by the levee at its head. The evidence showed that the ditch cut by plaintiff to shorten the channel at the point above defendant's land had for its object the hastening of the flow of water at that particular point, but did not injuriously affect defendant's land. It was stated in Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169, as "settled law in this state that plaintiff as the owner of the upper land has an easement over the lower adjacent land of defendant to discharge surface water as it is accustomed naturally to flow, and defendant had no right to interrupt such flow to plaintiff's injury" (citing cases). It was said in Los Angeles Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face or tract of land, occasioned by unusual freshets or other extraordinay causes." In Sanguinetti v. Pock, supra, the opinion pointed out the features wanting to make the drainage there involved a water course. But here the features or characteristics of what the law defines to be water course clearly appear, and we think the evidence supports the findings.

It is not necessary to consider whether or not the finding that the ditch cut by plaintiff has been in adverse use for more than the statutory period is sustained by the evidence. The findings as to the water course and its natural adaptation for drainage of the riparian land are sufficient to support the judgment. Appellant calls attention to the recent case of Wood v. Moulton, 146 Cal. 317, 80 Pac. 92. An examination of the facts in that case will show that there was no pretense of the existence of a natural drainage channel by which the water complained of was accustomed to flow across plaintiff's and defendant's lands.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 602

STATE v. CAMPBELL.

(Court of Appeal, Third District, California. May 15, 1906.)

1. VENUE — PLACE OF TRIAL — CHANGE OF VENUE—ACTIONS BY STATE.

Code Civ. Proc. §§ 395, 396, declaring that all actions for the recovery of money must be tried in the county where the defendant resides, unless he directly or impliedly consents to a trial elsewhere, is applicable to an action by the state to recover money which came into defendant's hands in his official capacity as medical superintendent of one of the state insane asylums, notwithstanding Pol. Code, § 433, subd. 16, enumerating the duties of the Controller, and declaring that he shall have the right to institute suits in the name of the state against persons who have become possessed of public money or property and fail to pay over the same, of which suits the courts of "Sacramento county have jurisdiction, without regard to the residence of the defendants."

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 20.]

2. STATUTES — CONSTRUCTION — CODES — CONFLICTING PROVISIONS—VENUE OF ACTIONS.

Pol. Code, § 4481, provides that, if the provisions of any title conflict with another title, the provisions of each title must prevail as to all matters arising out of the subject-matter of such title. Pol. Code, § 433, relates to the duties of the Controller. Code Civ. Proc. § 395, relates to the place of trial of civil actions. *Held* that, if any controversy is created between such latter sections as to the place of trial of an action by the Controller, section 395 must control.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by the state, by E. P. Colgan, as Controller, against M. B. Campbell. From an order changing the place of trial to the county of defendant's residence, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and George A. Sturtevant, for appellant. J. W. McKinley, for respondent.

McLAUGHLIN, J. This action was commenced in the superior court, in and for the county of Sacramento, to recover certain moneys which came into the hands of respondent in his official capacity as medical superintendent of one of the state asylums for the insane. In due time and form respondent, who was at the time the action was commenced a resident of Los Angeles county, made his motion that the place of trial be changed to the county of his residence, and this appeal is from the order granting said motion.

There can be no doubt that as a general rule all actions for the recovery of money must be tried in the county where the defendant resides, unless he directly or impliedly consents to a trial elsewhere. Code Civ. Proc. §§ 395, 396. It is, however, contended by appellant that a contrary rule, applying to actions such as the one at bar, is declared in subdivision 16 of section 433 of the Political Code. The provision relied upon is found in a section of the Code defining and enumerating the duties of the Controller of this state, and reads as follows: "To direct and superintend the collection of all moneys due the state, and institute suits in its name * * * against persons who, by any means have become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state, of which suits the courts of Sacramento county have jurisdiction, without regard to the residence of the defendants." We can see nothing in this language which changes the general rule, or excepts actions commenced by the state from its operation. There is no hint that the jurisdiction thus conferred is exclusive, nor is it provided that actions therein mentioned must be tried in Sacramento county. The subdivision is entirely silent on this point, and no intention to change the ordinary rule governing the place of trial is manifested. The main, central object of this provision is to give the Controller power to institute certain suits in the name of the state, and it seems to us that, given a reasonable construction, the clause in question simply means that such suits may be instituted in the county where the seat of state government is located, and where the Controller has his official residence. Pol. Code, §§ 145, 852. The section in which the subdivision is found relates to the general duties of the Controller, and that is certainly one of the last places where an attorney or judge would look for a law governing the place of trial of civil actions. On the other hand, section 395 of the Code of Civil Procedure is found in a title which deals exclusively with that subject, and it would be a radical departure from cardinal rules of construction to hold that the express and definite provisions of that and the succeeding sections of the same title are modified, controlled, or nullified by implications drawn from a provision which is not only silent on the point, but has no relation whatever to the subject-matter dealt with in said section. Lewis' Sutherland's Statutory Construction, §§ 443, 447, 448, 491; Code Civ. Proc. § 4; Pol. Code, §§ 4, 4480 et seq.; Warner v. Warner, 100 Cal. 16, 34 Pac. 523; Emeric v. Alvarado, 64 Cal. 607, 2 Pac. 418. There can be no doubt that the provisions of section 395 apply directly to all cases not provided for in the three preceding sections, and adopting a construction which avoids conflict, and gives harmonious effect to the provisions of both sections under consideration, we think the court had power, on proper application, to change the place of trial. This power was directly recognized in People v. Plumas, Eureka M. Co., 51 Cal. 566, when the court considered the merits of an application to change the place of trial on the ground of the convenience of witnesses. True, the application passed upon in that case was also based on the ground that the defendant resided in San Francisco; but the court held that the place of residence conferred no right to a change of venue because the action fell within the terms of section 392, Code of Civil Procedure, and was, therefore, expressly excluded from the operation of section 395 of the same Code. The distinction between the jurisdiction of courts, and the right to have the action tried in the county of defendant's residence, is exemplified in a number of cases, where it was held that, although the court where the action was commenced undoubtedly had jurisdiction, the defendant was nevertheless entitled to have the place of trial changed. Hancock v. Burton, 61 Cal. 71; Duffy v. Duffy, 104 Cal. 604, 38 Pac. 443; Staacke v. Bell, 125 Cal. 314, 57 Pac. 1012; Warner v. Warner, supra; Security L. Co. v. Kauffman, 108 Cal. 222, 41 Pac. 467.

There is another reason why the order of the court must be sustained. Section 4481 of the Political Code provides that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title," and there is a provision common to the Code of Civil Procedure and the Political Code which recites that each establishes the law of this state respecting the subjects to which it relates. Code Civ. Proc. § 4; Pol. Code, § 4. If appellant's construction of section 433 of the Political Code be adopted, then, necessarily, there is a conflict between that section and section 395 of the Code of Civil Procedure, and, if each is to prevail on all matters and questions embraced in the respective titles, then the former controls as to the duties of the Controller, and the latter as to the place of trial of civil actions. Odd Fellows S. B. v. Banton, 46 Cal. 609; People v. C. P. R. R., 83 Cal. 397, 23 Pac. 303; In re Bergin Estate, 100 Cal. 377, 34 Pac. 867; Fessenden v. Summers, 62 Cal. 487. Appellant seeks to avoid this conclusion by arguing that section 395 does not apply to actions brought in the name of the state; but we think that the words "in all other cases" embrace every form of action, no matter by whom brought, not included in the three preceding sections. Watkins v. Degener, 63 Cal. 500; Thurber v. Thurber, 113 Cal. 610, 45 Pac. 852; Hennessey v. Nicol, 105 Cal. 140, 38 Pac. 649. If we could see anything in the section which would operate to trench upon the sovereign rights of the state, or "injuriously affect its capacity to perform its functions," we would be forced to the conclusion that it could have no application to actions brought by or against the state. But we cannot imagine how the sovereign rights or prerogatives of the state can be impaired by giving every citizen the privilege of having actions brought against him by the state tried in the county of his residence. And we are particularly at sea as to the reasons which would make such injurious consequences attend suits instituted by the Controller, rather than by the Attorney General or other officer authorized to sue in the name of the state. The state, through its legislative branch, has said that all cases not embraced in sections 392, 393, 394, Code of Civil Procedure, must be tried in the county where the defendant resides, and in the absence of some specific provision to the contrary, we think this must be construed as applying to the state, whose consent is at least implied. Green v. U. S., 9 Wall. (U. S.) 655, 19 L. Ed. 806; People v. Blankenship, 52 Cal. 619; Green v. State, 73 Cal. 32, 11 Pac. 602, 14 Pac. 610; People v. Noyo, 99 Cal. 461, 34 Pac. 96; Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196. Many cases may be found where general laws relating to procedure have been held applicable to the state; but it will only be necessary to refer to a case cited by appellant, where the necessity for service of notice of appeal in cases where the state was appellant is discussed. S. F. L., etc., Co. v. State, 141 Cal. 358, 74 Pac. 1047.

Eliminating section 433 of the Political Code from consideration, it would hardly be contended that section 395, Code of Civil Procedure, does not apply to actions by and against the state, and, as the provision thus excluded from consideration does not declare to the contrary, it results that the rule in this regard is not changed.

The order is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 548

In re HEENEY'S ESTATE.

(Court of Appeal, Third District, California. May 15, 1906.)

1. ADMINISTRATORS—ACCOUNT—CREDITS.

Where certain heirs, including the administrator subsequently appointed, paid $250 on debts secured by a mortgage on intestate's family residence for the express purpose of obviating the necessity of probate proceedings, which all the heirs were seeking to avoid, he was not entitled to credit, in his account as administrator subsequently appointed, for the amount of such payment.

2. SAME—CLAIMS—ALLOWANCE TO ADMINISTRATOR.

Under Code Civ. Proc. § 1493 et seq., providing that all claims against decedent's estate must be presented and allowed before the administrator could have "rightful authority" to pay them, a payment made by the heirs of an intestate on a mortgage indebtedness owed by the latter, prior to the appointment of one of such heirs as administrator, was not validated by such appointment.

3. ASSIGNMENTS—EQUITABLE ASSIGNEES.

Where two of the heirs of an intestate paid a debt secured by a mortgage on the family residence of the intestate, and procured the note and mortgage to be assigned to their sister, such heirs became the equitable assignees of the mortgage lien and claim.

4. COURTS—PROBATE COURTS—JURISDICTION.

While probate courts in the settlement of estates have all the powers of a court of equity to determine conflicting interests of heirs or lienors, such interest cannot be determined, except in appropriate proceedings under proper pleadings.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 469–472.]

5. ADMINISTRATORS — CLAIMS — ESTABLISHMENT.

Claims of an administrator for reimbursement for moneys expended before his appointment cannot be established by his uncontradicted evidence, especially where such evidence and the assignment presented as his voucher show on the face of the record that the legal claim or right is in another, whose rights have not been foreclosed as provided by Code Civ. Proc. § 1632.

6. SAME—SUITS BY HEIRS—EXPENSES.

Where heirs of an intestate joined in a suit to remove a cloud from the title to their property, expenses incurred in such litigation, though it was successful, did not constitute a proper charge against the estate.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Judicial accounting by Richard J. Heeney, as administrator of the estate of Richard Heeney, deceased. From a judgment allowing certain credits, certain heirs appeal. Reversed.

J. J. Fitzgerald, for appellants. R. C. Minor, for respondent Merz. Asilley & Neumiller, for respondent Walter.

McLAUGHLIN, J. Richard Heeney died intestate in 1892, leaving five children, who were his only heirs. Of these children Mary E., died in December, 1896, William in April, 1900, Lulia A. in May, 1901, and Walter in April, 1903. The only survivor, Richard J., is a respondent herein, and the husband and child of Lulia A., as her sole heirs, are appellants. William left a widow, but neither Mary nor Walter were ever married. By reason of a tacit understanding or agreement among the heirs, no administration was had upon the father's estate until March 8, 1901, when letters were issued to the respondent. The only property consisted of the family residence or home, and up to May, 1903, it was used as the residence and home of the family under a mutual agreement between them. From May, 1903, until February, 1904, the home was occupied by the appellant and his child. When Richard Heeney died his property was mortgaged for the sum of $500, and in 1895 the two adult sons, William and Richard J., paid the mortgage debt and caused the mortgage to be assigned to their sister Mary under an agreement, and pursuant to the advice of their attorney that it should be assigned to the oldest member of the family. Before her death Mary assigned this mortgage to Lulia, in whose name it now stands of record. Up to the time of William's death he and respondent also paid all taxes levied upon the property, and after the death of William the respondent paid all taxes, except those levied for 1904, which were paid jointly by respondent and appellant pursuant to an agreement had between them. Certain actions to foreclose liens for street work had been pending for some time, and in 1900 respondent employed and paid an attorney to defend these suits and prosecute an action to quiet title brought by the surviving heirs against the Pacific Paving Company, a corporation claiming a lien on the property. The litigation was carried to a successful issue, but certain costs paid by respondent were not recovered by him. In his final account as administrator of his father's estate, respondent claimed credit for one-half of all sums paid by himself and William, and the full amount paid by him individually as above mentioned, and also inserted items of credit for interest on the sums so paid. In the report accompanying his account he alleged that all of these payments were made for the benefit of the estate and with the consent of the other heirs. The appellant in his individual and representative capacities filed exceptions to these items in the account and asked that certain expenditures made by him for the benefit of the estate be also allowed. The court refused to allow the administrator credit for sums paid for taxes on the mortgage, or for constructing a sidewalk on the premises, and also disallowed all charges for interest on these and other amounts expended by respondent. He was, however, credited with the amount paid by him in satisfaction of the mortgage, and for taxes on the property, and also for sums paid out by him for attorney's fees and costs in the litigation with the paving company. The contestant appeals from the order settling the account upon a bill of exceptions containing all of the evidence presented at the hearing. This evidence consists wholly of the testimony of respondent, and tax and other receipts, which, with the written assignment of mortgage to Mary E. Heeney, were presented by him as vouchers. No claim for any of the amounts was ever presented by the administrator, and the appellant contends that the court erred in allowing the various items above mentioned.

It is claimed by respondent that his appointment and qualification caused his letters or authority to relate back to the time of his father's death, thus validating all of his acts before such appointment, which were, in their nature, beneficial to the estate, and which would come within the scope of an administrator's rightful authority. That this rule obtains in many jurisdictions cannot be doubted. Schuler on Executors, § 195; Woerner's Am. Law of Administration, § 173; 7 Am. & Eng. Ency. Law (1st Ed.) p. 193. But, in view of our specific and comprehensive Code provisions regulating the settlement of estates, there can be very little room for the application of such a rule in this state. Granting, however, that it can have force here under proper conditions and circumstances, we are of the opinion that the court erred in allowing the item of $250 paid on the debt secured by mortgage on the property. To begin with, the testimony of respondent himself shows that such payment was not made with any thought of a subsequent administration of the estate. On the contrary, according to his version, the very object for which this and other payments were made, was to dispense with the necessity of probate proceedings which all of the heirs were seeking to avoid. It would indeed be passing strange if acts done with deliberate intent to avoid compliance with the forms of law could receive the sanction of the law whose mandate the actor sought through such acts to evade. Great stress is laid upon the alleged fact that this desire and agreement was mutual and that all heirs consented to the payments made and further agreed that the money should be refunded. Waiving the self-evident fact that the minor heir could neither lend assent to the payment nor to an agreement of any kind, the most formal agreement could not dispense with the usual and ordinary procedure fixed by law for settling the estate of a deceased person. Estate of Strong, 119 Cal. 667, 51 Pac. 1078. We have found no case, and believe none can be found, where the rule invoked was applied under the circumstances disclosed by this record. There are other cogent reasons why the item under consideration should not have been allowed as a credit in the administrator's account. Under the system obtaining in this state there can be no doubt that all claims must be presented and allowed before the administrator can have "rightful authority" to pay them. Code Civ. Proc. § 1493 et seq. It is possible that after an action to foreclose a mortgage has been commenced, as provided in section 1500, of the aforesaid Code, the administrator might be authorized to compromise or fully pay the demand without such presentation or allowance. But, even if this be true, this single exception to the general rule that no action against an estate will lie unless a claim has been presented cannot be construed as conferring upon an administrator sweeping general authority to pay all debts secured by mortgage without either presentation or suit. Therefore, under the rule invoked, and certainly under the provisions of our Code, no payment made by a person without authority can be validated when the same payment, if made by a duly qualified administrator, would not be sanctioned or allowed in his account. Taking the view most favorable to respondent, he and his brother William became the equitable assignees of the mortgage lien and claim, when they paid the debt and procured an assignment of the note and mortgage to their sister. If a stranger had paid the money and procured the assignment of the mortgage and debt to another, there could be no question that he would at least be required to present his claim or proceed under section 1500, supra. In fact, a suit to which the legal assignee was a party would be indispensable to a proper adjustment of rights involved and to the protection of the estate. If this be true, then certainly the mere fact that the legal as well as the equitable assignees were heirs cannot operate to dispense with formalities required in the matter of simple claims attended by no such complications. Considering the fact that the mortgage now stands unreleased in the name of one of the deceased heirs, and that the heir of William has an equitable interest as great as that held by respondent, it must be apparent that the respective rights of heirs and the estate could not be adjudicated or conserved in a proceeding like the one under review. While probate courts have all the powers of a court of equity in the settlement of estates, the conflicting interests of heirs or lienors, no matter what their nature or origin, can only be determined in an appropriate proceeding under proper pleadings. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Guardianship of Breslin, 135 Cal. 22, 66 Pac. 962; Thellar v. Such, 57 Cal. 459; Buckley v. Superior Court, 102 Cal. 8, 36 Pac. 360, 41 Am. St. Rep. 135. The necessity for such a proceeding is very apparent here. In the proceeding for the settlement of the final account the rights of the parties could not possibly be conserved or adjusted. It is manifestly unjust that respondent have an opportunity to recoup, while the heirs of William get nothing, and it is equally as unjust to credit him with taxes paid and deny appellant a like credit. It is said that no claim for the outlay made by William was ever presented, but the obvious answer to this is that, if the presentation of a claim was necessary to secure reimbursement for the widow of William, then respondent as his coassignee can occupy no more favorable position. One thing is certain, and that is that the law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment can be established by his uncontradicted evidence, especially when such evidence and the assignment presented as his voucher, show that on the face of the record the legal claim or right is in another whose rights are not foreclosed. Code Civ. Proc. § 1632; Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

We cannot see how the expenses incurred in the suit brought by the heirs can be considered or allowed as charges against the estate. If heirs choose to bring suit to remove a cloud from their title to property, no one can object; but the expenses of such litigation are to be adjusted and paid by the parties to the action, and not by the estate of which the property forms a part. To hold otherwise would be to make an estate liable for expenses and costs which could not be controlled or measured by an administrator or executor, and invite confusion, if not absolute waste, in the settlement of estates. It may be that attorney's fees paid by the administrator in defending the suit brought in his father's lifetime were properly allowed. The evidence is meager as to the time and circumstances of such payments. If the liability therefor was incurred after his father's death, and the employment of an attorney was necessary to safeguard the interests of the estate, they should be allowed under the rule first considered herein. The same may be said of taxes paid by the administrator; but it may be remarked that in our opinion the probate court may, under proper petition, adjust the rights of the other heirs who are equitably entitled to reimbursement for taxes paid by them or those under whom they claim.

The order is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

3 Cal. App. 619

TITLE GUARANTEE & TRUST CO. v. LOS ANGELES COUNTY.

(Court of Appeal, Second District, California. May 16, 1906. Rehearing Denied by Supreme Court July 13, 1906.)

1. TAXATION — MONEY HELD BY ONE AS AGENT OR TRUSTEE.

Money given by one having a contract for purchase of land to plaintiff, employed to pass on the title, to be paid to the vendor or returned to the purchaser, with deduction for charges, according to the result of the search, and which is deposited by plaintiff in a bank, is in plaintiff's possession and control, within Pol. Code, § 3628, providing for assessment of property to one in whose possession or control it is.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 176.]

2. SAME — ASSESSMENT TO AGENT OF UNKNOWN PARTIES.

An assessment to plaintiff, "Escrow money in Merchants' National Bank, $55,000," is in effect to him as agent or trustee of parties unknown to the assessor, as is proper under Pol. Code, § 3628; plaintiff not having in his statement to the assessor disclosed the facts as to the money, as under section 3629 he should have done, so as to enable the assessment to be made under section 3639 to plaintiff as agent or trustee of the various persons interested in the money.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 693.]

3. SAME—DEDUCTION FOR DEBTS.

The obligation of one on account of money in his control as agent or trustee is not that of debtor, so as to require a deduction of the amount thereof from his assessment.

4. SAME—CORRECTION OF ASSESSMENT.

One who is assessed with money in his control as agent may, after he has paid the tax under protest, have the assessment corrected by the supervisors to show the principal ultimately liable for the tax.

Appeal from Superior Court, Los Angeles County, D. K. Trask, Judge.

Action by the Title Guarantee & Trust Company against the county of Los Angeles. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., J. D. Fredericks, Dist. Atty., and W. P. James, Chief Deputy Dist. Atty., for appellant. John D. Pope, for respondent.

SMITH, J. This is a suit to recover taxes paid under protest. The case as shown by the admitted allegations of the complaint and stipulations of the parties, is: A verified statement of property for taxation for the year 1904, showing deposits to the amount of $3,650, and no more, had been given in to the assessor by the plaintiff; and afterwards there was included in the plaintiff's assessment by the assessor the following item: "Escrow money in Merchants' National Bank, $55,000." The latter amount was held by the plaintiff as agent or trustee for the owners and purchasers of various tracts of land (22 in number) whose titles it had been employed to pass upon, and was to be paid to the owners or returned to the purchasers (with deduction of charges), according to the result of the search.

The question involved is whether this property was assessable to the plaintiff; and this question, we think, must be answered in the affirmative. The money was undoubtedly in the possession and control of the plaintiff as agent or trustee of the various parties interested in it. It was, therefore the duty of the plaintiff to return it in its statement, and the duty of the assessor to assess it to the plaintiff, or the equitable owners, if accessible. Pol. Code, §§ 3639, 3628; People v. National Bank of D. O. Mills & Co., 123 Cal. 52, 55 Pac. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32; Bode v. Holtz, 65 Cal. 106, 3 Pac. 495. In the case of Weyse v. Crawford, 85 Cal. 196, 24 Pac. 735, it was, indeed, held that goods on storage in a warehouse for which warehouse receipts had been issued were not subject to what is called an arbitrary assessment to the warehouseman under the provisions of section 3652 et seq. of the Political Code. But this did not affect the right and duty of the assessor to assess this property as required by section 3628 of that Code. People v. Nat. Bank of D. O. Mills & Co., supra. The case is also different from this in other essential circumstances; for here the property assessed was not tangible property that could have been asesssed to unknown owners and siezed and sold by the assessor, but was a fund consisting of credits due from the bank to the plaintiff, over which it had in fact absolute control as agent or trustee of the parties interested in the fund.

Nor was the property taxed subject to any deduction on account of debts due from the plaintiff. Its obligation to the various parties interested in the fund was not that of debtor, but of agent or trustee. Hence, had the facts been disclosed to the assessor by the plaintiff, as under the provisions of section 3629 they should have been, the assessment should have been made to it as agent or trustee of the various parties interested in the fund. Pol. Code, § 3639. But in the absence of this information, the assessor had no other resource than to assess the property to the plaintiff, as required by section 3628, as agent or trustee of parties unknown to him which he in effect did. Nor are we prepared to hold that, under the circumstances, the failure of the assessor to designate the plaintiff's principals or beneficiaries was sufficient to invalidate the assessment. It had the opportunity of correcting the defect, if in any way harmful to it, by application to the assessor while the assessment roll was still under his control, or afterwards by application to the board of equalization, which had power to correct the plaintiff's assessment, either by adding the names of the parties ultimately liable or by transferring the whole amount taxed to the assessments of the several parties interested in the fund. Pol. Code, § 3681; Henne v. County of Los Angeles, 129 Cal. 297, 61 Pac. 1081.

Nor do we think it material that the plaintiff had no opportunity of applying to the board of supervisors until after its property was levied upon and the tax paid under protest. All the relief it was entitled to was to have the assessment corrected so as to show the parties ultimately liable, and this could have been done by the supervisors as effectually after payment as before.

The judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant.

We concur: GRAY, P. J.; ALLEN, J.

149 Cal. 405

PEOPLE v. STAPLES. (Cr. 1310)

(Supreme Court of California. July 10, 1906.)

1. Criminal Law—Pleading—Not Guilty—Withdrawal—Right to Move.

A defendant is entitled notwithstanding a plea of not guilty to move at any time before trial for leave to withdraw it for the purpose of demurring to, or moving to set aside, the indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 687.]

2. Same—Motion.

Where, after accused had pleaded not guilty, he moved for a continuance and for leave to withdraw the plea for the purpose of moving to set aside the indictment, but the motion contained no showing that any ground existed on which such motion might be based if an opportunity to present it were granted, the denial of the motion to set aside the plea was not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 687.]

3. Same—Renewal of Motion.

Where a motion for leave to withdraw a plea of not guilty for the purpose of attacking the indictment was denied, accused was not entitled as of right to renew the motion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 687.]

4. Same—Proof.

A second motion for leave to withdraw a plea of not guilty for the purpose of attacking the indictment was properly denied where there was no showing of ignorance on the part of counsel of the facts on which the second motion was based when the first one was made.

5. Same—Discretion.

A motion to set aside a plea of not guilty, and for leave to attack the indictment is within the discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 687.]

6. Same—Change of Venue—Hearing—Provisional Denial.

Where the court denied a motion for a change of venue with leave to renew the same if the facts disclosed on the impanelment of the jury should further warrant the same, defendant's failure to renew his motion operated as an abandonment or waiver thereof.

7. Homicide—Corpus Delicti—Evidence.

In a prosecution for homicide circumstantial evidence *held* insufficient to establish the corpus delicti.

8. Same—Motive.

Where, at the time of an alleged arson, defendant's wife was not at the place where the fire occurred, and knew nothing concerning the same, evidence of the destruction of certain premises rented by defendant by fire was inadmissible for the purpose of establishing a motive for the killing of his wife.

In Bank. Appeal from Superior Court, Amador County; R. C. Rust, Judge.

F. N. Staples was convicted of murder, and he appeals. Reversed.

Wm. G. Snyder and A. Caminetti (William J. McGee, of counsel), for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., J. Charles Jones, and C. P. Vicini, for the People.

LORIGAN, J. The defendant was indicted for the murder of his wife in Amador county, convicted, sentenced to death, and appeals from the judgment and an order denying his motion for a new trial. Many grounds are urged for a reversal, but it is mainly insisted that the verdict of the jury was not warranted from the evidence.

Before we approach the consideration of this claim, however, it is necessary to dispose of other points raised by defendant prior to the actual trial, which were ruled on adversely to him, and upon which he predicates error. These points are that the court erred in refusing to grant the motion of defendant to be permitted to withdraw his plea of not guilty, so that he might move to set aside the indictment filed against him, and also erred in denying his motion for a change of venue.

As to the motion to permit a withdrawal of his plea. It appears that upon the arraignment of defendant, March 9, 1905, he was represented by an attorney, and the time for receiving his plea continued until March 11, 1905, at which date he entered a plea of "not guilty," and the time for trial, by consent of said attorney, was fixed for April 10, 1905. Neither at that time, nor prior thereto, was any suggestion made that defendant desired to move to set aside the indictment, nor was any motion of that character interposed. Subsequent to the arraignment and plea, defendant having procured additional counsel, they gave notice that on March 27, 1905, they would move the court to grant a continuance of the time of trial for a month and to permit defendant to withdraw his plea of "not guilty," and make such motion relative to the indictment as he might be advised, said motion being based on the grounds that defendant could not prepare for trial on the day set, and that the plea of "not guilty" was inadvertently entered. The motion was based upon affidavits which were addressed mainly to a showing for a continuance, although as to the motion for leave to withdraw the plea it appeared therefrom that the attorney representing defendant on the arraignment, and at the time he pleaded was inexperienced and unacquainted with the practice in criminal procedure, and for that reason it was claimed failed to make a motion to set aside the indictment before the defendant pleaded. Upon the hearing the court granted the motion for a continuance, but denied the motion to allow a withdrawal of the plea. As there was no proper showing addressed to the motion to withdraw the plea of "not guilty," and be permitted to interpose a motion to set aside the indictment—nothing to show that there existed any ground upon which such motion might be based if an opportunity to present it were granted—the order denying the motion to set aside the plea was correctly made. Undoubtedly a defendant has a right, notwithstanding a plea of not guilty is interposed, to move at any time prior to the trial for leave to withdraw it for the purpose of demurring or moving to set aside the indictment (People v. Villarino, 66 Cal. 230, 5 Pac. 154), but he has no absolute right upon motion to have the order made, and whether it shall be granted or not is a matter resting in the discretion of the court, to be exercised upon proper and sufficient showing, and it cannot be said that such discretion is abused where a bare motion to be permitted to withdraw the plea and attack the indictment is presented without any suggestion or showing that, if granted, the defendant has any grounds whatever upon which to base the motion which he claims he desires to interpose. It would be an idle act upon the part of the court to further delay the trial of a cause, which has advanced so far as to have the plea of the defendant entered, by granting a motion to withdraw that plea, and permit an attack upon the indictment, without any showing at all that valid, reasonable or even any disputable grounds existed upon which an attack could or would be based. While inexperience of counsel may supply a reason why the motion to set aside was not made before the plea of defendant was entered, it in no wise tends to show that there then existed any grounds upon which a motion could have been based had he been more experienced in criminal procedure. The showing of inexperience should have been supplemented by some showing by affidavit of the existence of facts or grounds upon which a motion to set aside the indictment could have been based had his counsel been advised of the legal right of defendant to do so, or at least by proffer for filing of a motion to set aside the indictment upon specified grounds should the motion to withdraw the plea be granted. As no affidavit was presented and no proffer made, there was, hence, nothing to indicate that any grounds existed upon which to predicate a motion should the plea be withdrawn, and, under these circumstances, there was no abuse of discretion on the part of the court in denying the motion for leave to do so.

The motion of March 27, 1905, having been properly denied, the defendant, through the same counsel who had presented the original motion, but without any leave or permission of the court to do so, on April 27, 1905, again moved the court to permit the withdrawal of defendant's plea and for leave to file a motion to set aside the indictment upon a number of specified grounds. The motion was based upon affidavits setting forth that certain of the grand jurors participating in finding the indictment against defendant were biased and prejudiced; that others were not citizens of the United States; that others were not on the assessment roll, and also setting forth other grounds as a basis for the contemplated motion to set aside. It was also accompanied by a proffer of a motion to set aside the indictment upon all these grounds. We are not advised, from anything appearing in the briefs of appellant, where he found authority in law warranting him in making this second motion. Possibly the court upon application could have permitted the defendant to renew his motion, but we know of no rule of procedure which entitled the defendant as a matter of right to renew it. Independent of this, however, the affidavits which accompanied the second motion do not show that counsel and the defendant were not fully advised of the existence of all the facts recited in their affidavits accompanying the renewed motion when the original motion was made; nothing to show their inability to present these facts upon that motion. For all that appears upon the renewed motion and affidavits accompanying it the defendant and his counsel were in possession of all the facts when the first motion was made as ground for setting aside the indictment urged on their second application. Not a particle of excuse, if any existed, is suggested why they did not then present them. In the absence of any showing by counsel of ignorance of the facts upon which the second motion was based when they made the first one, it is only reasonable to infer that they knew of their existence, and that by failure to present them at that time they waived them. Treating the second motion as in the nature of an application to set aside the previous order, and to allow an additional or further showing, the refusal of the court to do so cannot be said to be error. As the granting of a motion to set aside a plea is discretionary with the court, if, on the original application, there is nothing at all to warrant the order then applied for, or such weak showing as to justify its refusal, it cannot be said to be an abuse of discretion to refuse to set aside the order so as to allow another different or additional showing. If such a rule could obtain, the right of counsel to renew such motions and predicate error upon their denial would be unlimited and unrestrained. Of course, no such right exists. For these reasons the second application was without warrant and properly denied.

As to the denial of the motion of defendant for a change of venue: The affidavits on this motion were directed to the point whether defendant could obtain a fair and impartial trial in Amador county where the alleged crime was committed. Those presented on the part of the defendant tended to show such a general prejudice existing in that county against him that he could not; those on the part of the prosecution tended to show that no prejudice existed sufficient to preclude him from having a fair trial. We think from a perusal of the affidavits, without detailing the facts disclosed by them, that the defendant made a very strong showing in support of his motion, but upon settled principles of law we do not think that he is in a position to claim any error in the action of the court in regard to it. When the motion was made the court did not make final disposition of it, but denied it temporarily, saying: "The rule involved has been in existence in this state from the ninth California down to the present time—nearly an unbroken line of authorities—and is to the effect that the court may compel, if it so desires, at least an attempt to draw a jury before passing upon a matter of this kind finally. * * * The order of the court is that the motion for a change of venue be denied temporarily. You understand, of course (addressing counsel for defendant), that the denying of the motion temporarily means that hereafter if it develops that there is any ground for it the court will entertain the motion again." Of course, counsel were familiar with the case referred to by the court (People v. Plummer, 9 Cal. 298) and the subsequent cases of People v. Goldenson, 76 Cal. 328, 19 Pac. 161, and People v. Fredericks, 106 Cal. 554, 39 Pac. 944, holding that it is no error for the trial court to postpone the consideration of an application for a change of venue until an attempt is made to impanel the jury, where leave is granted to counsel to renew his application if the facts disclosed on the impanelment should further warrant it, and that where counsel fails thereafter to renew his motion, he cannot claim that error was committed by the court in failing to order a change of venue. In those cases it was held (notably in the latter case) that the failure to renew his motion, where it was denied temporarily only, was an abandonment and waiver of the whole question, and fatal to any claim based upon the original application. In the case at bar, no ultimate disposition of the motion was made, and defendant was accorded the right to subsequently renew his motion. He did not do so, and he cannot, within the rule of the above cases, now insist that the court erred, when his right to move was only postponed, and he did not see fit to avail himself of his opportunity to subsequently renew the motion.

Having disposed of these objections we now come to a consideration of the principal point insisted upon by appellant, that the verdict was not warranted by the evidence. Giving a general outline of the evidence, preliminary to a particular consideration of it when we reach the salient points in the case, it appears that defendant, a physician, and his wife, a trained nurse, took up their residence in Amador City, in 1902, where defendant engaged in the practice of his profession. In June, July, and August of 1904, there was an epidemic of typhoid fever in that city, and defendant was employed professionally in many cases growing out of it, his wife assisting him in the care of his typhoid patients. In August of that year, while nursing a little girl suffering from that disease, his wife was taken ill, it is claimed on the part of the defense from an attack of typhoid fever, a matter which will be considered later, and took to her bed on the 14th of that month. Next morning defendant employed a Mrs. Reeves as housekeeper, and on August 17th engaged Miss McCarthy, a professional nurse, to take charge of his wife, called Dr. Gall of Amador City into consultation, and at the time Miss McCarthy came as nurse called in Dr. Quinn, who prescribed for her and attended her thereafter until the morning of August 29th. On August 30th, Mrs. Staples having become somewhat convalescent, she discharged Miss McCarthy as nurse, telling her that, as Dr. Quinn was not coming any more, she thought she could also dispense with her services. The nurse left, and Mrs. Reeves thereafter regularly attended to Mrs. Staples. During the night, after the nurse left, Mrs. Staples became worse; nervous, with a slight rise in temperature which increased as the night advanced, so that about the middle of the night defendant was required to call up Mrs. Reeves, who had retired, to assist him. Enemas having been administered by the defendant, Mrs. Staples became apparently stronger and better, in which condition she remained practically during the daytime of the 31st and until about 7:30 in the evening. At that hour, while defendant was in the yard, Mrs. Reeves called him, saying that his wife was worse. When he entered the sick room he found her very weak and in a semiconscious condition. He sat down beside her bed, felt her pulse, and immediately reached up to the bureau for a whisky glass which was resting there, containing a colored liquor, which he administered to her little by little with a spoon, and then placed the glass back on the bureau. She did not rally or become conscious, and about a quarter past 8 died. Within a little over an hour after her death her body was embalmed by John Daneri, an undertaker and embalmer of Amador City. He was sent for by defendant to prepare the body for burial. Nothing was said to him by defendant about embalming the body, only to prepare it for burial, and this he proceeded to do, as he says, in his own way. He opened the femoral artery in the right leg and injected into it in the direction of the heart two quarts of embalming fluid. The body was still warm while the fluid was being injected, and there was no impediment, after the fluid started, to its flow through the artery; the flow was continuous and unimpeded, until the required quantity was injected. Daneri, when he came to the house, had asked the defendant if he intended shipping the body east, and receiving a reply in the negative, had given simply an arterial embalmment. No puncture of the stomach nor any of the organs of the body was made, nor was there directly injected therein any embalming fluid, a process which the embalmer said he would have employed had the defendant intended to send the body away. The embalming fluid used consisted of chloride of zinc, bichloride of mercury, alum water, arsenic, formaldehyde and salt. The body of deceased was buried in one of the cemeteries in Amador county. The defendant remained in Amador City for a month subsequent to the death of his wife, disposed of his property in that place, and in the latter part of September left for San Francisco, where he opened an office in the Galt House in that city.

Immediately prior to the time when defendant's wife was taken ill he had built a house in Amador City, which they occupied at the time of her death. Near them resided a family named Hoxie, consisting of a husband and wife and young daughter. On September 13th Mrs. Hoxie deserted her husband and child, and subsequently went to live at the Galt House with the defendant, as his mistress. This conduct on the part of the defendant doubtless awoke the indignation of the residents of Amador City against him, and generated a suspicion as to the cause of his wife's death. At least, investigation was put on foot to determine it, and on the 18th of October, 1905, the body of Mrs. Staples was exhumed, and an autopsy held. The exhumation was made by Daneri, the undertaker who had embalmed and buried the body, and it was found in an excellent state of preservation. The autopsy was held about the center of the cemetery, a hedge surrounding the place precluding any observation from the outside, and was made by Doctors Gall and Endicott, physicians of Amador county. As to that examination, the testimony of Dr. Gall was quite general. It was to the effect that he examined all the vital organs of the body except the interior of the stomach, and could find no apparent cause of death; that he examined internally about two feet of the intestines in the vicinity of the ileocæcal valve, and found no indications of any disease from such examination. Dr. Endicott testified with more particularity. He stated that they examined the brains, heart, kidneys, liver, intestines and all the vital organs of the body; used the knife and made their examination with the naked eye; examined the intestines externally throughout their full course, and internally for about two feet above and below the ileocæcal valve; that neither of them made any chemical tests or microscopic examinations, nor did they take any cultures. They removed the stomach, sealed it, and sent it to Price & Son, chemists in San Francisco for examination and report. Thomas Price of that firm, an analytical chemist and toxicologist of large experience in his profession, made tests to discover the presence in the stomach of veratrum viride, strychnine or arsenic. The stomach when opened by him for that purpose was entirely empty, containing no fluid —simply a moisture and no solids. He first tested for veratrum viride and then strychnine, but found neither of these two compounds. He then tested for arsenic, and the test disclosed the presence of 1.26 of a grain. So much for the general facts in the case.

The theory of the prosecution is that the death of Mrs. Staples was occasioned by the administration to her by defendant of veratrum viride or arsenic or both. The evidence as to these matters was, it may be said, almost entirely circumstantial, and consisted of the testimony of experts called upon both sides, whose opinions as to the essential facts in the case were at radical variance.

At the outset it may be said that there is no room for doubt but that the illness with which Mrs. Staples was prostrated on the 14th of August was typhoid fever. This is abundantly shown from the evidence, not only of the defendant, but of disinterested witnesses who were actually in attendance on her, and whose testimony and opinions in that respect are not questioned. It was established by the testimony of the trained nurse, by Dr. Quinn, who was attending physician from the time of her illness until two days before her death, and by the testimony of Dr. Gall, one of the autopsy physicians who had been called into consultation with defendant when his wife first took ill, and diagnosed her case as one of typhoid fever. It was futher confirmed by the testimony of experts on the trial, who declared that some of the symptoms specified were marked evidence that the disease was typhoid fever. However, we do not understand this to be contested by the prosecution, its position being that, though the disease with which Mrs. Staples was prostrated was typhoid fever, yet that disease was not the cause of her death; that her death was caused by the poisons specified administered by defendant while she was suffering from that disease.

Now, as to the evidence that the death of Mrs. Staples was occasioned by either of these poisons, and, first, as to the claim that it occurred from veratrum viride. Half an ounce of that drug contains, as testified to by the druggist who sold it, about 580 drops, and would not fill an ordinary whisky glass quite one-half full. The druggist who sold it testified that veratrum viride is of a reddish brown color and translucent. The official dose of the drug is from two to five drops, and the evidence shows that anything over that might be fatal, and in some cases it might take 30 drops to cause death. The only evidence in the case upon which the theory of the prosecution can be based with reference to the administration of veratrum viride is that in the afternoon of the day upon which Mrs. Staples died the defendant purchased it, and when she became semiconscious before her death he administered to her from a glass a liquid which had the appearance of veratrum viride. There is nothing else in the evidence to indicate poisoning from this drug. Neither the autopsy nor the chemical analysis of Dr. Price revealed its presence at all in the body of deceased, nor was there any evidence of any clinical or pathological symptoms or conditions indicating that death had been occasioned from it. On the contrary, as to these symptoms and conditions, the direct evidence, if it does not show that she did not die from the effects of veratrum viride, at least very strongly indicates that she did not, and the preponderance of the expert evidence tends to confirm this conclusion. The purchase by defendant of veratrum viride was not, of itself, an incriminating circumstance, As to that purchase the defendant testified that, "about 4 o'clock in the afternoon (August 31st) I felt of her pulse, and examined her thoroughly. This rapid pulse gave me a suggestion of the disease of uræmia, which I have known to follow cases of typhoid fever, and led me to examine Mrs. Staples' urine; I found the urine contained albumen, and this strengthened the theory that uræmia might set in as a complication. In uræmia with convulsions I always use veratrum viride, tincture of veratrum viride, and in order to be prepared for this complication, if it arose, I went to the drug store about five or a little after, and purchased one-half ounce of veratrum viride." He purchased it at the drug store where he was accustomed to deal, and the druggist testified, as did the defendant, that when the defendant entered the drug store and asked for the tincture of veratrum viride, the former inquired of him how Mrs. Staples was; the defendant said she was worse and that he wanted the tincture of veratrum viride for her. The druggist asked if he should label it and defendant answered: "Yes, you had better, because I might want it for some of my other patients." These are the conditions and circumstances under which the purchase was made; openly, and with the declared object for which it was purchased. The undisputed medical testimony in the case shows that while poisonous when administered in excessive doses, tincture of veratrum viride is a well-recognized official drug, administered principally in cases of uræmic convulsions which sometimes arise in cases of typhoid fever. So that as far as the purchase of the drug is concerned, under the circumstances detailed—to meet possible complications in Mrs. Staples' case—it not only appears that the drug was a proper remedy, openly purchased for the purpose the defendant claimed and desired it, but as a physician, fearing the complications he indicated, it was his professional duty to get it, and give it should they arise. Defendant testified the complications he feared did not arise, and that he did not administer any of the drug to his wife.

It is insisted, however, that the liquid was administered when Mrs. Staples was in a semiconscious condition. This is the time when it is claimed by the prosecution that it was given—at about 7.30 p. m., and that the liquid administered at that time was veratrum viride. But that the liquid administered then was this tincture, is, under the evidence, purely conjectural. The defendant testified that the liquid he then gave his wife was whisky and water. Mrs. Reeves, who was present when he was giving it, testified that the liquid was in a small whisky glass, and had the appearance of whisky and water. It was given without any secrecy, in the presence of the housekeeper, and it is not contended that whisky or water in her then condition was not a proper stimulant to give her.

Now, as to the clinical symptoms and pathological conditions. Dr. Morgan, a physician and chemist and toxicologist of many years' experience, called on behalf of the defense, testified: "Veratrum viride, when taken in poisonous doses, acts upon the system, first, the same as mustard and water, it being a powerful irritant. It irritates the lining membrane of the stomach, and causes vomiting. After that, if it is absorbed into the system, the patient becomes depressed, becomes weak, and is covered with a cold perspiration. In case that death follows veratrum viride poisoning, it is not until quite a time after the administration of the drug. The shortest time in which death has occurred following veratrum viride poisoning being 13 hours, and it has been prolonged until death has occurred, 24 hours after having taken the dose. * * * The first symptoms of veratrum viride taken in poisonous doses is the irritation of the stomach and vomiting." Dr. Endicott for the prosecution testified that, "the symptoms of veratrum viride, when given in poisonous doses, is a partial collapse, then slight pulse, usually covered with a cold perspiration, and as a usual thing suffering from nausea. Vomiting does not frequently accompany it, but if taken internally vomiting would accompany it in a large majority of cases, but not immediately; sometimes produces intense burning in the stomach."

This is a fair embodiment of all the testimony in the case as to the effect of veratrum viride upon the stomach when administered in poisonous doses. From it it appears that veratrum viride is a slow poison, and that death would not result from it within at least 13 hours after it was given. This is the only evidence in the case as to the time within which death would earliest ensue. Defendant obtained the drug about 5 p. m. Assuming that he administered it, or commenced doing so, immediately after obtaining it (which is not claimed), still, as Mrs. Staples died at 8:15 p. m., it would appear from the only expert evidence on the subject that a sufficient time (three hours and a quarter) had not elapsed for the poison to have occasioned her death. Respondent insists that owing to the weakened, debilitated condition of Mrs. Staples the administration of a poisonous dose of veratrum viride, administered at the time it is claimed it was (7:30 p. m.), would cause death in a much shorter time than if administered to one in good health. This may or may not be true. Whether veratrum viride in poisonous doses would operate more speedily on Mrs. Staples, on account of her debilitated condition, so as to cause her death, and within what time it would so operate, were pertinent and essential matters of proof in the case, and neither jury, counsel, nor this court, can indulge in a speculation on the subject contrary to the only evidence in the case upon that point. But aside from this, there was an absence of the symptoms which accompany poisoning from veratrum viride. There was no vomiting. This is testified to by the defendant, but laying his testimony aside, it is also testified to by Mrs. Reeves, the housekeeper, who was present from the time the liquid, which is claimed by the prosecution to have been veratrum viride, was administered, until Mrs. Staples died. Whatever may be said of the testimony of the defendant, the integrity of Mrs. Reeves as a witness, and the accuracy of her observations, in the sick room, are not questioned. She testifies that during that period there was no vomiting and the evidence clearly shows that at no period during Mrs. Staples' sickness was there any. To meet this testimony, it is again insisted by respondent that the slight vitality of Mrs. Staples prevented the exhibition of these symptoms. But it nowhere appears from the evidence that this debilitated condition would prevent this characteristic symptom of the poisoning from appearing. No witness testifies that it would, but, on the contrary, all testified that it is a symptom which will appear. The position of counsel seems to be that while the death of Mrs. Staples was occasioned by the administration of the poison, yet, before the symptoms showing that she was so poisoned appeared, she died. Whatever merit there may be in this position, nothing in the evidence in the case furnishes any basis for it being taken. If she was poisoned by veratrum viride, the expert evidence shows that this symptom of it would have manifested itself; as it did not, it is evidence strongly tending to show that she was not so poisoned.

We now come to the autopsy, and will consider its bearing, first, on the matter of poisoning by veratrum viride. The exhumation of the body was 48 days after death. As to the autopsy itself, the testimony of the two autopsy physicians is that they found no pathological or diseased condition sufficient in their opinion to account for the death of Mrs. Staples; there was no apparent cause of death that they could ascertain, which, of course, must be taken to include that they did not find any evidence of poisoning by veratrum viride or any other poison. Prof. Price, the chemist, to whom the stomach was sent, testified that as far as veratrum viride was concerned, he found no evidence of its presence in the analysis of the stomach which he made. This evidence, if the presence of veratrum viride could have been discovered by an autopsy, or by chemical test after death, would be almost persuasive proof that veratrum viride had not been administered to the deceased. To meet this, however, the prosecution introduced the evidence of the autopsy physicians, testifying as such, and not as chemists or toxicologists, to the effect that veratrum viride being a vegetable drug, if administered, all traces of it would disappear between two and three weeks after death. To be specific, Dr. Endicott was asked: "Q. How long after it (veratrum viride) would be administered could it be found? A. It could not be found any great length of time after death in my opinion, because it is a vegetable compound; it would decompose. Q. How long would it take this particular drug to decompose, being a vegetable matter, after being administered? A. I could not state a definite period of time. Q. Well, can you give about the time? A. Well, I should say in two weeks anyway, that there would not a trace be found." On the subject Dr. Gall testified: "Q. How long would it take, being a vegetable drug—how long would it take to decompose? A. Well, I don't know; it is a difficult question to answer; it would depend a good deal. Q. Just about? A. Oh, about two or three weeks I should think." And on cross-examination he stated: "I never saw any one die from it (veratrum viride). I never saw any sample that would demonstrate to me that it would decompose or disappear in two or three weeks; only say from my own general knowledge, because when decomposition sets in generally those vegetable properties decompose. Well, you would allow about two or three weeks for decomposition to start, that is all; there was a certain amount of decomposition in this body. But for a body that had been buried seven weeks it was remarkably well preserved; no evidence of decomposition in the heart."

Now, it will be observed from this testimony that the evidence of the physicians as to inability to detect the presence of veratrum veride poisoning in a body proceeds upon the theory that veratrum viride in their opinion is a vegetable drug and disappears with the decomposition of the body; otherwise, it could be detected. But there was no evidence that the body was decomposed at the time of the autopsy, or that decomposition had set in. Dr. Gall's own evidence largely negatives that proposition, and the testimony of Daneri, the embalmer, is that when he exhumed the body for the autopsy it was just as natural as the day he put it down and buried it; almost petrified; that to the touch it was like putting your finger on a piece of iron. If, then, the only reason why veratrum viride, if administered, could not be discovered in a dead body would be because decomposition had set in, as it had not set in on the body of deceased, there was no reason why a proper examination or analysis to discover it would not have revealed its presence. The evidence of the autopsy physicians is the only evidence in the case that veratrum viride disappears within a few weeks. In fact, this testimony and that of the two following witnesses is the only evidence on the point.

Prof. Price, the chemist and toxicologist, testifying as to his analysis of the stomach, was asked whether veratrum viride administered 50 days prior to an autopsy could be discovered in then making an analysis of the stomach, to which he responded: "I have no personal experience myself to enable me to say how long this veratrum viride will remain in the stomach after death, and from all my investigation among the authorities they are silent on that subject." He also designated veratrum viride as an alkaloid. Dr. Morgan, a physician, and also a chemist and toxicologist of experience, testified that, "there is no evidence upon which we can base a positive opinion as to how long veratrum viride taken into the stomach would remain before decomposition would set in; it is an alkaloid; morphine will remain in the human body one or two years after death, and strychnine as long as ten years. Morphine, strychnine and veratrum viride are all alkaloids, and we could reasonably expect to find them in the body for a period of a year or two, any one of the three."

Before proceeding to a further consideration of the case, it is proper at this point to say that when the defendant was on the stand he did not state, nor did his counsel make inquiry of him as to what had become of the veratrum viride which he purchased. This doubtless, was an oversight on the part of defendant's counsel, and, at best, only shows that he did not account for it. His failure, however, to testify on direct examination on this subject did not preclude the prosecution from making inquiry in that direction, if it so desired; hence, it was a possible oversight on the part of both the defense and prosecution that the subject was not gone into.

We do not think that any further discussion of the evidence upon this branch of the case is necessary, and without commenting upon it further than we have, we now pass to a consideration of the evidence bearing upon the claim of the prosecution that the deceased came to her death from arsenical poisoning.

This branch of the case, in our judgment, requires less discussion than we have devoted to the claim of poisoning by veratrum viride. There is no evidence that defendant had procured or had in his possession any arsenic. As a physician, he may have had it, but there is no proof that he did. Neither at any time during her illness did Mrs. Staples exhibit any symptons of arsenical poisoning. As to those symptons there is no dispute. Dr. Morgan testified: "The first symptons of arsenical poisoning is a burning sensation in the throat and stomach, and an intense desire for water, then follows vomiting, which is so severe that it cannot be controlled, the patient constantly desiring water, and as often as it is given constantly vomiting it. After that we usually find a diarrhoea, and the vomiting becomes streaked with blood; the diarrhoea is of a peculiar character known as the rice water stools, and contains patches of mucous membrane from the intestines. The patients, if they die, usually die in from six hours to two days." Dr. Tiffany said: "Arsenic irritates the lining membrane of the stomach and intestines, and it creates more or less vomiting and purging, running off condition of the bowels. Vomiting takes place when it is used beyond physiological action to a poisonous extent, as soon as there was enough irritation of the stomach. The administration or receipt of arsenic in poisonous doses in the stomach would cause irritation within a few hours. In the case of taking by the mouth of arsenical poisoning, the irritation would leave on the internal organs a congested condition, an aridness, an inflamed condition. * * * If one poisonous dose was administered at a time it would produce vomiting."

The sickness of the deceased covered a period of over two weeks, and there is no evidence whatever that at any time the symptons attending arsenical poisoning exhibited themselves. There was no vomiting or purging. Neither did the autopsy or the chemical analysis of the stomach show any irritated condition of either the stomach or of any other internal organ of the body. Arsenic, it is true, was found in the stomach. But the evidence shows that its presence there could have resulted through the process of embalming, and, as far as the evidence on that point is concerned, it is quite apparent that it did. There is only one witness (Dr. Morgan), who testifies upon this subject. Prof. Price, who made the analysis, nowhere says (and there is no pretense that any other witness testified on the subject) that it could not have gotten into the stomach as the result of embalming. The most that can be claimed for his testimony (which is the deduction that the prosecution arrives at from it; but not what the professor said) is that as the chemist did not find chloride of zinc, bichloride of mercury, formaldehyde or alum, but only arsenic, in his analysis, that therefore the arsenic could not have gotten into the stomach from the embalming fluid; that if it did, the other ingredients of the fluid would also be found there. The professor did testify that he found no chloride of zinc or bichloride of mercury, but did not say why he did not find them. He testified also that he found no trace of formaldehyde or of alum, but the reason for this, as he says, is because he did not look for them. As to the presence of arsenic in the stomach, he did not testify that it could not have gotten into the stomach from the embalming fluid. His only testimony on that point was that he found there the quantity of arsenic stated. Dr. Morgan, an equally reputable chemist, stated his belief that the arsenic in the stomach came from the embalming fluid and in addition said: "My experience has taught me to believe that it is impossible for an organ in the human body to be within a few inches of the embalming fluid for the period of 48 days without absorbing some of the arsenic. The embalming fluid injected into the right femoral artery would travel up the femoral artery a few inches and reach the aorta which is the largest artery in the body, and being mixed with blood would pass on up to the heart. Now, the stomach lies right over the aorta, not being separated from the interior of the aorta by more than an inch, and it would only have to travel that small distance of tissue in order to reach the stomach." He further testified, giving his reasons therefor, which space prevents quoting, that it was possible for arsenic to pass from the embalming fluid to the stomach without the chloride of zinc or bichloride of mercury showing itself there; that arsenic when injected into a dead body will commence diffusing itself through the tissue at once, which the other salts will not immediately commence to do so, nor will they, "until such time as the body turns to liquid," when they will also travel. In addition to this he made an experiment with the embalming fluid of Mr. Daneri upon the stomach of a deceased person, which actual experiment confirmed the opinion he entertained and expressed. The opinion of Dr. Morgan with respect to these matters was not disputed by any medcal or other opinion given in the case. So much for the evidence relating to arsenical poisoning.

In addition to these particular facts relative to the claim of the prosecution that the death of deceased was occasioned by poisoning there was other evidence, to be referred to generally. Reputable expert physicians testified that the autopsy made by the autopsy physicians was incomplete, and was not sufficient to determine whether the deceased had died from typhoid fever or not, while the same physicians testified that from the symptons attending the sickness of deceased, they were satisfied that she had died of typhoid fever. It was further shown by the evidence of disinterested parties that defendant and his wife had lived happily together, and that during her illness he treated her kindly, and seemed to do everything that he could to help her, and alleviate her sufferings. This is as far as we deem it necessary to state the evidence in the case. We do not concern ourselves with many suggestions, more of an argumentative character than otherwise (but even as such quite cogent), made by counsel for appellant which he claims are inconsistent and incompatible with the theory of the prosecution that the death of deceased was occasioned through poisoning. We content ourselves with the evidence as we have stated it, which in our judgment did not warrant the verdict of the jury. It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed. Now, considering the evidence in the case at bar under these elementary rules of law, there was no proof in the case that the wife of defendant died from arsenical poisoning, in fact, the evidence is not only consistent with the claim of defendant that she did not, but it may be said that the preponderance of evidence in the case is to the effect that she did not. As to poisoning by veratrum viride: Aside from the opinion of the experts that Mrs. Staples died of typhoid fever, from which she was concededly suffering, the clinical and pathological conditions tend to show that she did not die from the administration of that poisonous drug. The only evidence at all as to veratrum viride is that the defendant got it and that he administered to her a liquid which looked like it. The most that can be said of his particular evidence is that it might have been sufficient to have raised a suspicion in the mind of the jury that he did administer it. Certainly it was not effective for any other purpose. This, however, could only be a suspicion, and no jury has a right to declare forfeited the life of a defendant upon mere suspicion. Especially is this true when the facts upon which the suspicion might have been generated are entirely consistent with innocence; and could exist without the defendant being guilty of the heinous offense of which he was accused. No man can be convicted of murder upon evidence which, at best, leaves the question of criminal agency in causing death, if not reasonably doubtful, at least merely conjectural.

We are not unmindful of the claim of the prosecution that there existed a motive for the death of Mrs. Staples; a desire on the part of defendant to get rid of her so that he might enjoy the society of Mrs. Hoxie. Assuming (which the evidence does not clearly show) that a meretricious relationship between them existed prior to Mrs. Staples' death (the evidence is clear enough of its existence a month afterwards) and giving to the claim of the prosecution the full force which such a relationship or desire might disclose, still this, of itself, was not sufficient to warrant the conviction of the defendant. It is a circumstance to be taken into consideration by the jury, but not sufficient, of itself, to warrant a conviction. A motive being shown, there must still be evidence of the fact of death by poisoning established to a moral certainty, and conceding that there was sufficient proof upon which the jury could deduce a motive in this case, still, as we have endeavored to point out, the evidence was otherwise insufficient to prove the corpus delicti; it was entirely insufficient to warrant the jury in finding to a moral certainty that deceased died of poison administered by the defendant. Motive, while a potent factor in the sum of evidence proving guilt, is not in itself sufficient to sustain a conviction in the absence of other proof tending clearly to show criminal agency on the part of defendant causing death.

The same may be said of what is denominated by the prosecution evidence of the flight of the defendant. No doubt but that the jury had the right to consider this evidence, and its potency was for their determination. That evidence, however, simply amounted to this, that a month after Mrs. Staples' death defendant took up his residence in the Galt House in San Francisco with Mrs. Hoxie; that he had his office for the practice of his profession there, and his professional sign prominently displayed; that on October 22, 1905, Mrs. Hoxie, being fearful that her husband had discovered her whereabouts, and fearing injury from him, prevailed on defendant to take her away from San Francisco; that they left hurriedly in the nighttime and went to Ensenada, Lower California, where defendant engaged again in the practice of his profession under his own name and professional sign; that he remained in Ensenada about two months, and then, in company with Mrs. Hoxie, went back into the country about 30 miles to the ranch of a man named Blackwell, where they were arrested. The evidence shows that the defendant during all these times kept his true name, did business under it, made no effort, as far as these matters are concerned, to hide his identity, and there was no evidence to show that he ever knew till after his arrest, that any suspicion existed as to the cause of his wife's death, or that any autopsy upon her remains had been held.

We think we have mentioned every claim of the prosecution, and discussed all the important evidence addressed to each, and our conclusion from a consideration of the whole case is that the evidence as we have recited it did not warrant the jury in the verdict against the defendant, and for that reason the judgment and order denying a new trial must be reversed.

Aside from the contention that the evidence was insufficient to warrant the verdict of the jury, it is insisted by the defendant that the court committed error in its rulings relative to the admission of evidence, in denying challenges to the jury interposed by defendant, and in its refusal to give certain instructions. We think there was no error as to the rulings concerning challenges to the jurors, and as to the particular rulings relative to the testimony of certain witnesses, we do not think they disclose any error.

The court admitted under the claim of motive, evidence of the destruction of rented premises occupied by the defendant in Amador City in 1902. This evidence was admitted on the theory that it supplied an additional motive for the murder by defendant of his wife because she knew that his destruction of these premises was incendiary, and might have prosecuted him for arson. In our judgment, all the evidence was inadmissible. In this regard it is sufficient to say that when this alleged arson was committed the wife of the defendant was not in Amador City, knew nothing about the fire, and that the evidence introduced to show arson on the part of defendant wholly failed to prove it. We do not perceive that the court erred in refusing to give the instructions tendered by defendant. They were all substantially given in the charge of the court.

The judgment and order denying a new trial are reversed, and the cause remanded that a new trial may be had.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; HALL, J.; SLOSS, J.

NOTE. McFARLAND, J., being unable to act, HALL, J., one of the justices of the district court of appeal for the first appellate district, participates herein pro tempore, pursuant to section 4, article 6, of the Constitution.

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7 Cal. Unrep. 273

PEOPLE v. COLLINS. (Cr. 1358.)

(Supreme Court of California. July 9, 1906.)

CRIMINAL LAW—CUSTODY OF ACCUSED—PERMISSION TO VISIT CLERK'S OFFICE—AUTHORITY TO GRANT.

A single justice of the Supreme Court has no jurisdiction to grant the application of an attorney, convicted of perjury and confined in the county jail, to visit the clerk's office of the county in charge of an officer, for the purpose of examining the records in the case in order to enable him, while acting as his own attorney, to prepare an appeal to the appellate district court.

In Bank. George D. Collins was convicted of perjury and pending the taking of an appeal, he applied to a single justice of the Supreme Court for permission to visit the office of the county clerk for the purpose of examining papers and records. Application denied.

LORIGAN, J. This is an application addressed to me, as one of the associate judges of the Supreme Court, for an order, directed to the sheriff of the city and county of San Francisco, to permit petitioner, who is in his custody pending appeal from a judgment of conviction for perjury, to visit, in charge of a deputy sheriff, the office of the county clerk of said city for the purpose of examining certain papers and records therein.

The application sets forth that the petitioner was convicted and sentenced, and that he has appealed from the judgment to the District Court of Appeals for the first appellate district, where such appeal is now pending; that a bill of exceptions on said appeal was presented, settled, certified, and filed; that in settling the same the judge of the superior court before which he was tried refused to allow a large number of important and substantial exceptions to be incorporated therein in accordance with the facts; that petitioner desires to apply to the Supreme Court of this state, under section 1174 of the Penal Code, to prove said exceptions; that the original bill is on file in the county clerk's office, and that to prepare his petition to the Supreme Court it will be necessary for him (acting as his own attorney) to inspect the same and the other records and papers in the case; that he has applied to the trial judge for permission to visit the county clerk's office for that purpose, which was denied him, hence this application.

I am not advised of any provision of law which confers upon an associate justice of the Supreme Court any authority to entertain or grant an application of this character. If it exists, it rests in the Supreme Court as a court, and is not reposed in the individual justices constituting that tribunal.

It may also be suggested in this connection that, as the appeal of petitioner from the judgment of conviction to which his bill of exception pertains is pending in the District Court of Appeal for the first appellate district, that tribunal would appear to be, at least in the first instance, after refusal by the trial judge, the proper one, as matter of procedure, in which to make this application. I do not pass at all upon the merits of the application of petitioner, concluding, as I do, that, as an associate justice, I have no authority to entertain the petition. For that reason, let it be dismissed.

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149 Cal. 396

Ex parte SPENCER. (Cr. 1,332.)

(Supreme Court of California. July 9, 1906.)

1. CONSTITUTIONAL LAW—DISCRIMINATION—EMPLOYMENT OF MINORS.

St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under 14 years "in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house or in the distribution or transmission of merchandise or messages," does not manifestly discriminate against the enumerated occupations, so as to violate Const. art. 1, § 21, prohibiting the granting of special privileges to any class of citizens.

2. SAME—RIGHT TO ACQUIRE PROPERTY.

St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under 14 years old in certain employments, does not unduly and without reasonable cause restrict the right of minors to work at any occupation they wish, and thus deprive persons of the right to acquire and possess property in violation of Const. Cal. art. 1, § 1; and Const. U. S. 14th Amend.

3. STATUTES—SPECIAL LEGISLATION.

St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under 14 years of age in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution or transmission of merchandise or messages, violation of which is made a misdemeanor by section 4 (page 14), cannot be said to make an improper classification, and so to be special legislation, in violation of Const. art. 4, § 25, subds. 2, 33.

4. CONSTITUTIONAL LAW — DISCRIMINATION—EMPLOYMENT OF MINORS.

The proviso to St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under 14 years of age in certain employments, that on the sworn statement of the parent that the child is over 12 years old, and that the parent or parents are unable, from sickness, to labor, the judge of the juvenile court may permit such child to work for a specified time, does not discriminate against orphans and abandoned children; the exception being for the sick parent.

5. SAME.

The proviso to St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under 14 years of age in certain occupations, that during the time of the regular vacation of the public schools a child over 12 years old may work at any such occupation, on a permit from the principal of the school attended by the child during the immediately preceding term, does not grant principals of public schools the exclusive power to give such permits, and so discriminate against pupils of private schools, but the permit, while it is to extend only to the time of the public school vacation, is to be given by the principal of the school which the child has attended, whether public or private.

6. SAME.

The provisions of St. 1905, p. 11, c. 18, § 2, that no child under 16 years old shall work at certain kinds of employment between 10:00 a. m. and 6:00 p. m., and no child under 16 years old shall work at any gainful occupation during the hours that the public schools are in session, unless he can read English at sight and write simple English sentences, or is attending night school, are reasonable, and so not unconstitutional.

7. SAME.

The exemption of domestic labor and the several kinds of farming from the operation of St. 1905, p. 11, c. 18, § 2, prohibiting the employment of children under certain ages, is not an unreasonable discrimination.

In Bank. Application of J. M. Spencer for writ of habeas corpus to be directed against J. F. Dinan, chief of police of the city and county of San Francisco. Petition denied.

W. F. Williamson, for petitioner. W. H. Langdon, Dist. Atty., and R. W. Harrison, Asst. Dist. Atty. (Jno. M. Ehleman, of counsel), for respondent.

SHAW, J. The petitioner was arrested and confined upon a charge of violating sections 2 and 4 of the act of February 20, 1905, regulating the employment and hours of labor of children, and prohibiting the employment of illiterate minors and of minors under certain ages. St. 1905, pp. 11, 14, c. 18. The return to the preliminary writ shows that the petitioner was arrested and taken into custody upon four several complaints, relating to four different children, each complaint charging him with employing a child under 14 years of age in the workshop and boiler room of a steamer; the child not then having a permit to work from the judge of the juvenile court of the county, and the time of such employment not being the time of the vacation of the public schools. The second clause of section 2 of the act provides that no child under 14 years of age shall be employed in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution or transmission of merchandise or messages; provided that, upon the sworn statement of the parent that the child is over 12 years of age and that the parent or parents are unable, from sickness, to labor, the judge of the juvenile court, in his discretion, may issue a permit allowing such child to work for a specified time, and provided, further, that during the time of the regular vacation of the public schools of the city or county, any child over 12 years of age may work at any of the prohibited occupations, upon a permit from the principal of the school attended by the child during the immediately preceding term. Section 4 of the act declares that a violation of any of the provisions of the act shall be a misdemeanor. The complaints charge violations of these provisions. Several objections on constitutional grounds are made to the validity of the act. It is claimed that it is a special law for the punishment of crime, where a general law could be made applicable, and, therefore, contrary to section 25, subds. 2 and 33, art. 4, Const.

Cal.; that it is not of uniform operation, but is discriminatory, and hence in conflict with sections 11 and 21 of article 1; and that it would deprive persons of the right to acquire and possess property, thus violating section 1 of article 1 of the state Constitution and the fourteenth amendment to the Constitution of the United States.

The presumption always is that an act of the Legislature is constitutional, and when this depends on the existence, or nonexistence, of some fact, or state of facts, the determination thereof is primarily for the Legislature, and the courts will acquiesce in its decision, unless the error clearly appears. Bourland v. Hildreth, 26 Cal. 184; University v. Bernard, 57 Cal. 612; In re Madera Irr. Dist., 92 Cal. 310, 28 Pac. 272, 675, 14 L. R. A. 755, 37 Am. St. Rep. 106; Sinking Fund Cases, 99 U. S. 718, 25 L. Ed. 496; 1 Tiedeman on Police Power, p. 10, note; Cooley, Const. Lim. (7th Ed.) 228. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Sinking Fund Cases, supra. "The delicate act of declaring an act of the Legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. * * * In a doubtful case the benefit of the doubt is to be given to the Legislature; but it is to be remembered that the doubt to which this rule of construction refers is a reasonable doubt as distinguished from vague conjecture or misgiving." Bourland v. Hildreth, supra. From their tender years, immature growth and lack of experience and knowledge, minors are more subject to injury from excessive exertion, and less capable of self-protection, than adults. They are, therefore, peculiarly entitled to legislative protection, and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination.

The first objection to the validity of the part of the section above stated is that it is discriminatory and special because it does not prohibit such employment of minors in all occupations, but only in those specifically mentioned; that work at other places, of which saloons, barber shops, railroads, ferries, and warehouses are specified by counsel as instances, would be equally injurious, and that in order to be general and uniform they should be included in the prohibition. The objection is two-fold: First, that the legislation constitutes an unfair discrimination against the particular trades mentioned; second, that it unduly and without reasonable cause restricts the right of minors to work at any and every occupation in which they may wish to engage. There is nothing in the act to indicate a purpose on the part of the Legislature to make use of the laudable object of protecting children as a mere pretense under which to impose burdens upon some occupations or trades and favor others. It appears to have been framed in good faith and for the purpose of promoting the general welfare by protecting minors from injury by overwork and by facilitating their attendance at schools. The Legislature may undoubtedly forbid the employment of children under the age of fourteen years at any regular occupation if the interests of the children and the general welfare of society will be thereby secured and promoted. The power to forbid their employment in certain occupations and not in all depends on the questions whether or not any appreciable number of children are employed in the callings not forbidden, and whether or not those callings are injurious to them, or less injurious than those forbidden. If certain occupations are especially harmful to young children and others are not so, there can be no serious doubt that it is within the power of the Legislature to forbid their employment in one class and permit it in the other. The difference in the results would justify the classification with a view to the difference in the legislation. Also, if children are employed in certain occupations to their injury, and are not employed at all in others, or so infrequently that the number is inappreciable and insignificant, the occupations regularly employing them have no ground to complain of discrimination. They compose the entire class to which the legislation is directed, the class which causes the injury to be prevented. And upon the facts assumed, neither the children nor the persons engaged in the occupations in which they are not employed would be affected by the prohibition as to other occupations. The preliminary question as to the effect of the specified occupations on the children, and as to the number of children engaged therein, are questions of fact for the Legislature to ascertain and determine. It has determined that the facts exist to authorize the particular legislation. If any rational doubt exists as to the soundness of the legislative judgment upon the existence of the facts, that doubt must be resolved in favor of the legislative action and the law must accordingly be held to be valid in these respects. The specifications of forbidden callings are broad and comprehensive. Even of those which, as counsel assert, are omitted from the classification, we cannot say that a saloon is not a "mercantile institution," it being a place where merchandise is sold; nor that a barber shop is not a "workshop," it being a place where a handicraft is carried on; nor that ferries and railroads are not engaged in the "distribution or transmission of merchandise or messages." At all events, in view of the rule that a statute must be liberally construed to the end that it may be declared constitutional rather than unconstitutional (People v. Hayne, 83 Cal. 117, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211; 26 Am. & Eng. Ency. of Law, 640), we would not give the description of forbidden occupations this narrow construction in order to make the law invalid. The decision of the Legislature that the specified occupations are more injurious to children than others not mentioned, and hence the subject of special regulation, and that they constitute practically all the injurious occupations in which children are employed at all, and therefore the only cases in which regulation is needed, is not so manifestly incorrect, not so beclouded with doubt concerning its accuracy, as to justify the court in declaring it unfounded and the law, consequently, invalid.

There is a proviso to this clause of the section, to the effect that if either parent of such child makes a sworn statement to the judge of the juvenile court of the county that the child is over 12 years of age, and that the parent or parents are unable, from sickness, to labor, such judge, in his discretion, may issue a permit allowing such child to work for a time to be specified therein. There is no force to the objection that this discriminates against orphans and abandoned children. The exception allowed by the proviso is not made for the direct benefit of the child, but for the sick parent. It is a burden put upon the child because of the special necessity of his case which justifies the different provision respecting him. The Legislature deems the necessity of allowing the child to work to aid in the support of the sick parent sufficient to outweigh the benefits which would otherwise accrue from the education and protection of the child during such inability. If there are no parents whose necessities the child's labor could alleviate, the reason for this exception is wanting. The provision seems a reasonable one in view of the conditions upon which, alone, it can apply. There is a further proviso or exception, to the effect that any child over 12 years old may work at the prohibited occupations during the time of the regular vacations of the public schools of the city or county, upon a permit from the principal of the school attended by the child during the term next preceding such vacation. This does not, as counsel contends, give the principals of the public schools the exclusive power to give the contemplated permits. Its true meaning is that the permit is to be given by the principal of the school which the child has attended, whether the school is public or private, but that it can extend only to the time of the public school vacation. This act was approved February 20, 1905. Its provisions relating to attendance upon schools, and those of section 1 of the act of March 24, 1903 (St. 1903, p. 388, c. 270), with the amendment of March 20, 1905 (St. 1905, p. 388, c. 333), to said section 1 must be considered together. The act of 1903, in effect, requires all children to attend, either the public schools, or a private school, during at least five months of the time of the sessions of the public schools. The amendment of March 20, 1905, extends the time of such compulsory attendance, so as to embrace the whole period of the public school session. Therefore, if the parents, guardians, or custodians of a child choose to send it to a private school, is must attend thereon at least during the time the public schools are in session. A permit may then be obtained for it to work during the vacation of the public schools, if its interests or necessities so require, without subjecting it to conditions substantially different from those affecting the children attending the public schools. There is no discrimination. The Legislature has the power to make such reasonable regulations as these with respect to the time of the vacations of schools, whether public or private, in the interest of the public welfare and the welfare of the children.

A third clause of section 2 declares that no child under 16 years of age shall work at any gainful occupation during the hours that the public schools are in session, unless such child can read English at sight, and write simple English sentences, or is attending night school. The first clause of section 2 provides that no minor under 16 shall work in any mercantile institution, office, laundry, manufacturing establishment, or workshop, between 10 o'clock in the evening and 6 o'clock in the morning. Section 5 (page 15) of the act further provides that nothing in the act is to be construed to prevent the employment of minors at agricultural, viticultural, horticultural, or domestic labor, during the time the public schools are not in session, or during other than school hours. The petitioner's contention with respect to the first and last clauses of section 2 is that they constitute such important parts of the statute that it cannot be presumed that the Legislature would have adopted the other parts thereof if it had been aware of the invalidity of these particular provisions, and hence the whole act must fall. We cannot accede to this proposition. They are separable and independent provisions, and are not so important to the entire scheme as to justify us in concluding that the Legislature would have refused to adopt the other parts without these, and thereby to declare the entire statute invalid. Nor can it be conceded that these provisions are invalid. The principles already discussed apply with equal force to the first clause of the section. The proviso concerning illiterate children is a reasonable regulation to prevent those having control of such children from working them to such an extent as to hinder them from acquiring, or endeavoring to acquire, at least the beginning of an education before arriving at the age of 16 years. The exemption of domestic labor and the several kinds of farming from the operation of the act is not an unreasonable discrimination. Such work is generally carried on at the home and as a part of that general home industry which should not be too much discouraged, and it is usually under the immediate care and supervision of the parents or those occupying the place of parents, and hence is not liable to cause so much injury. These circumstances distinguish them from the prohibited industries and is a sufficient reason for the exemption. We find no reasonable ground for declaring the law invalid.

The petition is denied, and the petitioner remanded to the custody of the officer.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment, and in what is said by Mr. Justice SHAW in his opinion; but I do not concur in some of the quotations which he makes from other cases, and particularly in that quotation in which it is stated that the presumption in favor of the validity of a statute "continues until the contrary is shown beyond a rational doubt." This is, in my opinion, too strong a statement of the rule.

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3 Cal. App. 689

PEOPLE v. FERNANDEZ.

(Court of Appeal, Second District, California. May 31, 1906.)

1. CRIMINAL LAW—REQUEST TO CHARGE—REFUSAL.

It is not error for the court to refuse accused's requests to charge which are fully covered by instructions given.

2. SAME—REMARKS OF TRIAL JUDGE—HARMLESS ERROR.

Where all the testimony of a witness was adverse to accused, he was not harmed by an observation of the trial judge that the witness had been giving nothing but opinions for the last hour.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1526-1530; vol. 15, Cent. Dig. Criminal Law, § 3125.]

3. SAME—TRIAL—CONDUCT OF COUNSEL—EXAMINATION OF JURORS.

Accused was not entitled, during the taking of testimony and after the jury had been impaneled, to interrogate several of the jurors in open court as to whether they had read any reports of the trial in the newspapers.

4. SAME—NEW TRIAL—MISCONDUCT OF JUROR—READING NEWSPAPERS.

An affidavit that a juror read in a newspaper "reports of the progress of the trial" was insufficient to show misconduct justifying a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2252.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Feliz Fernandez was convicted of burglary, and he appeals. Affirmed.

Frank C. Prescott, for appellant. U. S. Webb, Atty. Gen., and L. M. Sprecher, Dist. Atty., for the People.

GRAY, P. J. The defendant appeals from a judgment convicting him of burglary, and from an order denying him a new trial.

1. The testimony of Inez Dominguez, corroborated as it was by the other members of her family, made out a clear case of burglary in the first degree against the defendant, and there is no merit in the contention that the verdict is not supported by the evidence.

2. The defendant urges that instructions offered by him were refused. One of these instructions related to the degree of certainty with which circumstances should be proved and that they should point conclusively to defendant's guilt; and the other instruction related to the presumption of innocence. The first instruction given to the jury covered the proposition of the presumption of innocence fully and was as favorable to defendant as he had a right to demand. So, too, the required certainty of circumstantial evidence and the law covering that question was clearly and fully stated to the jury. Hence there was no error in refusing the requested instructions.

3. Complaint is made of some oral expressions of the trial judge in the presence of the jury, to the effect that the testimony of a certain witness, elicited on cross-examination, as to the defendant having secreted matches in the bedclothes in a certain room amounted to nothing more than the opinions and beliefs of the witness. These statements of the witness were, in fact, nothing but opinions or conclusions drawn by him from certain discoveries he claimed to have made. To call them opinions and to say that "the witness had been giving nothing but opinions for the last hour" could in no way harm the defendant, for all the testimony of the witness was adverse to the defendant; and to say that he was only giving his opinions could only lessen the force of his testimony. If the court had intimated that the witness was confining himself to facts, the defendant might have properly complained.

4. During the taking of testimony and after the jury had been impaneled, defendant requested the privilege of asking the several jurors some questions in open court as to whether they had read any reports of the trial in the newspapers. The court refused the request, stating that this was not the time or place for any such inquiry. We think the court was right, and that there is no merit in the objection to the action taken.

We are also satisfied that there is no showing made by the affidavit filed on motion for a new trial that required the granting of the motion. What the jurors read in the newspaper does not appear even in substance.

Nor does it appear from the affidavit that the newspaper contained anything that could have possibly prejudiced the reader against the defendant or his case. All that affirmatively appears from the affidavit is that a juror read in the paper "reports of the progress of the trial." Being a juror, he knew all about "the progress of the trial" and it could not hurt him to read what he already knew.

Some other points are urged by the appellant, but they are not considered of sufficient importance to warrant special treatment.

The judgment and order are affirmed.

We concur: SMITH, J.; ALLEN, J.

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3 Cal. App. 691

RIVERSIDE COUNTY v. YAWMAN & ERBE MFG. CO.

(Court of Appeal, Second District, California. May 31, 1906.)

1. COUNTIES—CONTRACTS—SUPPLIES—BIDS—DUTY TO ADVERTISE.

County government act (St. 1897, p. 459, c. 277, § 25, subd. 8) confers express authority on the board of supervisors to furnish a courthouse without requiring competitive bidding. Section 4 (page 452) gives the board general authority to purchase such personal property as may be necessary in the exercise of its powers; and section 25, subd. 21 (page 464), declares that the board shall annually advertise for bids for furnishing the county with stationery, clothing, bedding, groceries, provisions, drugs, medicines, "and all other supplies." *Held*, that the term "other supplies" had reference to ordinary supplies which the board was required to keep for use and replenish annually, if needed for distribution among the county officers, and did not include furnishings for the courthouse, which the board was authorized to purchase without advertising for bids.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 188.]

2. PLEADING—DEMURRER—EFFECT.

A demurrer to a complaint only admits material matters.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 525–534.]

3. COUNTIES—CLAIMS—ALLOWANCE—ACTIONS.

An allegation in a complaint that the board of supervisors had passed upon and allowed a bill for furniture purchased for the courthouse constituted an allegation that the board acting in a judicial capacity had determined the correctness of the claim.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 355, 356.]

4. SAME—ALLOWANCE—COLLATERAL ATTACK.

Where a board of supervisors has passed on the validity of the claim against the county, the board's findings on questions of fact cannot be collaterally assailed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 322, 323.]

5. SAME—RECOVERY OF PAYMENT.

Where the county board of supervisors purchased furniture for the courthouse, paid for the same, and retained and used it, the county was not entitled, without returning the furniture, to recover the amount paid with penalty under the county government act of 1897 (St. 1897, p. 452, c. 277, § 8), declaring that whenever any county officer has drawn any warrant in favor of any other person without being authorized by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county may institute suit to recover the money so paid and 20 per cent. damages for the use thereof.

Appeal from Superior Court, Riverside County; B. F. Bledsoe, Judge.

Action by Riverside county against the Yawman & Erbe Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Lyman Evans and A. A. Adair, for appellant. Gill & Densmore, for respondent.

ALLEN, J. This is an appeal by plaintiff from an order sustaining a demurrer to the complaint and judgment thereon in favor of defendant.

The material facts involved are these: The board of supervisors of Riverside county purchased, without preliminary publication or competitive bidding, certain furnishings for use in the county offices in the courthouse of that county. The agreed price and value thereof, as shown by a verified claim, was by the district attorney certified as a proper charge against the county. The board allowed the claim, and the same was regularly paid by the treasurer. A grand jury of the county subsequently determined that such payment was without authority of law and directed the district attorney to institute this suit for the recovery of the amount paid, together with a penalty of 20 per cent. Their action and this suit is based upon section 8 of the county government act of 1897 (St. 1897, p. 452, c. 277), which provides: "* * * Whenever any county officer has drawn any warrant * * * in favor of any other person, without being authorized by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered * * * to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent. damages for the use thereof." And upon the construction of subdivision 21 of section 25 (page 464) of such act, which provides: "The board of supervisors of the several counties shall annually advertise, for at least ten days in a newspaper of general circulation in the county, for sealed bids for furnishing the county with stationery, clothing, bedding, groceries, provisions, drugs, medicines, and all other supplies. All bids shall be on a schedule, showing all articles needed in the several offices and departments, prepared by the clerk of the board, shall state separately the price of each article to be furnished. and any person may bid upon any article separately."

It is insisted that furnishings for a courthouse are "other supplies" within the meaning of the law, and that there being no publication or bids therefor, or schedule prepared as provided, the purchase and payment was therefore without authority of law. We are of opinion that from a reading of the whole subdivision it is apparent that the term "other supplies" has reference to ordinary supplies which the board is required to keep for use and replenish annually, if needed, for distribution among the county officers; that furniture for courthouse is not in the contemplation of such act ordinary supplies. This construction is accentuated by subdivision 8, sec. 25 (page 459), of the same act, which confers express authority upon the board to erect, rebuild, or furnish a courthouse, and with reference to which furnishing no publication or competitive bidding is expressly required. In addition, the board by virtue of section 4 (page 452) of the act is given authority generally to purchase such personal property as may be necessary in the exercise of its powers. This construction of subdivision 21 is in line with the construction given by the Supreme Court of subdivision 8 in McGowan v. Ford, 107 Cal. 183, 40 Pac. 231, where it was held that repairing and altering a courthouse, or improving the grounds around it, was not included in the subdivision having reference to the publication and bids for the erection and construction of a building; the doctrine of which case being that the general power to contract may be exercised unless there is an express mode provided by statute. Nor have we involved here any such question as was involved in Swasey v. County of Shasta, 141 Cal. 394, 74 Pac. 1031, in which it was held that the erection and construction of a fence around a courthouse was included in the term "building," no doubt upon the theory that the building, fence, and property became real estate and was, in effect, one holding and a single entity. This cannot be said of the furniture in a house. Nor does the dictum in the case last mentioned affect the question here involved; the statement there being that "ordinary county supplies shall be bought after advertisement." The board of supervisors of a county, then, in the absence of statutory restrictions, may purchase personal property in the open market in like manner as other purchasers, and, unless there be some mode of purchase which shall be held the measure of their power, such purchase is not without authority of law, and warrants issued therefor are not issued without authority of law.

It is insisted, further, that the demurrer to the complaint admits that a part of the furniture purchased and paid for had not been delivered when the board approved the bill. A demurrer only admits matters material. The allegation of the complaint that the board had passed upon and allowed the bill is an allegation that the board, acting in a judicial capacity, had determined its correctness. It was the peculiar province of the board to pass upon the questions of fact involved in this purchase, and having determined the same it cannot be assailed collaterally. County of Alameda v. Evers, 136 Cal. 133, 68 Pac. 475. The same observations may be made with reference to the form in which the claim was presented. It affirmatively appears from the complaint that the board of supervisors has purchased, paid for, and retained the use of certain personal property, and a court is asked to compel restitution with penalty in favor of such purchasers. The Legislature never contemplated conferring such power upon a public corporation when it enacted section 8 of the county government act. The right there sought to be conferred was to recover money paid without authority of law. To say that one who receives property under a contract with the owner and retains and uses it is not authorized by law to pay for it would be to say that a public corporation may take and use property for public purposes without compensating the owner, provided they can once get possession of it under the guise of a contract; and to say that they may recover the purchase price actually paid without tendering back that which they have received would be to say that our Legislature intended to discourage common honesty as applied to public corporations, and that the courts were to be made "handmaidens of iniquity." We think, therefore, that this contract was valid in its inception, that the payment was regular, and that under no circumstances could the county recover this money while retaining the fruits of its bargain.

Order and judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 701

NEWTON v. UNITED ELECTRIC, GAS & POWER CO.

(Court of Appeal, Second District, California. May 31, 1906.)

APPEAL — NEW TRIAL — REVIEW — ABUSE OF DISCRETION.

The appellate court will not set aside an order of the trial court granting a new trial, unless it appears that it was erroneous, or that there has been an abuse of discretion.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Lyman Newton against the United Electric, Gas & Power Company. From an order granting defendant's motion for a new trial, he appeals. Affirmed.

Edwin A. Meserve, A. S. Longley, and J. P. Chandler, for appellant. Cochran, Williams & Phillips, and Hunsaker & Britt, for respondent.

SMITH, J. The following is the opinion of the trial judge referred to in the decision of the court:

"In this case the facts are briefly these: Defendant maintains a transformer, which is attached to cross-beams. The cross-beams are fastened to piers under the approach to the Long Beach wharf and pavilion. The transformer and cross-beams are about 14 feet from the ground. From the shore side, two wires run to the transformer carrying a large voltage of electricity. Two wires run from the transformer, carrying a much lower voltage, to supply lights for the wharf and pavilion. At the time of the injury complained of, the plaintiff was employed by the city of Long Beach to sweep the wharf and pavilion, and perform other duties in line with such work. Early in the morning of the accident, plaintiff's attention was attracted to the fact that smoke was coming from one of the cross-beams. Plaintiff thereupon placed some boxes alongside of a small shack standing near, and by the aid of these boxes climbed upon the flat roof of the shack. A woman, who had attracted plaintiff's attention to the smoking cross-beam, passed him a small bucket of water which he threw at or upon the beam. Thereupon plaintiff fell or was thrown from the shack to the ground. He was soon in a partially unconscious condition. An examination, made soon afterwards, showed a loss of skin upon the backs of his hands and an injury to his back. One of the issues was whether these wounds were bruises caused by his fall from the shack to a board walk or whether they were electric burns. The plaintiff's theory of the case is that when he threw the water upon the cross-beam, a circuit was formed thereby, through the agency of the water, electricity then escaping at the cross-beam, was conducted to the plaintiff and through him and the shack to the ground. It was a wooden shack, and it is hardly supposable, though admitting this to have been a damp, foggy morning, that the wooden shack could have been a sufficiently good conductor of electricity to have completed the circuit so that plaintiff could have been shocked, even if it be assumed that the electricity would leave the cross-beam, and travel to plaintiff through the medium of a column of water or through the air saturated with water the distance from him to the beam. But plaintiff testified that as he was climbing up, he received quite a severe electric shock when he first put his hand upon the shack. If this is true, it would seem that the shack was 'grounded,' for, had it been 'grounded,' there could have been in it no accumulation of static electricity from a leakage of the service wires that ran into it. And if it was not 'grounded,' plaintiff, when standing upon it, could not have received through his body a current from the cross-beam either by the agency of the water or otherwise. But it seems quite improbable that the electricity would leave the cross-beam to take a path afforded by such a poor conductor as a column of water, even if it be conceded that, for an instant, there was a continuous column of water from the bucket to the cross-beam, which is also improbable. And it seems still more improbable that the electricity would travel to plaintiff through a column of aqueous atmosphere, created by the agency of the water thrown toward the beam. The injuries found upon the plaintiff's body are as well explained as bruises suffered in consequence of his fall as electric burns. Further, assuming that defendant was negligent in not properly insulating its wires, it is a grave question whether it can be said, as a legal proposition, that plaintiff's injuries (if he was injured in consequence of an electric shock) were a natural and probable consequence of defendant's negligence.

"Barrows on Negligence, at page 13, says: 'The tendency of the courts would seem to be that, negligence being established, the person guilty of it is liable for its consequences whether they be such as he could or ought to have forseen or not.' It has been held that one negligently causing a fire is liable only for damages or injuries caused by the fire, and that he is not liable for personal injuries received by persons in voluntarily attempting to extinguish the fire. As to this matter the cases of Liming v. Ill. Cent. R. Co., 81 Iowa, 246, 47 N. W. 66, and Pike v. Grand Trunk R. Co. (C. C.) 39 Fed. 255, may be cited as illustrating the conflicting views of the courts. But while courts have differed as to what are 'natural and probable' consequences of negligence in given cases, the principle that consequences of negligence to be actionable must be 'natural and probable' has not been denied. In this case, while the evidence may justify the conclusion that it is possible that plaintiff received an electric shock, it falls far short of showing a probability of such result under like circumstances. And a remotely possible consequence resulting through the agency of an unusual and peculiar set of cooperating circumstances fails to satisfy the requirements of a definition of a natural and probable consequence. In this case, the wires were suspended 14 feet from the ground, and were securely fastened. There was no apparent danger of anyone coming in contact with them in their position high above the ground and several feet below the plank walk overhead. There was no negligence in placing or securing these wires in their place. And as the only explanation of the very slight charring of the cross-beam, on the morning of the accident, is to be found in the fact that one of the insulators, on this beam, was broken, I think it should be held that plaintiff's injuries (conceding them to have resulted because of an electric shock) are not a natural and probable consequence of the breaking of this insulator. And I so hold, not upon the theory that in attempting to extinguish what he believed to be an incipient fire, plaintiff acted as a mere volunteer, but upon the theory that it was his right and duty to extinguish any fire that he believed might spread and injure or destroy the wharf and pavilion. And I do not find that plaintiff was guilty of any contributory negligence. Shearman & Redfield on Negligence, § 679.

"But I do not think the evidence shows that defendant was negligent. The only substantial fact in the case upon which to predicate negligence is the fact that an insulator upon this cross-beam was broken. There is no satisfactory evidence showing when or how this insulator broke, nor any act or omission of defendant whereby it was broken or maintained for any time in a broken condition. There is no satisfactory evidence to show that defendant did or failed to do anything whereby it was remiss in its duty. And unless it can be held that the fact of the breaking of an insulator is itself proof of negligence, no negligence has been established in this case. On the other hand, the evidence introduced by defendant tends to show that it exercised all necessary and usual precautions."

"The defendant's motion for a new trial is granted on the ground of the insufficiency of the evidence to justify the verdict, and on the ground that the verdict is against law; and as to all other grounds, the motion is denied. D. K. Trask, Judge."

This appeal is from an order granting the motion of the defendant for a new trial. The case is stated and the grounds for granting the order appear in the opinion of the judge of the lower court—which will be found in the statement of the case.

We find nothing in the record to exclude the case from the established rule that the appellate court will not set aside an order of the trial court in granting or refusing a new trial, unless it appears that it was erroneous, or that there has been an abuse of discretion. Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Cutten v. Pearsall, 146 Cal. 697, 81 Pac. 25.

The point chiefly urged by the appellant is, that the opinion of the court "is the opinion of the judge as an electrical expert, and not a judicial opinion." But assuming, for the purposes of the decision only, that we may look to the opinion of the judge as constituting the exclusive grounds of his decision, yet it is admitted that there was expert evidence on both sides of the question involved, and there is nothing in the opinion to indicate that the judge's decision was not based upon the expert evidence given pro and con.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 687

SECURITY SAVINGS BANK v. SCOTT et al.

(Court of Appeal, Second District, California. May 31, 1906.)

1. BANKRUPTCY—DISCHARGE—RELEASE OF MORTGAGE.

A mortgage is not discharged by the mortgagor's adjudication and discharge as a bankrupt.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 812.]

2. SAME—LIABILITY OF SPOUSE.

Where a mortgage was signed by the mortgagor's wife and contained an express agreement on her part to pay the note secured by the mortgage according to its terms and conditions, she was not discharged from liability by the mortgagor's adjudication and discharge as a bankrupt.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 786.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Security Savings Bank against Arthur Scott and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hugh T. Gordon, for appellants. Shankland & Chandler, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff. The suit was brought on a mortgage executed by the defendants to secure a promissory note of the defendant Arthur Scott. The defendant Arthur suffered default. The defendant Colista sets up in her answer a conveyance of the property to her by her codefendant and a subsequent discharge of the latter in bankruptcy; and as to her a judgment was entered on the pleadings in favor of the respondent.

The only point urged by the appellants is that the mortgage was discharged by the adjudication in bankruptcy. No direct authority is cited for this proposition, nor do we think any argument in its favor can be drawn from the authorities and provisions of the law cited. The contrary seems to be established by the provisions of the bankruptcy act and the authorities cited in respondent's brief. The appellants' contention is, we think, without merit. Were it otherwise, there appears in the mortgage an express agreement upon her part "to pay said note according to the terms and conditions thereof"; and this, at least, was not discharged by the adjudication.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 606

KRAMM v. STOCKTON ELECTRIC R. CO.

(Court of Appeal, Third District, California. June 15, 1906.)

1. DEATH—COMPLAINT—NEGLIGENCE—WILLFULNESS.

A complaint charging that defendant, by its agents and servants, carelessly and negligently and willfully and wantonly ran one of its street cars upon, knocked down, ran over, and killed, plaintiff's intestate, was not demurrable for uncertainty because it could not be ascertained therefrom whether plaintiff claimed damages for negligence or willfulness; the gist of the action being the actual damages for the personal injuries inflicted by defendant's moving cars without reference to the manner in which the injury was inflicted.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 60, 61.]

2. NEGLIGENCE—WILLFULNESS.

While carelessness does not necessarily imply wantonness, wantonness may include negligence, since wantonness may exist without an intent to injure.

On rehearing. For former opinion, see 86 Pac. 738. Petition denied.

CHIPMAN, P. J. Respondent petitions for a rehearing on two grounds: First, the insufficiency of the complaint; second, insufficiency of the evidence to entitle the case to be submitted to the jury. Upon the second of these points we are still of the opinion that the court erred in granting defendant's motion for nonsuit. Upon the first point it is perhaps due to defendant that we express an opinion, inasmuch as it is claimed that at the oral argument attention was called to it, although in respondent's brief the point was not alluded to and might, for that reason, be disregarded. People v. Northey, 77 Cal. 635, 19 Pac. 865, 20 Pac. 129; Phelps v. Mayer, 126 Cal. 551, 58 Pac. 1048. The complaint charged that defendant by its agents and servants "carelessly and negligently and willfully and wantonly * * * ran one of its street cars upon, knocked down, ran over and killed said Philip Kramm." There was a demurrer to the complaint for insufficient facts and also for uncertainty because it could not be ascertained therefrom whether plaintiff claimed damages for the alleged careless and negligent conduct of defendant or whether damages were claimed for the alleged willful and wanton conduct of defendant. The demurrer was overruled and the case went to trial on the complaint and answer. It is now urged "that plaintiff cannot recover in any event by reason of her complaint, which does not state facts sufficient to constitute a cause of action. In other words, that there cannot be carelessness, negligence, willfulness and wantonness at the same time." No question as to ambiguity or uncertainty being urged in the petition for rehearing, we need not consider that ground of the demurrer.

In Esrey v. Southern Pacific Company, 103 Cal. 541, 37 Pac. 500, the complaint at the first trial (88 Cal. 399, 26 Pac. 211) charged that defendant carelessly and negligently "ran one of its cars against plaintiff," etc. When the cause was tried the second time, the complaint was amended so as to charge the acts of defendant to have been also "willfully and wantonly" done. The court said: "In view of the suggestion of the court made at the time the case was previously before us, the plaintiff prior to the present trial in the court below amended her complaint, by charging the acts of the defendant to have been willfully and wantonly done. Conceding this form of allegation necessary to support the judgment—and the law of the case would seem to so declare—still we do not think the cause of action has been materially altered by the amendment, and consequently the plea of the statute of limitations is not well taken. That amendment pertains wholly to the manner in which the injury was inflicted, and actual damage is all that is sought to be recovered. The gist of the action is a claim for actual damages for personal injuries inflicted by defendant's moving cars, and these are the facts found stated in the original complaint." And it was held that the form of the action was uncharged by adding to the charge of simple negligence and carelessness the element of wantonness. To constitute wantonness in the eye of the law, it is not necessary to allege or show an intent to injure. Gross negligence, or what is sometimes called the "last" negligence, may be the equivalent of willful or wanton negligence; and where the conduct of defendant exhibits reckless indifference to probable consequences, with knowledge of facts and circumstances likely to result in injury, it becomes wanton negligence. Harrington v. L. A. Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. The claim that there cannot be carelessness, negligence, willfulness, and wantonness at the same time cannot be maintained. It is true that carelessness does not necessarily imply wantonness, but as wantonness may exist, without intent to injure, it certainly may imply carelessness. To do an act in reckless disregard of consequences, though not intending thereby to do injury, is to do the act in a careless and negligent manner, and would also, under some circumstances, be wantonly done. It was not necessary to sustain the action that the act of defendant be shown to have been wantonly and willfully as well as carelessly and negligently done. The fact that the manner of doing the act was charged in the conjunctive, did not deprive plaintiff of the right to show what happened and to recover accordingly. We violate no rule of pleading in holding that the complaint was sufficient as we understand the case of Esrey v. S. P. Co., supra.

The petition is denied.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 626

PIPHER v. SUPERIOR COURT OF CALIFORNIA, IN AMADOR COUNTY et al.

(Court of Appeal, Third District, California. May 23, 1906.)

1. APPEAL—FINAL JUDGMENT—SPECIAL PROCEEDING.

The presentation of the claim of an official court reporter to the judge or court for allowance is neither an action, nor a special proceeding, within Code Civ. Proc. § 963, subd. 1, authorizing an appeal from a final judgment entered in an action or special proceeding commenced in the superior court or brought thereto from another court.

2. MANDAMUS — STENOGRAPHERS — FEES—ALLOWANCE—FINAL JUDGMENT.

Code Civ. Proc. § 274, provides that in criminal cases the fees for reporting and for transcripts ordered by the court must be paid out of the county treasury on the order of the court, etc. *Held*, that the action of the judge in passing on the claim of an official stenographer for fees earned in a criminal case was not final in the sense that it was conclusive or beyond review if erroneous; the duty of the judge after services have been performed under his order to direct the issuance of a warrant being ministerial and subject to control by mandamus.

3. SAME—FINDINGS OF FACT.

Where, on presentation of an official stenographer's claim for fees in a criminal case, the judge allowed a portion of the claim, but disallowed a claim for a transcript because it had not been ordered by him, as contended by the stenographer, mandamus would not lie to compel the judge to make a different finding of fact as to the order of such transcript and to compel the allowance of the balance of the claim.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 61-70.]

Mandamus on petition of Joseph E. Pipher against the superior court of the state of California in Amador county and R. C. Rust, Judge thereof. Writ denied.

R. Platnauer, for petitioner. C. P. Vicini, Dist. Atty., for respondent.

CHIPMAN, P. J. Mandate. The petition shows that plaintiff is an official reporter of the superior court and that defendant is judge of the superior court of Amador county. On May 1, 1905, defendant appointed petitioner as the official reporter, pro tempore, of said court, and he thereupon entered upon the discharge of his duties as such reporter. From May 1 to May 17, 1905, both inclusive, plaintiff, under order of said court, took down in shorthand all the proceedings at the trial then pending in said court in the case entitled, "The People, plaintiff, v. F. N. Staples, defendant," charged with the crime of murder. During the trial, upon the order of the court, plaintiff transcribed and made two copies of the testimony of certain witnesses taken at said trial and delivered to the district attorney and to the attorney for the defendant one copy each of such transcription, containing 1,200 folios of 100 words per folio, and also transcribed excerpts of certain other testimony, and delivered one copy each to the district attorney and defendant's attorney, said transcription containing 150 folios of 100 words per folio. On May 17, 1905, plaintiff presented to defendant a demand for the amount claimed to be due him for said services and for his reasonable traveling expenses from the city of Sacramento to the town of Jackson, and the amount of such demand for such services has by order of the court been paid to plaintiff. On May 17, 1905, defendant directed plaintiff to write out and transcribe and furnish defendant for transmission to the Governor a complete transcription of his shorthand notes of all the testimony taken and proceedings had at said trial, and also to furnish to the district attorney and attorney for defendant each a copy of said transcription, "other than that of the testimony of those witnesses whose testimony had theretofore been transcribed by affiant." Thereafter plaintiff complied with said order by making the transcription so ordered and furnished copies as ordered. "The transcription of affiant's shorthand notes of the whole of the proceedings in said action contained 3,450 folios of 100 words per folio, and that the transcription delivered to said district attorney, and to the attorney for the defendant in said action, each contained 2,250 folios of 100 words per folio. That the total amount of transcription performed by affiant subsequent to said 17th day of May, 1905, pursuant to said order aforesaid. was as follows: 1 copy of 1,200 folios, being 1 copy of the testimony of certain witnesses which had been transcribed during the trial, prior to the 17th day of May and 3 copies of 2 250 folios each, being the transcription of the balance of said shorthand notes excepting the testimony transcribed during the trial, said folios being 100 words each and said 3 copies having been made by affiant at one time." That subsequently, on June 23, 24, and 25, 1905, on the order of said court, plaintiff attended said court and reported the proceedings had in said case, and that his traveling expenses from Sacramento to Jackson and return were $5.50. That the fees allowed by law, including traveling expenses, for such services are the sum of $1,018. That plaintiff has received $500 and no more, which sum was paid on June 24th, and there remains due the sum of $518. That on February 14, 1906, plaintiff demanded of defendant in writing that said court make an order directing the payment of said last-named sum out of the county treasury of said Amador county as due plaintiff for his said services, and "defendant refused and still refuses to make such order, or any other than one directing the payment to affiant out of said county treasury of the sum of $113."

Defendant answered by a sworn statement. After stating the fact as to the transcription which was made during the trial and paid for, the answer denies that defendant made any order in the matter other than as follows: "At the conclusion of the said trial defendant ordered said plaintiff as such official reporter pro tempore to complete the transcription of the testimony taken and proceedings had at said trial by transcribing two copies of his notes excepting the portions already transcribed and which had been paid for. so that the court could file one copy with the clerk of the court and forward the other to the office of the Governor of the state and that plaintiff proceeded to do so and procured the return from the district attorney and from the attorney for the defendant of the testimony transcribed during the trial and incorporated it into the two copies of the transcript ordered by the court, but without any order or authorization therefor he made a complete copy of the entire record and sent it to this defendant with a statement that he made it for transmission to the Governor, and also his bill for it, and for the two copies ordered by the court. That defendant refused to accept the copy not ordered and notified plaintiff that he would hold the copy subject to his order. That said copy has never been accepted or used and is still in the chambers of defendant as judge of said superior court, subject to plaintiff's order. The bill presented by plaintiff was for $1,029.50, and on June 24, 1905, defendant ordered paid thereon the sum of $500 which plaintiff on said date received. That on July 29, 1905, defendant as such judge passed upon and allowed on said bill the further sum of $113 and ordered the county auditor to draw his warrant on the treasurer of said Amador county for said sum in favor of plaintiff," which he refused to accept. Defendant further "avers that he has acted upon plaintiff's claim and allowed it in the sum of $1,193.50, all of which plaintiff has received except the sum of $113, and that such allowance is a full, fair, and adequate allowance to plaintiff for all his services, expenses, and transcriptions." Defendant demurred to the petition for want of facts sufficient to entitle plaintiff to the relief demanded.

It appears from the petition, as well as from the answer, that plaintiff presented his bill for allowance for the full amount claimed to the judge of the court who acted upon it, made an allowance, and ordered a warrant drawn for the amount in his judgment found to be due. The fees allowed the official reporter are provided for by section 274 of the Code of Civil Procedure, and it is provided: "In criminal cases, the fees for reporting and for transcripts ordered by the court to be made must be paid out of the county treasury upon the order of the court: provided that when there is on official reporter in attendance, and a reporter pro tempore is appointed, his reasonable expenses for traveling and detention must be paid and allowed by the court and paid in like manner."

It is claimed by plaintiff that the rule for determining whether a writ should issue in any particular case is stated in Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, as follows: If the determination of the tribunal was not intended to be final, and there is no other adequate remedy, the writ must issue. And it is stated that the sole issue of law here is as to the power of the court to compel a judge of the superior court to act in a specified manner. It is contended that the court has such power (Wood v. Strother), and that the demurrer should be overruled and that the questions of fact raised by the answer should be tried by this court, in accordance with sections 1089 and 1090 of the Code of Civil Procedure. Defendant contends that the proceeding pointed out by section 274 is either an action or a special proceeding under sections 20, 21, 22, and 23 of the Code of Civil Procedure, and that the judgment of the court therein was appealable (Code Civ. Proc. § 963), and thus there was furnished "a plain, speedy and adequate remedy in the ordinary course of law," within the meaning of section 1086 of the Code of Civil Procedure. It is also claimed that the court having acted by making its order, mandamus will not lie to compel it to reverse its order and act differently, because plaintiff has a plain, speedy, and adequate remedy at law; also, that the duty performed by the court was judicial, and, whether or not the court erred, its action cannot be reviewed by mandamus. Section 963, subd. 1, gives an appeal "from a final judgment entered in an action, or special proceeding commenced in a superior court, or brought into a superior court from another court." We do not think that the presentation of his claim by the reporter to the judge or court for allowance is either an action or a special proceeding such as is contemplated by the Code sections referred to by defendant, and therefore no appeal lies under section 963. Indeed, the language of this latter section refers only to final judgments entered in actions or special proceedings "commenced in a superior court, or brought into a superior court from another court." The making up and presenting the bill of the official reporter for his services can hardly be said to be an action or special proceeding. It is only when the court refuses to act at all, or, acting, allows less than is claimed, that any cause of action can arise.

Nor is the action of the judge in passing upon the claim final in the sense that it is conclusive and placed wholly beyond review or correction if erroneous. If the record showed beyond dispute that an order had been made by the judge to perform the service for which the claim was presented, and that the service was performed as ordered, we do not think the judge could arbitrarily refuse to direct the auditor to draw his warrant for the amount due. The statute fixes definitely the compensation, and, where the services have been performed under the order of the judge, his further duty to direct the warrant to issue is ministerial and we think could be compelled by mandate. It would be no sufficient answer that the reporter had an action at law in the proper court for his services. But in the case here it appears from the answer of the judge that he made no order authorizing the plaintiff to perform the services charged for. He allowed all items for services in any way authorized by him. If there was a minute order entered in the records of the court, the plaintiff has failed to present it. We have only his general statement that he was ordered to make the transcription for which he makes the charge. To the contrary the defendant sets forth specifically what the order was, and, being the judge of the court who made the order, we think we must accept it as the true statement of the fact, and this is the only fact in controversy.

But, aside from this view of the matter, it is undisputed that the judge had the whole subject before him and acted upon it. He passed upon the fact and decided that there was no order made by him authorizing the transcription for which alone the claim is made. He also passed upon and allowed all other items, and as to them there is no dispute. The authorization is the foundation of plaintiff's claim, and this fact is found against him and is conclusive upon us. We must presume that the court speaks either from the minute entry or from his notes as to what the order in fact was. The court has the power to direct the minute entry to be made to conform to the fact (Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139), and we must presume that the court would make the entry to correspond with its sworn statement here. No rule of the law of mandamus would justify this court in ordering the judge to make a different finding of fact. Conceding that we may direct him to act in a particular way the rule laid down in Wood v. Strother, supra, does not go to the extent of holding that we may compel the exercise of his judgment or discretion in a particular way. The county was liable for such transcription only as was authorized by order of the court. Richards v. Superior Court, 145 Cal. 38, 78 Pac. 244. If, as has been said, the facts were undisputed that services, for which the law fixed a definite compensation, had been rendered pursuant to the order of the court, mandamus would lie to compel the court to allow the claim and direct the warrant to issue. To this extent the judge would be compelled to act in a particular way. But the rule cannot be so extended as to authorize this court to compel the judge to find a fact in a particular way against his conception and judgment of what the fact was. It was said in Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670: "While mandamus will lie to compel judicial action and in some instances even specific action (Wood v. Strother, supra), and is an appropriate remedy in a proper case to obtain the relief here sought (People v. Norton, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant and without his proper discretion to refuse." To compel the court to find the fact in a particular way would be to constitute this court the tribunal to hear and determine as a court of first instance the very questions committed to the judge of the superior court, or would convert this court into a court for the correction of errors of both law and fact by writ of mandamus. This is not and never was the office of mandamus.

The writ is denied.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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3 Cal. App. 731

PEOPLE v. DRUFFEL.

(Court of Appeal, First District, California. June 14, 1906.)

CRIMINAL LAW — APPEAL — BILL OF EXCEPTIONS—NECESSITY.

The sustaining of a demurrer to an indictment cannot be reviewed on appeal in the absence of a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2808.]

Appeal from Superior Court, Santa Clara County.

Appeal by the people from an order sustaining a demurrer to the indictment on a prosecution against D. O. Druffel. Affirmed.

Dist. Atty. Campbell, for the People. Nicholas Bowden, for respondent.

HALL, J. This is an appeal from an order sustaining defendant's demurrer to the indictment. The order also directs that the case be submitted to the next grand jury.

The transcript on appeal contains no bill of exceptions, but consists of: (1) The indictment; (2) Demurrer of defendant to indictment; (3) Minute order allowing demurrer; (4) Notice of appeal; (5) Certificate of clerk of trial court. It is objected by respondent that without a bill of exceptions there is no proper record before this court, and in support of this contention cites us to People v. Long, 121 Cal. 494, 53 Pac. 1097, which was an appeal, without a bill of exceptions, from an order sustaining a demurrer to an indictment, and ordering the case submitted to the grand jury. It was there held that without a bill of exceptions no review of the action of the court in sustaining a demurrer to the indictment could be had upon an appeal by the people from the order sustaining the demurrer. The procedure followed in this case is identical with that of the Long Case, and the doctrine laid down in the latter case governs this case.

There being no legal record before us from which we can determine whether the court erred, the order appealed from is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

PEOPLE v. McPHERSON.

(Court of Appeal, First District, California. June 14, 1906.)

Appeal from Superior Court, Santa Clara County.

Appeal by the people from an order sustaining defendant's demurrer to the indictment on a prosecution against J. C. McPherson. Affirmed.

Dist. Atty. Campbell, for the People. Nicholas Bowden, for respondent.

HALL, J. This is a companion case to People v. Druffel (Cr. 35; this day decided) 86 Pac. 907.

The transcript contains no bill of exceptions, and upon the authority of People v. Long, 121 Cal. 494, 53 Pac. 1097, the order appealed from is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

3 Cal.App. 622

CHAPMAN v. HUGHES et al. (two cases.)

SAME v. WOODWARD et al.

(Court of Appeal, Third District, California. May 22, 1906.)

Appeal — Mandate — Correction of Judgment—Jurisdiction of Lower Court.

Where a judgment for costs had been docketed in conformity with Supreme Court rule 23 (78 Pac. xi), on the remand of the case, and as provided by Code Civ. Proc. § 958, the trial court, though having no power to set aside such judgment, could nevertheless make the judgment entered on its records conform to the direction of the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4666–4672.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by W. S. Chapman against Thomas Hughes and others. From an order vacating a judgment, plaintiff and E. W. Chapman appeal. Reversed.

T. M. Osmont and Garrett McEnerney, for appellants. L. L. Cory, F. H. Short, and H. Hawes, for respondent.

McLAUGHLIN, J. The above-entitled actions were consolidated and tried as one, but the court in deciding entered separate findings, judgments and decrees. On appeal from the judgment, or judgments, so entered, the Supreme Court rendered two opinions, and it will be necessary to quote from each at some length in order to explain the question here presented for decision. In the main opinion, filed April 7, 1900, the opinion in department was expressly approved and made a part of the opinion in bank, and we quote from the decision therein as follows: "It is to be remembered that, while this was originally a simple action by Chapman against Hughes for an accounting, it subsequently became complicated by supplemental pleadings and the addition of new parties defendant. Of these, one was the defendant E. W. Chapman, against whom Hughes was seeking an accounting, and others were grantees and transferees of parts of the land and of mortgages, and of mortgage notes. Although those actions were consolidated and tried as one, and a single judgment entered, yet between these defendants there was no privity nor common interest. It would therefore be unjust to force a defendant who has established the validity of his purchase to litigate the matter anew because the findings of the court in some other respect not material to his rights have been successfully attacked. Therefore, in subservience of the ends of justice and the right of the parties, it is ordered that the judgments appealed from be vacated. It is further ordered that a new trial be had upon the issues touching the right of Hughes to an accounting with E. W. Chapman; that, if after such hearing the court shall determine that Hughes is entitled to an accounting, it shall take or order taken an account, to the end that the sum found due, if any, from E. W. Chapman to Hughes, may be set off against the sum found due, if any, from Hughes to W. S. Chapman. It is further ordered and adjudged that the accounting between W. S. Chapman and Thomas E. Hughes be affirmed in all respects as settled by the court, and that his sales, transfers, and assignments of parts of the land, and of the proceeds of sales of parts of the land, be affirmed in all respects as found by the court, saving as to those matters and as to those findings hereinabove considered as to which it has been declared that the findings are not sufficiently supported by the evidence. As to such transactions, a further accounting shall be had in accordance with the rulings of this court, upon which accounting proper evidence addressed by any of the parties shall be received and considered." Upon a rehearing touching the single proposition of the validity of the deed from Thomas E. to Matilda B. Hughes, the court said: "To the end, therefore, that the record in this case, or in these cases, may be free from uncertainty, it is ordered that the judgments appealed from be reversed, and the cause or causes remanded for further proceedings in conformity with the views here expressed and with those expressed in the opinion of this court rendered April 7, 1900." Chapman v. Hughes, 134 Cal. 644, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. When the remittitur was filed in the court below, the appellants, there and here, filed their memorandum of costs incurred on that appeal, and the clerk of the trial court thereupon docketed judgments for such costs against all of the defendants in the three actions included in the order of consolidation. Upon motion, the lower court entered an order that no portion of the costs included in the memorandum were properly chargeable against the defendants Annie E. Hughes, O. J. Woodward, H. U. Maxfield, First National Bank of Fresno, T. W. Patterson, Fresno National Bank, H. D. Colson, Fresno Loan & Savings Bank, and James Dungan, and that the judgment so docketed against said defendants be vacated and set aside. It was further ordered that the judgment docketed against Thomas E. Hughes, W. M. Hughes, and L. E. Patterson be likewise set aside, their liability for such costs to abide a future determination by the trial court. The plaintiff and defendant E. W. Chapman appeal from the order so made and entered.

The attorneys for respondents have not favored us with their views touching the questions to be decided, but counsel for appellants contend that the trial court was without jurisdiction in the premises, inasmuch as the Supreme Court by reversing the judgments had fixed the liability for costs on all of the defendants. It needs no citation of authorities to show that where a judgment for costs has been docketed, in conformity with rule 23 of the Supreme Court (78 Pac. xi) and section 958 of the Code of Civil Procedure, the trial court is without power to vacate or set aside such judgment. But it does not follow that the trial court is without authority to make a judgment entered on its records or docket conform to the directions of the higher court. This power certainly exists when the cause has been remanded for further proceedings in conformity with the opinion of the supreme tribunal, and it has been impliedly recognized even where there was a simple reversal. Long v. Superior Court, 127 Cal. 687, 60 Pac. 464; Baker v. Southern Calif. Ry. Co., 130 Cal. 114, 62 Pac. 302. It follows that so far as the order here assailed conforms to the decision of the Supreme Court it is valid, and that any portion thereof contrary to such decision is void.

It is clear, from the deciding clauses quoted from the opinions of the Supreme Court on the former appeal, that said court intended to and did affirm the findings of the trial court as to all defendants claiming by purchase or assignment from Hughes, save where it was expressly declared that the findings were not sufficiently supported by the evidence. It is also very clear that it was not intended that there should be a new trial as to any of such defendants, and that it only remained for the trial court to enter a judgment in their favor upon the findings expressly approved. The plain purpose of the general clause reversing the judgments, found in the last opinion filed, was to free the record from any uncertainty that might otherwise exist, and clear the way for the entry of judgments in conformity with the opinions. It follows that the judgments for costs docketed against the First National Bank of Fresno, Fresno National Bank, H. D. Colson, Fresno Loan & Savings Bank, O. J. Woodward, T. W. Patterson, and James Dungan was void, and that the order under review as to them was and is valid. And we think this also applies to defendant H. U. Maxfield, for, while it was said that there should have been a finding that the transfer to him was made as collateral security, and that upon a satisfaction of his debt any balance should go into the trust fund, it clearly appears that the finding as to his right as an innocent transferee was held good. As to the other defendants named in the order, we think the same was void as in conflict with the decision of the higher court, and the judgment for costs contained in the remittitur. The judgment was affirmed in part and reversed in part as to defendant Thomas E. Hughes, and this under the rule touching a modification of the judgment made him liable for costs. We do not think his discharge in the insolvency proceedings relieved him from this liability, and in any event it is certain that the trial court was powerless to relieve him from the effect of the judgment rendered by the Supreme Court.

The order as to the Fresno National Bank First National Bank of Fresno, Fresno Loan & Savings Bank, and defendants Colson, Woodward, Patterson, Maxfield, and Dungan is affirmed. As to the defendants Annie E. Hughes, Thomas E. Hughes, W. M. Hughes and L. E. Patterson, the order is reversed, appellants to recover their costs from said defendants as to whom the order is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 576

DORRIS et al. v. McMANUS et al.

(Court of Appeal, Third District, California. May 15, 1906. Rehearing Denied by Supreme Court July 12, 1906.)

1. Quieting Title—Defenses.

In a suit to quiet title, a defense that, if defendant B. prevailed in a pending suit, he intended to bring another action on indicated legal grounds, the judgment in which might enable creditors of a firm at the time of a conveyance of the land in controversy to plaintiff's grantor to subject the property to seizure and sale in satisfaction of their demands, was insufficient.

2. Cancellation of Instruments—Deeds—Fraud.

Parties seeking to annul a conveyance of land for fraud must both plead and prove facts constituting legal fraud, either actual or constructive.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 78.]

3. Fraudulent Conveyances — Consideration.

Where, in a suit to quiet title, one of the defendants claimed that a conveyance to plaintiff's grantor was fraudulent as to the creditors of the firm making such conveyance, the inadequacy of the consideration for the conveyance to plaintiff was immaterial; the creditors of the firm being only interested in the bona fides and validity of the deed from the firm.

4. Action—Right to Begin—Another Action Pending.

Where defendant was prosecuting a suit to judgment with a view, after recovering the judgment, of instituting other proceedings to set aside conveyances of certain land to plaintiff as a fraud on the creditors of plaintiff's prior grantors, plaintiff was entitled at once to commence a suit to quiet title, and was not compelled to suspend the trial thereof until the suit defendant had brought and the one he intended to bring had been determined.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 744, 745.]

5. Quieting Title—Injunction—Effect.

Where, in a suit to quiet title, the court, in addition to decreeing that plaintiffs owned the land and that defendants had no interest therein, awarded a perpetual injunction restraining defendants from setting up or maintaining any action or proceeding under which they asserted any claim to the property, such injunction was merely ancillary to the principal relief granted, and, if unnecessary to make the relief to which plaintiffs were entitled effectual, it was not prejudicial to defendants.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 98-100.]

Appeal from Superior Court, Modoc County; N. D. Arnot, Judge.

Action by P. S. Dorris and another against Laura J. McManus and others. From a judgment in favor of complainants, defendant Charles Bohnert appeals. Affirmed.

J. H. Magaffey and E. C. Bonner, for appellant. G. F. Harris, Jamison & Adams, and Gillis & Tapscott, for respondents.

McLAUGHLIN, J. Action to quiet title. The complaint contains the averments usual in this class of actions, all of which are denied in the answer. In addition to such denials, the answer contains affirmative allegations, reciting that on the 11th day of January, 1901, appellant commenced an action in the superior court of Modoc county, against P. A. Dorris and C. J. Dorris, a copartnership styled "P. A. Dorris & Bro.," upon a promissory note executed to appellant by said partnership, for the principal sum of $2,780 and interest thereon, which action was then pending and undetermined. That appellant, in the event that he obtained judgment in said action, which had then been pending more than two years and nine months, intended to and would institute another action to set aside the transfer of the property in dispute to plaintiffs, on the ground that at the time such transfer was made said property belonged to and was owned by said partnership, and the members thereof, who procured the execution of said transfer to plaintiffs, for the purpose of hindering, delaying, and defrauding the creditors of said firm. The facts which might render such transfer fraudulent were not stated, nor was there any attempt to show that an action to set it aside would rest on a substantial, or even plausible, basis. There was no positive statement that the partnership, or any individual member thereof, ever owned any part of the land; nor was there any averment tending, in the remotest degree, to show that the debt, evidenced by the promissory note sued upon, accrued, before the transfer was made, or that appellant was or could be in a position to bring an action to set it aside. First National Bank v. Eastman, 144 Cal. 490, 77 Pac. 1043, 103 Am. St. Rep. 95. No light was thrown on the probability of appellant's success in the pending suit, and surmise was left groping as to the likelihood of his obtaining a favorable judgment in the action which would be commenced at some indefinite future date, if the stated contingency arose, and appellant did not recede from his then existing intention. In short, the affirmative defense contains nothing to show that the transfer to plaintiff was probably, or even possibly, void or voidable as to appellant. Boiled down to its essence, it amounts to no more than a bald statement that, if appellant prevailed in a pending suit, he intended to bring another action upon indicated legal grounds, the judgment in which might, perchance, enable creditors of the firm at the time the transfer was made to make the property in controversy subject to seizure and sale in satisfaction of their demands. It is apparent that this cannot be distorted or twisted into any semblance of a claim of title, present or future, vested or contingent, and that imagination must be given full rein, in order to draw therefrom an inference that respondent's title can ever be affected or impaired through appellant's agency. In order to reach the conclusion that appellant's rights, whatever they may be, will ever assume tangible form as a chain of title adverse to respondents, we must indulge in conjecture upon conjecture, without any statement of facts justifying a random guess. Pleadings are construed most strongly against the pleader; but, if the rule was reversed, the affirmative matter pleaded in the answer would still lack many elements necessary to constitute an equitable or any form of defense. The only issue, therefore, was whether respondent's claim of ownership was well founded when tested in the crucible of appellant's admitted assertion of right. The court, however, not only found on such issue, but also found that the transfer to plaintiffs was not fraudulent, and added specific findings reciting certain facts and circumstances preceding and attending the execution of such transfer. Appellant assails the sufficiency of the evidence to support the findings, but as they all relate to the main issue of title, and the validity of the transfer to plaintiffs, which was not, properly, an issue in the case, nothing will be lost if we proceed to an analysis of the evidence without more particular mention of the objections urged.

The title to more than 2,800 acres of land is here involved, and the evidence shows without conflict that neither P. A. nor C. J. Dorris, nor the firm of which they were members, ever had any apparent, tangible, legal, or equitable right or title to more than 320 acres thereof. Title to the bulk of this large area was acquired through letters patent issued in 1881 and 1882 by the state of California to Jerome Churchill, the immediate grantor of the plaintiffs. The greater portion of the remainder was conveyed to said Churchill prior to the year 1885, by parties who held under patents from the general government. P. A. and C. J. Dorris acquired title to 320 acres of the land in dispute, through patents from the last-mentioned source, but conveyed the same to Churchill in 1882 for a stated consideration of $7,013. It will thus be seen that plaintiff's grantor acquired title to most of the land from primary sources, and that he held and possessed all of it for many years before the deed to plaintiffs was executed. On June 29, 1900, Churchill, as party of the first part, and P. A. and C. J. Dorris, of the firm of P. A. Dorris & Bro., as parties of the second part, entered into an agreement, the preamble of which recites that the parties thereto had for years past had unsettled accounts, and that the second parties were indebted to the first party in a large sum of money, and that they mutually desired to effect a full and final settlement of all business matters between them. It was further recited in said preamble that the said second parties theretofore had a "contingent interest in certain property in the possession and owned and controlled" by the party of the first part, and that in an agreement entered into in 1898 the first party agreed to sell, and the second parties to buy, certain real estate for the sum of $30,000, payable on a date mentioned, and that the latter desired to be relieved from the obligation thus assumed. Following these preliminary recitals the second parties agreed to "release, remise and convey" to said party of the first part all claim, right, title, and interest held by them, in or to all property, real, personal, and mixed, to which said second parties had theretofore made any claim, contingent or otherwise, and particularly all claims accruing under the agreement of 1898. Thereupon the party of the first part agreed to release the second parties from all claims, demands, and indebtedness of every kind and nature, and all parties mutually agreed that this would constitute a full settlement of all demands between them. On the same day the said second parties executed a quitclaim deed to the lands here in question to Churchill, and the latter conveyed the same to plaintiffs for a stated consideration of $10. Churchill testified that he had been dealing with P. A. and C. J. Dorris, as partners, for 25 years, and that at the time of the settlement they owed him about $350,000. He further stated that in the settlement he took all of their property, consisting of 6,000 cattle, 600 horses, and certain ranches in Modoc and Siskiyou counties, of the aggregate value of about $218,000. His testimony was corroborated by his son, and plaintiff P. S. Dorris testified as to the annoyance and detriment suffered by reason of claims against the land made by creditors of P. A. and C. J. Dorris. This was all the evidence presented by respondent, and appellant offered no evidence whatever.

The mere statement of the evidence is sufficient to demonstrate that the finding in favor of respondents' title and against appellant's claim must be upheld. And assuming that the case was tried upon the theory that the fraudulent nature of the transfer to plaintiffs was in issue, we think the finding against appellant on this point is fully sustained by the evidence. Indeed, we think there is no evidence to the contrary. Fraud is odious and is never presumed. The parties seeking to annul any contract, and particularly a transfer of real property, on that ground, must fully and clearly plead and prove the facts constituting legal fraud, actual or constructive. Bell v. Thompson, 147 Cal. 693, 82 Pac. 327; De Galindo v. De Galindo, 147 Cal. 81, 81 Pac. 279; People v. McKenna, 81 Cal. 158, 22 Pac. 488; Moore v. Copp, 119 Cal. 436, 51 Pac. 630; Gray v. Galpin, 98 Cal. 635, 33 Pac. 725. Here there was not only a failure to plead, but an utter dearth of evidence to prove fraud of any kind. It is said that the consideration mentioned in the deed from Churchill to plaintiffs was clearly inadequate, and hence an inference or presumption of fraud arose from that fact alone. But appellant is not concerned with the adequacy of the consideration passing to Churchill from plaintiffs, but with the bona fides and validity of the deed from P. A. and C. J. Dorris to the former. If that transaction was not tainted by fraud, actual or constructive, then it could not matter to appellant whether any consideration good or valuable passed to Churchill from his grantees. In testing the validity of the deed to Churchill; the interest of the firm or its members in the land, the reasons underlying the equitable interest, which was all they could have therein, and many other facts showing why the transfer of such equitable interest to a creditor holding the legal title was fraudulent, would have to be pleaded and proven. The answer leaves us perplexed and doubtful as to the nature of the pleading and proof upon which his assault on the tranfers will be made, and perplexity gives way to bewilderment when appellant, though afforded an opportunity, submitted his case without affording any enlightenment on this point.

It is next contended that an action to quiet title cannot lie against appellant's asserted right, and that the court should have deferred the trial of this cause until the suit which appellant had brought, and the one he intended to bring, had both been determined. Waiving the fact that the answer admits that appellant was claiming an estate and interest in the land adverse to appellants, it seems quite clear to us that this contention cannot be sustained. Code Civ. Proc. § 738; Head v. Fordyce, 17 Cal. 149; Castro v. Barry, 79 Cal. 447, 21 Pac. 946; Withers v. Jacks, 79 Cal. 300, 21 Pac. 824, 12 Am. St. Rep. 143; Peterson v. Gibbs, 147 Cal. 5, 81 Pac. 121; Dranga v. Rowe, 127 Cal. 509, 59 Pac. 944. It would indeed be strange if persons in the position of respondents could not compel the adjudication of asserted claims as strenuously urged and tenaciously defended as those here contended for by appellant. In addition to decreeing that respondents owned the land, and that appellants had no right, title, or interest therein, the court awarded a perpetual injunction restraining all of the defendants from setting up or maintaining any action, proceeding, or claim under or through which defendants asserted any claim, right, interest, legal or equitable, in or to the property or any portion thereof; "whereby they, or any or either of them, could or might throw any cloud upon the title of said plaintiffs." It is argued that this clause, of itself, is so palpably erroneous as to necessitate reversal, because it prohibits appellant from bringing an action to test the validity of the tranfers through which plaintiffs obtained title. Haggin v. Kelley, 136 Cal. 481, 69 Pac. 140, and Reiner v. Schroeder, 146 Cal. 416, 80 Pac. 517, are cited in support of the position assumed; but we can find nothing in either case sustaining the proposition. We have neither the right nor the inclination to pass upon questions not before us, and therefore refrain from any comment touching the effect of the judgment here, as an estoppel against further litigation between the same parties touching the title to the premises. It is enough to say that the injunction is merely ancillary to the principal relief, and, if it was unnecessary to make the relief to which respondent was entitled effectual it could not injure appellant. Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55; Brooks v. Calderwood, 34 Cal. 566; Axtell v. Gerlach, 67 Cal. 484, 8 Pac. 34; Jones v. Jones, 140 Cal. 591, 74 Pac. 143.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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3 Cal. App. 661

SCHREINER v. GRANT BROS.

(Court of Appeal, Second District, California. May 29, 1906.)

1. Master and Servant—Injuries to Servant—Action—Pleading.

Plaintiff alleged that at the time of his injury he was employed by defendants as a foreman of a steam shovel gang in the construction of a roadbed; that, while engaged in blasting, by reason of the negligence of "the defendants and their servants," he received the injury complained of, but there was no specific allegation as to the servant chargeable with the negligence. *Held*, that the complaint did not allege that plaintiff himself was not the servant whose negligence caused the accident, and was therefore demurrable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 849-851.]

2. Same.

Such defect was not supplied by other allegations that defendants did not employ a competent powder man, and that they employed plaintiff without telling him of the danger, etc.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 849-853.]

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John Schreiner against Grant Brothers. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles H. Nattingly, for appellant. Isidore B. Dockweiler, for respondents.

SMITH, J. The suit was brought to recover personal damages suffered by the plaintiff while in the employment of the defendants, and alleged to have been caused by their negligence in numerous particulars specified, or some of them. The judgment was on demurrer to the complaint.

The complaint is very confused and unsatisfactory in its allegations, and, indeed, seems to have been drawn with the view of concealing the actual facts in the case. The facts, however, as gathered from the complaint, seem to have been: The plaintiff was employed by the defendants as foreman of the steam shovel gang in the construction of a roadbed which defendants were building. As preliminary to the doing of this work some blasting was required, and plaintiff was employed by defendants to take charge of this work, or, as expressed in the complaint, was ordered to do so. And, while so engaged, by reason of the negligence of "the defendants and their servants" he received the injury complained of. From these allegations non constat that the plaintiff himself was not the servant whose negligence caused the accident; and from the careful omission of any more specific allegation as to the servant chargeable with the negligence, it may be surmised that such was in fact the case. The demurrer to the complaint was rightly sustained.

There are numerous other allegations—such, e. g., as that the defendants did not employ a competent powder foreman, and that they employed the plaintiff without telling him of the danger, etc.—but these do not, we think, supply the essential defect in the complaint.

Judgment affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 642

McAULAY v. TAHOE ICE CO.

(Court of Appeal, Third District, California. May 23, 1906.)

1. Appeal—Undertaking—Amount.

Where plaintiff appealed from an order that judgment be entered in favor of defendant on defendant's payment to the clerk of the sum of $92 and from the judgment entered pursuant to such order, only one undertaking on appeal was required.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2097.]

2. Same—Filing—Time.

Where an undertaking on appeal was filed on the same day on which the notice of appeal was served, it was in time.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2064-2069.]

3. Courts — Appellate Jurisdiction — Amount in Controversy.

Where the amount claimed was in excess of $2,000, an appeal was properly taken to the Supreme Court, which alone had jurisdiction, as provided by Const. art. 6, § 4.

4. Appeal—Undertaking—Validity.

Const. art. 6, § 1, vests the judicial power of the state in a Supreme Court and District Courts of Appeal. Code Civ. Proc. § 940, declares that an appeal is taken by filing a notice with the clerk of the court in which the judgment or order appealed from is entered, stating the appeal from the same, and serving a similar notice on the adverse party or his attorney, and the filing of an undertaking, within five days after service of such notice. Section 941 provides that the bond must be to the effect that the appellant will pay all costs which may be awarded on the appeal, or on a dismissal thereof, not exceeding $300. *Held*, that where a notice of appeal recited that plaintiff appealed to the Supreme Court, and an undertaking recited that it was to cover an appeal to the "Appellate Court for the Third District of the State of California," a court which did not exist, such undertaking was insufficient to sustain the appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2049.]

5. Same—Dismissal.

Const. art. 6, § 4, declares that no appeal taken to the Supreme Court or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the case shall be transferred to the proper court on terms. *Held*, that such section merely saved appeals taken to one court when the jurisdiction was in another, but did not save an appeal from dismissal where the undertaking was insufficient to sustain an appeal to the court to which it was attempted to be taken.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3127.]

6. Same—Undertaking—Validity.

Where an undertaking on appeal described an appeal to a court which did not exist and which was different from the court to which the notice of appeal recited the appeal was taken, it was fatally defective, though under Code Civ. Proc. § 941, providing the terms of an appeal bond, it was unnecessary that it should recite the name of the court to which the appeal was taken.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2049.]

Appeal from Superior Court, Nevada County; J. W. Hughes, Judge.

Action by Thomas McAulay against the Tahoe Ice Company. From a judgment for defendant, plaintiff appeals. On motion to dismiss. Granted.

J. M. Walling, for appellant. Morrison & Cope and Thos. S. Ford, for respondent.

CHIPMAN, P. J. Action for personal services as agent of defendant. The cause was tried before a jury and, after deliberation, the jury returned into court and, being asked if they had agreed upon a verdict, answered they had. Before the amendment or recording thereof, the judge of the court ordered the plaintiff to pay the jury fees of $92, whereupon "counsel for plaintiff stated that plaintiff was unable to pay said jury fee." The court then "ordered that plaintiff be granted ten days within which to pay the jury fee, and, if not paid during that time, the court would enter a judgment in favor of the defendant because of the failure of said plaintiff to pay said jury fee. The jury were then excused from further service." There was no rule of court regulating the payment of jury fees, although it was the practice of the court to require payment of the jury fee by the prevailing party before the verdict was read. Upon April 25, 1905, counsel for defendant gave notice of a motion to be heard on May 1, 1905, to dismiss said action and enter judgment for defendant upon the grounds, among others, that "ten days have elapsed since said court ordered plaintiff to pay the jury fees, and the same have not been paid." Said motion was continued to May 20, 1905, on which date, on motion of defendant, the court made and entered an order "* * * that judgment in said action be entered in favor of the defendant upon payment by the defendant to the clerk of this court of said sum of $92." And on the 20th day of May, 1905, judgment was entered that the plaintiff take nothing by his action. Thereafter, to wit, on June 6, 1905, plaintiff served notice in the said action that he "appeals to the Supreme Court of the state of California, from the judgment therein entered, in said superior court, on the 20th day of May, 1905; * * * also from the order of said court entered herein, dated May 20th, 1905. * * *" On June 6, 1905, plaintiff filed with the clerk of the court an undertaking in said action entitled "In the superior court, county of Nevada, state of California. Thomas McAulay, Plaintiff, v. Tahoe Ice Company, a corporation, Defendant. Undertaking on appeal." The body of the undertaking reads as follows: "Whereas, the plaintiff, Thomas McAulay, in the above-entitled action intends to appeal to the Appellate Court, for the Third District, of the state of California, from a judgment and order made and entered against plaintiff in said action, in the superior court, in favor of defendant, Tahoe Ice Company, in said action, entered on the 20th day of May, A. D. 1905: * * * Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, * * * undertake and promise * * * that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars. * * *" Respondent has filed a motion to dismiss the appeals on the following grounds: First, that no undertaking was filed within five days after the service of the notice of appeal; second, that no undertaking has been filed at any time; third, that the pretended undertaking is not an undertaking on appeal to the Supreme Court, but pretends to be an undertaking on appeal taken to a court having no existence, namely, to the Appellate Court for the Third District of the state of California, and the notice of appeal given was that appellant appealed to the Supreme Court; fourth, that but one undertaking for $300 was given, whereas there were two appeals, each requiring such undertaking.

The undertaking was filed on the same

day on which the notice of appeal was served and was in time. We think, also, one undertaking for $300 was sufficient. Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418. A more serious question remains. The notice of appeal was that plaintiff appeals to the Supreme Court, and properly, because that court alone had jurisdiction; the amount claimed being in excess of $2,000 Section 4, art. 6, of the Constitution. The undertaking recites that plaintiff "intends to appeal to the Appellate Court, for the Third District, of the state of California." There is no such court known to our judicial system by that title or name. Section 1, art. 6, of the Constitution declares that "the judicial power of the state shall be vested * * * in a Supreme Court, District Courts of Appeal," etc. Section 4 divides the state, by counties, "into three Appellate Districts," provided that "in each of which there shall be a District Court of Appeal consisting of three justices." The county of Nevada, whence comes this case, is embraced within this "the third district." Throughout the Constitution, where reference is made to this court, it is designated a "District Court of Appeal." "An appeal is taken by filing a notice with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, * * * and serving a similar notice upon the adverse party or his attorney, * * * the appeal is ineffectual for any purpose unless within five days after service of the notice of the appeal, an undertaking be filed. * * *" Code Civ. Proc. 940. "The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded on the appeal, or on a dismissal thereof, not exceeding three hundred dollars. * * *" Id., § 941. The undertaking contemplated can be for no other purpose than to indemnify the respondent, i. e., "that the appellant will pay all damages and costs which may be awarded against him on the appeal." The appeal referred to is and can be none other than the appeal referred to in the notice. The appeal is declared to be "ineffectual for any purpose unless the undertaking be filed." The undertaking referred to in sections 940 and 941 is obviously the same undertaking. The indemnity attempted to be given was not against damages and costs that might be incurred in the Supreme Court, to which plaintiff gave notice of appeal, and if one may regard the designation of the court given in the undertaking as sufficiently certain, it would not have been a compliance with the statute, for the requirement is that the undertaking shall be "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal," which, as we have said, means only the "damages and costs awarded" in the judgment rendered in the court to which the appeal is noticed.

Appellant cites the following provision of section 4, art. 6, of the Constitution: "No appeal taken to the Supreme Court or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the case shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed." And it is claimed to be of no consequence whether the case is appealed to the Supreme Court or to a District Court of Appeal." We do not so understand this provision. It means simply where an appeal is taken to one of these courts, and the jurisdiction is in another, it must be transferred to the proper court, and shall not be dismissed because appellant had mistaken the court to which he has appealed. But where the appeal is taken to either one of these courts, whether it has or has not jurisdiction, the appeal to such court must comply with the law relating to appeals to that court in respect to the undertaking precisely as though no other court was in existence; if the court is referred to in the undertaking, it must name the court to which the appeal is noticed. Under the provisions of the Constitution, when the case is properly appealed to the Supreme Court, it may transfer the case to this or some other district court of appeal, and by such order of transfer, and not otherwise, does the District Court of Appeal acquire jurisdiction. But it is claimed that section 941 of the Code of Civil Procedure does not require that the undertaking should mention the court to which the appeal is taken, and that the designation of the court as it appears in the undertaking may be rejected as surplusage; that the undertaking is entitled properly, and correctly refers to the judgment and order from which the appeal is taken, and this is sufficient. Citing Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418. In that case the question here did not arise. The notice was that the "defendant * * * appeals to the Supreme Court," and the undertaking stated that the defendant "is about to appeal to the Supreme Court." It may be that an undertaking would be sufficient that states an intention to appeal from the judgment (describing it) without mentioning the court to which the appeal is to be taken, although the practice, we believe, is to name the court; and there are strong reasons why the court to which the appeal is taken should be mentioned in the undertaking. On this point we express no definite opinion. But where the undertaking mentions the court to which the appeal is taken, whether correctly designated or not, the sureties cannot be held on such an obligation if the appeal is in fact taken to another and different court from that designated. The sureties may rely on the strict terms of their obligation. Brandt Suretyship

& Guaranty, § 106. It was said in Hibernia, etc., Soc. v. Freese, 127 Cal. 70, 59 Pac. 769: "It is required by a valid undertaking upon appeal that it shall refer with definiteness to the particular appeal to which it relates." See, also, Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685. An appeal bond was conditioned for the prosecution of an appeal from the judgment of a justice of the peace to the Anne Arundel county court. There was, in fact, no such court. Held, the sureties were not estopped to deny the existence of the court by the recital in the bond. The court said: "Whether the court exists or not is something more than a mere question of fact, as to which parties may agree or be concluded by admissions. It must depend upon the Constitution or laws, and, when the court can see that the supposed tribunal is not known to these, it must so decide, no matter what the parties may have admitted by estoppel or agreement." Tucker v. The State, 11 Md. 322.

It must be conceded that there is no court such as is described in the undertaking. It must also be conceded that the attempt made was to describe a court other than the one to which the appeal was in fact taken or noticed to be taken. On no principle can the recitals in the undertaking be rejected in order to hold the sureties to the payment of damages awarded in a different court from that referred to in the undertaking. It cannot be doubted but that the intention of the party who drew the undertaking was to describe properly the District Court of Appeal for the Third District, and the sureties may have supposed the designation correctly given or so intended to be given. But, this admitted, it only shows that there was no undertaking "on the appeal" which was to another and different court.

The question of appellant's right to have a proper undertaking approved by a justice of the Supreme Court, under section 954 of the Code of Civil Procedure, does not arise. as no such request has been made. Besides, such substituted undertaking must "be filed in the Supreme Court before the hearing upon the motion to dismiss the appeal." (Ibid.)

The appeal is dismissed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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4 Cal. App. 25

Ex parte BAKER.

(Court of Appeal, First District, California. June 25, 1906.)

1. Bigamy — Elements of Offense — Evidence.

Where. in a prosecution for bigamy, there was no evidence before the magistrate that the woman to whom it was charged accused had been previously married was living at the time of his second marriage, his commitment was unauthorized.

2. Habeas Corpus—Return.

Where, in habeas corpus proceedings, the sheriff returned that he held petitioner by virtue of a warrant and commitment issued after the writ had been granted, and before the hearing thereof, and annexed to his return what purported to be a copy of the order for petitioner's arrest for a different offense, and a commitment by the magistrate, but neither the original warrant nor commitment was offered at the hearing, and no evidence was given that such documents existed, the return was insufficient to show that the officer legally held petitioner in custody.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 68.]

Habeas corpus by George Baker. Petitioner discharged.

Geo. W. Waldorf, for petitioner.

HARRISON, P. J. The petitioner was arrested in the city of San José upon a charge of bigamy, and upon the hearing of the complaint thereon was held to answer before the superior court, and a commitment for his detention pending such hearing was issued to the sheriff, by which he was taken into custody, and has applied for a writ of habeas corpus, upon the ground that the evidence at the hearing before the magistrate was insufficient to show that any crime had been committed by him. There was no evidence before the magistrate that the woman to whom it was charged he had been previously married was living at the time of his second marriage in the county of Santa Clara, and for that reason the order for his commitment was unauthorized.

In the return of the sheriff he sets forth that, in addition to the warrant of commitment issued upon the aforesaid charge, he holds him by virtue of a warrant and commitment issued after the writ herein had been granted, and before the hearing thereon, and annexes to his return what purports to be a copy of an order for the arrest of the petitioner for a different offense, and a commitment of the petitioner by the magistrate to the custody of the sheriff upon said arrest. The sheriff, however, has not produced the original of said warrant or commitment, and no evidence has been offered that such documents exist. No application has been made on behalf of the people for an amendment of the return, or for a continuance of the hearing for the purpose of producing competent evidence of the existence of the documents. The return is therefore insufficient to justify the sheriff in holding the petitioner in his custody.

It is therefore ordered that the petitioner be discharged.

We concur: HALL, J.; COOPER, J.

3 Cal. App. 535

WOMBLE et al. v. WILBUR et al.

(Court of Appeal, Third District, California. May 15, 1906. Rehearing Denied by Supreme Court July 12, 1906.)

1. Cancellation of Instruments — Land Contract—Forfeiture.

Where a contract to convey land bound the vendee to pay the interest on deferred payments after July, 1901, and bound the vendor to pay a specified rent for the agricultural portion of the land, the vendor, not having paid such rent, was not entitled to a cancellation of the contract because of the failure of the vendee and his assignee to pay interest installments.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 29.]

2. Specific Performance—Contract to Convey Land—Rights of Assignee.

A contract to convey land obligated the vendee to pay the price in certain installments during a series of years with interest on deferred payments, the deed to be delivered on full payment of the price. The contract was made May 24, 1900, but was not recorded until December 8, 1902, though on May 24, 1901, the deed was deposited in a bank pursuant to the terms of the contract in escrow. The escrow agreement was signed by both vendor and vendee in the bank, and authorized the surrender of the deed on payment of installments without reference to interest. The vendee paid all the installments due to July 10, 1901, but paid no interest, which was not demanded, and on September 7, 1901, assigned his interest in the contract of sale to B. *Held*, that B. was not bound to inquire beyond the escrow agreement to ascertain the terms of the sale, and was therefore entitled to a deed on tendering the installments specified without interest.

3. Pleading—Denial—Sufficiency.

In an action to cancel a land contract, the complaint alleged that defendants willfully neglected and refused to pay plaintiffs the sums of $1,200 and $750 interest due on specified dates for which refusal, after 60 days' notice, plaintiffs elected to cancel the contract. One of the defendants answered denying that he had willfully or otherwise failed or refused to fulfill the conditions of the contract or otherwise, but that he had at all time fulfilled and performed all the conditions of the agreement. The other defendant alleged that he had no knowledge or belief sufficient to enable him to answer the allegation, and, placing his denial on that ground, denied that his codefendant had willfully, or otherwise, failed to perform the conditions of the contract (as in said mentioned complaint recited). *Held*, to constitute sufficient denials of defendants' failure to pay interest as alleged.

4. Cancellation of Instructions — Evidence.

Where a vendee's assignee was not bound to pay interest on deferred payments, and the bank with which the deed to the land contracted to be conveyed had been deposited in escrow had no authority to collect interest, letters between the vendor and the vendee with reference to the nonpayment of interest by the vendee were immaterial as against his assignee or the bank, in an action to cancel the contract.

5. Evidence — Secondary Evidence — Demand for Production of Writing.

Before the contents of a writing can be given in evidence orally, a demand must be made on the one having the writing in his possession and a refusal to deliver it must be shown.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 642.]

6. Assignments—Notice to Assignee—Time—Evidence.

Where it was sought to charge a vendee's assignee with notice of the original contract, the question whether the vendee ever gave a duplicate of such agreement to his assignee should have been limited to a time prior to the date of the assignment.

7. Cancellation of Instruments—Issues—Proof.

Where, in a suit for the cancellation of a land contract, the complaint alleged that the vendee's assignee claimed some interest in the property, a deed executed by the vendee to his assignee for the property in question was admissible.

8. Witnesses—Impeachment.

A question asked plaintiff's witness on redirect examination, whether, at a certain time and place, he did not tell W. that, at the time he assigned his interest in certain land to B. he gave B. a duplicate of the land contract which he held from plaintiff, and told B. concerning the same, in the presence of C., was objectionable as an attempt to impeach plaintiff's own witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1094–1100.]

9. Evidence — Declarations Against Interest.

In a suit to cancel a land contract, evidence that the vendee stated that he gave his assignee a duplicate of the contract of sale at the time he assigned his rights, was inadmissible as a declaration against interest as authorized by Code Civ. Proc. § 1870, since such fact, if true, would not bind such assignee to comply with the terms of such contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1105–1107, 1110.]

10. Witnesses—Cross-Examination.

Where, in a suit to cancel a land contract, the vendee's assignee was asked on direct examination what payments he had made, he was properly allowed to state on cross-examination that such payments were made under an escrow agreement; that he never knew that the original contract between plaintiff and his assignor provided for the payment of interest prior to the assignment; that he tendered to the bank the amount due under the escrow agreement; and that no interest had ever been demanded from him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 931–933.]

11. Same.

Where in a suit to set aside a land contract, an officer of a bank with which the deed had been deposited in escrow testified to the deed and the assignment of a portion of the vendor's interest in the property to his wife, and that a written demand had been served on the bank for a return of the papers, he was properly permitted to answer on cross-examination as to what other papers he had in his possession, as secretary of the bank, in connection with the sale of the property in question.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 931–933.]

12. Appeal—Objections to Evidence—Objections to Trial.

An objection to the admission of evidence cannot be made for the first time on appeal.

13. Evidence—Parol Testimony—Escrows—Conditions.

Where an escrow was evidenced by a written agreement signed by both parties fully setting out the conditions thereof, parol evidence was inadmissible to add further conditions thereto.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1929.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by John T. Womble and Adella Womble against I. R. Wilbur and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

A. H. Carpenter, for appellants. S. D. Woods, Campbell, Metson & Campbell, and A. L. Levinsky, for respondents.

BUCKLES, J. On May 24, 1900, John T. Womble and I. R. Wilbur entered into the following agreement:

"This agreement made and entered into this 24th day of May, 1900, by and between John T. Womble, of Hodson, Calaveras County, State of California, party of the first part, and I. R. Wilbur, of the City and County of San Francisco, State of California, party of the second part,

"Witnesseth, That for and in consideration of the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations to him moving from the party of the second part, the party of the first part hereby agrees to grant, bargain, sell and convey unto the party of the second part, all his right, title and interest in and to the SW. ¼ and the W. ½ of the E. ½ of section 29, township 2 N., range 12 E., M. D. B. & M., and the NE. ¼ of section 32, township 2 N., range 12 E., M. D. B. & M., containing 479 acres of land more or less, situated in the County of Calaveras, State of California, together with all the improvements and appurtenances thereunto belonging or in anywise appertaining; which said land adjoins the Royal mining property on the south; upon the following terms and conditions, to wit: The price to be paid for said property is the sum of thirty thousand dollars, payable in installments, as follows:

"July 10, 1900, $1875; January 10, 1901, $3750.
"July 10, 1901, $3750; January 10, 1902, $3750.
"July 10, 1902, $3750; January 10, 1903, $3750.
"July 10, 1903, $3750; January 10, 1904, $5625.

"On the signing of this agreement, the party of the first part agrees to execute a good and sufficient deed of conveyance of the property, free and clear of all incumbrances, and deposit the same in escrow with some bank in the City of Stockton, State of California, with instructions to said Bank to deliver said deed to the party of the second part upon the payment by him of all the installments of the purchase money hereinbefore provided for, provided that any and all installments remaining unpaid on the 10th day of July, 1901, shall thereafter bear interest at the rate of six per cent. per annum, said interest to be payable on the 10th day of July each year; and provided further, that if any of the installments of the purchase money shall remain unpaid for sixty days after it shall become due, the said party of the first part shall have the right and privilege of withdrawing said deed from escrow, and terminating this agreement, in which event the party of the second part shall forfeit all payments that have been previously made. The installments of purchase money hereinbefore provided for shall be payable at the said bank with which said deed in escrow shall be deposited, to the order of the party of the first part. On the signing of this agreement the party of the second part shall have the right and privilege of entering upon the said premises, and to open, develop and work the mines situated on said property, and to sink shafts, drifts, chutes, and stopes, and to extract the ore therefrom, and reduce or sell the same and retain the proceeds therefrom; said right and privilege, however, to terminate at the option of the party of the first part in case of default in the payment of any installment of the purchase money within sixty days after the same shall become due as hereinbefore provided; and during the currency of this agreement the part of the first part shall not in any way interfere with the workings in said property on the surface or underground, but he shall have the privilege of remaining upon the property and working the agricultural portion of it, for which he shall pay to the party of the second part the amount of one hundred and fifty dollars per annum, payable in advance.

"It is also understood and agreed that the party of the second part shall have the privilege to pass over and use such land as is necessary in the prosecution of the development of said mines.

"When the last payment is made, the party of the first part shall vacate the premises, leaving the buildings in as good repair as they are at the signing of this agreement, natural wear and tear excepted, provided, however, the said party of the first part shall have the right to remove from said premises a building owned and occupied by C. O. Womble, and one occupied by C. C. Crane.

"It is hereby further distinctly understood and agreed that time is of the essence of this agreement, and the due performance of the several conditions hereof by the party of the second part is a condition precedent whereupon depends the right of the party of the second part under this agreement. This agreement shall be binding upon and its rights and privileges shall inure to the benefit of the heirs, executors, administrators and assigns of the respective parties hereto. In witness whereof, the parties hereto have set their hands and seals, the day and year first above written.

"[Signed] John T. Womble [Seal.]
"I. R. Wilbur [Seal.]"

The above contract was duly recorded December 8, 1902.

A proper deed was prepared in accordance with said agreement and the Stockton Savings Bank was selected as the bank in which said deed should be placed in escrow, and on May 24, 1901, the deed was deposited in said bank with the following agreement or letter of instructions:

"To the Stockton Savings Bank, Stockton, Cal. There is herewith deposited by me with you a certain deed, of date October 18, 1899, made by me to I. R. Wilbur, of that certain land situate in the county of Calaveras, state of California, and described as the southwest quarter and the west half of the east half of section twenty-nine, township 2 north, range twelve east, M. D. M., and the northeast quarter of section thirty-two, township two north, range twelve east, M. D. M., containing 479 acres, more or less. This deed is delivered to you in escrow, to be held by you subject to the following conditions:

"The said I. R. Wilbur is to pay into your bank for me, the following sums of moneys at the following designated times, viz.:

"On July 10th, 1900, the sum of $1,875; on January 10th, 1901, $3,750; on July 10th, 1901, $3,750; on January 10th, 1902, $3,750; on July 10th, 1902, $3,750; on January 10th, 1903, $3,750; on July 10th, 1903, $3,750; on January 10th, 1904, $5,625.

"When all of such payments shall have been made in the sums and at the times specified, you will deliver the said deed to said I. R. Wilbur, or his assigns, or upon his written order. If the said payments be not made in the amounts and at the times specified and there shall be default in such payments to you for me, for the period of sixty days next after any of said dates, then and in that event such deed, on demand by me, shall be delivered by you to me.

"Witness my hand this 24th day of May, 1900.

"John T. Womble. [Seal.]

"I, the party grantee, named in the deed this day deposited with you in escrow, hereby recognize the foregoing as a correct statement of the terms of the escrow.

"I. R. Wilbur.

"The foregoing trust is hereby accepted and the said deed specified in the foregoing instruction is accepted subject to the conditions above mentioned.

"Stockton Savings Bank.

"By Sidney Newell, Cashier."

I. R. Wilbur paid all of said installments up to and including that of July 10, 1901, but paid no interest and none was demanded. On September 7, 1901, he assigned his interest in the agreement of sale to E. I. Braddock. Before the suit, Womble assigned one-half of his interest in the contract to his wife, Adella Womble. Womble remained in possession of the agricultural land and Wilbur took possession of the mining grounds.

The action was brought to annul the said agreement of sale and the right to purchase the mining property thereunder. Judgment was that Wilbur was indebted to plaintiffs for the sum of $2,150 on account of interest due on said contract, and that plaintiff was entitled to recover the $5,625, deposited in bank, and that the bank deliver the said deeds to E. I. Braddock; that plaintiffs take nothing against Braddock and the bank, but that each of these recover their costs of plaintiffs, and that the plaintiffs recover their costs of I. R. Wilbur. The court also refused to cancel said deed or annul the contract. The appeal is from the judgment and comes here on a bill of exceptions.

In the appeal of Wilbur (No. 157) from the same judgment, we did not have the evidence before us as now. As to Wilbur, the judgment was against him for $2,150, the same being interest due on his contract of sale with Womble, and that he have a credit of $300 to be taken therefrom on account of rent for two years due from Womble, which Womble had, by said agreement, promised to pay for the use of the agricultural land included in said deed. It is clear that Wilbur did not consider the escrow agreement as superseding, changing, or modifying the first agreement, for, on September 10, 1902, he wrote to Mr. Womble in relation to the payment of interest and in which he disclaimed any liability. It was not put upon the ground that the interest clause had been abrogated by the escrow agreement, but that Mr. Braddock had stepped into his shoes, but says he don't know whether Braddock understood about the payment of interest. And on April 2, 1903, he again wrote Womble to the same effect, and, at the trial, testified that these letters were in answer to letters Womble wrote him, stating the interest had not been paid. When he paid the January installment he paid no interest and none was demanded. But inasmuch as this is a suit in equity, and plaintiff asking the cancellation of the contract of sale, praying "for such other and further relief as may seem meet," and it being shown by the evidence that plaintiff did occupy the said agricultural lands and failed to pay the last two years' rent contracted to be paid, and further that the question of rent and of interest has already been determined in said appeal No. 157 of this court, we see no reason for disturbing the judgment so far as it relates to Wilbur.

The remaining question before us is, was E. I. Braddock entitled to have the deeds to said property delivered to him upon his paying all the installments remaining unpaid at the time he purchased from Wilbur? The agreement for interest was not recorded until December 8, 1902, more than one year after the sale to Braddock, and therefore was not notice to Braddock of its terms or of its existence. Although there is some conflict in the evidence as to whether Braddock had any knowledge of the agreement to pay interest when he purchased of Wilbur, Mrs. Womble testified she had said to Braddock that it would not be best for Womble to reduce the amount due in order to get all cash, for they were getting a good interest. This was the same day of, and prior to, the sale by Wilbur to Braddock. It is claimed that because Braddock knew Womble had conveyed to Wilbur he was bound to take notice of the terms, and Galland v. Jackman, 26 Cal. 88, 85 Am. Dec. 172, Killey v. Wilson, 33 Cal. 690, S. L. & T. Co. v. W. S. M. Co., 99 Cal. 636, 34 Pac. 321, and Moss v. Atkinson, 44 Cal. 3, are cited in support of that contention. In the first case, 26 Cal. 88, 85 Am. Dec. 172, the grantee knew that his grantor had previously made a deed of some kind to another person for the same property which prior conveyance was not recorded. The court held: "This being so, they cannot justly claim that they stand protected by the statute, because their case does not come within its letter nor its spirit." That case has no application. Here the second grantee was taking from the first grantee, and the terms by which the deed of the grantor was to be delivered to the first grantee was supposed to be placed with the bank, and when Braddock had read these terms he would be excused from making further inquiry. The next case, 33 Cal. 690, has no application to the case at bar. In 44 Cal. 3, the court held that possession of land under an unrecorded agreement with the owner to purchase the same is notice sufficient to put others on inquiry, and if they buy of the owner, the contract may be enforced, as against such purchaser, in equity.

In the case at bar Braddock bought of the grantee of the original owner and found a statement in writing signed by the grantee on file with the deed in escrow, purporting to state the terms of the escrow conveyance. For the same reason it seems to us 99 Cal. 636, 34 Pac. 321, furnishes no rule applicable to the case at bar. If Braddock was bound to look beyond the recital in the Womble deed, he did so, and the escrow agreement, which purported to contain the terms of the sale—that is of consideration and payments—was all he need look to. Womble, the grantor, was found in possession, but that possession would be satisfactorily accounted for by the terms of the escrow. The sale to Wilbur was not complete until all payments of purchase price had been made, and that of itself would account for Womble remaining in possession. The court found that at the time (September 7, 1901) when Wilbur assigned to Braddock, that Braddock had no knowledge of any contract or agreement between Womble and Wilbur other than what was expressed in the written instrument deposited with the Stockton Savings Bank, May 24, 1900, and the deed deposited at the same time. This finding is warranted by the testimony. The evidence shows conclusively that Braddock paid all the said installments falling due after September, 1901, except the last one, and this he made a tender of, and, when refused, deposited it in the Stockton Savings Bank to the credit of the Wombles. When Wilbur assigned to Braddock he made and executed a deed to him of all his interest in the property in controversy, and deposited the same with the Stockton Savings Bank to be delivered to Braddock when he had completed the payments as provided in the Womble escrow. As conclusions of law the court found that Braddock was entitled to the immediate delivery to him of said deeds, and this is amply supported by the evidence.

At the close of the testimony in this case, the plaintiff moved the court for judgment on the pleadings which the court denied, and this is assigned as error, on the ground that the complaint alleges that "the defendants willfully neglected and refused to pay the plaintiffs the sum of $1,200 and $750 interest due in July, 1902, and July, 1903," and that such willful refusal was for more than 60 days after due notice of such delinquency and demand for payment, and that the right to purchase was thereby forfeited, and that none of these allegations were denied in the answer of Wilbur and Braddock. But the answer of Wilbur denies in these words that he "has willfully or otherwise failed or refused to fulfill or perform the covenants or conditions on his part to be fulfilled or performed, as in said agreement provided, or otherwise; on the contrary, said defendant alleges that he has at all times kept, fulfilled, and performed all of the terms and conditions of the said agreement, and the whole thereof." The defendant Braddock, alleging that he has no knowledge or belief sufficient to enable him to answer such allegation, "and placing his denial on that ground, denies that the said I. R. Wilbur has willfully, or otherwise, or at all, failed or refused to perform the covenants or conditions, or any or either thereof, on his part to be fulfilled or performed by him, as in said agreement (so in said amended complaint recited) provided." We think this effectually disposes of plaintiff's motion for judgment on the pleadings. The allegation of the complaint that defendants willfully neglected and refused to pay the interest is denied by both Wilbur and Braddock, as well as the bank. Defendant Wilbur was asked by the plaintiff if, at any time, he paid any portion of the interest that was due under the first contract. Defendants objected. The objection was sustained as to Braddock and the Stockton Savings Bank and overruled as to Wilbur. The question was not answered, but further along in his testimony the witness answered that he never paid any interest whatever. There was no error in the ruling of the court.

Objection was made by defendants to the admission in evidence of a letter from Wilbur to Womble, dated September 10, 1902, referring to a letter of Womble's to Wilbur dated September 8th, and also a letter from Wilbur to Womble dated April 2, 1903, both letters having reference to the question of the interest not being paid. The objection was sustained as to Braddock and the Savings Bank, but overruled as to Wilbur, and the letters were introduced. As the bank was not authorized to collect interest and Braddock was not obliged to pay interest, these letters were not material to them. Wilbur was asked to state the contents of the letter of September 8th from Womble to himself, and to which this letter of September 10, 1902, was an answer. The defendant Braddock objected upon the ground that no demand had been made upon Wilbur to produce the letter. The objection was sustained. Before the contents of a writing can be given in evidence orally, a demand must be made upon the one having it in his possession and a refusal to deliver it up be shown.

Plaintiff asked the witness Wilbur if he ever gave Braddock a duplicate of the agreement of May 24, 1900. The court sustained an objection to the question on the ground that it must be limited to a time prior to September 7, 1901. The ruling was correct. On cross-examination the deed of Wilbur to Braddock was offered in evidence, to which the plaintiff objected. This was a deed for the same property as the Womble deed. The deed was proper evidence showing that Braddock had and claimed some interest in the property mentioned in the Womble deed, following the allegation of plaintiffs' complaint that Braddock claimed some interest. On redirect examination by plaintiff of the witness Wilbur he was asked if, at the house of J. U. Castle, in the presence of J. U. Castle (fixing the time), he did not tell Willis R. Womble that the time he assigned his interest to Braddock he gave Braddock a duplicate of the agreement of May 24, 1900, and that he told Braddock so in the presence of J. C. Campbell. Objection was sustained on the ground that it was cross-examination of plaintiff's own witness. The objection was properly sustained. The question was asked as an impeaching question, and the witness was plaintiffs' witness. There was no other suggestion made but that it was an impeaching question. But now plaintiffs in their brief argue that the question called for the declaration or admission of a party to the action, and that the evidence was therefore admissible under section 1870, Code Civ. Proc. But the act, declaration, or omission must be evidence against the party, and the fact that Wilbur may have said to Womble that he gave Braddock a duplicate of the agreement of May 24th at the time he assigned to Braddock would not bind Braddock to pay the interest or bind him in any way, and was therefore immaterial.

The witness Braddock (a defendant) had been asked by plaintiff on his direct examination what payments he had made on the first agreement or otherwise, and the witness had answered. On cross-examination he was permitted, against the objection of plaintiffs, to testify that he had never signed a contract that called for interest; that he made his payments under the letter of instructions to the bank; that he had not seen an agreement, nor was his attention called to any agreement, providing for the payment of interest prior to or at the time he and Wilbur entered into their contract; that he tendered Mr. Carpenter, the attorney of plaintiffs, the payment of $5,625; that he tendered it also to the bank, but the bank would not accept it on what Carpenter said; that Carpenter said to Mr. Lyons, and that Carpenter asked Lyons to count the money which Lyons did, and that he said the money was all there; that Carpenter told Lyons to refuse to take the money; that Carpenter told him to accept it for the bank, and it was so accepted; that he then deposited the said $5,625 in the Stockton Savings Bank to the credit of John T. and Adella Womble; that he then and there, January 9th, signed a notification which he then served on said Carpenter, as attorney for plaintiffs; that no demand was ever made upon him for interest; that defendants' Exhibits 3 (the agreement in escrow of May 24th) and 4 (a notice to plaintiffs and A. H. Carpenter, their attorney, of payment to the bank of the last payment and a demand for the deed) were then introduced in evidence. The ground of the objection made to all of this testimony was not cross-examination; was immaterial and hearsay, and called for conclusions of the witness. The examination in chief had been as to the payment of the installments, and everything testified to in the cross-examination was as to the payments and the matters connected therewith and explanatory thereof, and was legitimate cross-examination. No objection was raised to the introduction of Exhibits 3, 4, and 5, because the signatures thereto were not proved and it is too late to raise such objection for the first time in this court.

W. H. Lyons, an officer of the Stockton Savings Bank, was a witness called by plaintiffs. On his direct examination he testified to the deed of Womble to Wilbur, the assignment of Womble to his wife, the written notice served on the bank by Mr. Womble October 7, 1903, and a written demand made on the bank October 29, 1903, for return of deed, all presented to or filed with the bank, and were all papers in connection with the sale of the property to Wilbur. On cross-examination the witness was asked: "What other papers have you in your possession as secretary of the Stockton Savings Bank in connection with the sale of this property from Mr. Womble?" The question was objected to upon the grounds alone, that it is "wholly irrelevant, immaterial, and not cross-examination," and now, for the first time, a further objection is made that the question calls for other and different papers and so forth. The question was relevant and material and legitimate cross-examination because it related to papers in the same transaction and to such papers only. And for the very same reason, the objection raised here for the first time, were we at liberty to consider it, would be held to be not well taken. Section 2048, Code Civ. Proc. The plaintiff Adella Womble who was a witness for plaintiffs, was asked whether she had been to the bank with or without her husband and demanded the interest. The defendant Braddock objected upon the ground that it is incompetent as to him, and that the terms of a written agreement cannot be thus changed. The objection was sustained. It does not appear that the bank or defendant Braddock had any knowledge of the contract for the payment of interest when Braddock became the assignee of Wilbur, and therefore there was no error in sustaining the objection.

Mr. Womble was asked as to what verbal instruction he gave the bank when he deposited the deed in escrow. The court sustained the objection thereto. The instructions to the bank were in writing and no verbal instructions could have had any weight with the bank. It is true that a contract in escrow, as held in Cannon v. Handley, 72 Cal. 133, 13 Pac. 315, may be oral, but we think when there appears to be a full, complete, and sufficient contract in writing governing the escrow that no oral instructions can avail. If written instructions are given by the principal to his agent, these instructions may be changed by parol. Curtiss v. Starr & Co., 85 Cal. 376, 24 Pac. 806. But where the written instructions amount to an agreement made by two principals to their joint agent and signed by both, neither can change their instruction by parol without the concurrence of both. This is elementary.

There are many other assignments of error relating to the admission of evidence, all of which we have examined and find none of the rulings to be prejudicial error, if error at all, and it could serve no good purpose to set them out here.

The findings respond fully to all the material issues of the case, and are supported by the evidence, and the judgment rendered was warranted in every particular by the findings.

Finding no prejudicial error in the case, we affirm the judgment.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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3 Cal. App. 527

WOMBLE et al. v. WILBUR et al.

(Court of Appeal, Third District, California. March 1, 1906. On Rehearing, May 15, 1906.)

VENDOR AND PURCHASER—MODIFICATION OF CONTRACT—ESCROW AGREEMENT.

Where an agreement for the sale of land provided for the payment of certain installments and interest, and a deed of the land was deposited in escrow with a bank, together with a written escrow agreement reciting the required payments, but making no reference to interest, and the bank and an assignee of the vendee's rights had no notice of the first agreement, this does not show, as a matter of law, that the first agreement was superseded by the escrow agreement and that the interest was not to be paid.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by John T. Womble and another against I. R. Wilbur and others. From the judgment, defendant Wilbur appeals. Affirmed.

S. D. Woods, for appellant. A. H. Carpenter, for respondent Womble. Metson, Campbell & Metson, for respondent Braddock. A. L. Levinsky, for respondent Stockton Savings Bank.

CHIPMAN, P. J. This is an action to annul a certain agreement of sale of certain mining land between plaintiff John T. Womble and defendant Wilbur; also to cause to be delivered up to said plaintiff and canceled a certain deed made by him to said Wilbur and alleged to have been placed in escrow with defendant bank under said agreement; also for a certain sum as rentals for the use of said land, and for attorneys' fees. The court gave judgment that the defendant bank deliver forthwith to defendant Braddock the deed in question, as assignee of defendant Wilbur, and also the deed of Wilbur to Braddock; that plaintiffs recover judgment from defendant bank for the sum of $5,625, being the amount of the last payment due plaintiffs on account of said sale, which had been deposited to plaintiffs' credit by said Braddock; that plaintiffs recover from defendant Wilbur the sum of $2,151 as interest less $300 rentals due him from plaintiffs; and that defendants, the bank and Braddock, recover their costs. Defendant Wilbur appeals from the judgment on the judgment roll alone.

It was alleged in the complaint that Womble and Wilbur entered into an agreement on May 24, 1900, by which the former agreed to sell to the latter the land in question for the sum of $30,000, "payable in installments as follows: July 10, 1900, $1,875.00; January 10, 1901, $3,750.00; July 10, 1901, $3,750.00; January 10, 1902, $3,750.00; July 10, 1902, $3,750.00; January 10, 1903, $3,750.00; July 10, 1903, $3,750.00; January 10, 1904, $5,625.00." It was further provided: "On the signing of this agreement, the party of the first part agrees to execute a good and sufficient deed of conveyance of the property * * * and deposit the same in escrow with some bank at the City of Stockton, California, with instructions to said bank to deliver said deed to the party of the second part upon payment by him of all the installments of the purchase money hereinbefore provided for, provided that any and all installments remaining unpaid on the 10th day of July, 1901, shall thereafter bear interest at the rate of six per cent. per annum, said interest to be payable on the 10th day of July each year; and provided further that if any of the installments of the purchase money shall remain unpaid for sixty days after it shall become due, the said party of the first part shall have the right and privilege of withdrawing said deed from escrow, and terminating this agreement, in which event the party of the second part shall forfeit all payments that have been previously made. The installments of purchase money hereinbefore provided for shall be payable at the said bank with which said deed in escrow shall be deposited, to the order of the first party." The agreement gave to Wilbur the right to enter into possession of the property, sink shafts, run tunnels, and to extract ore and retain the proceeds, Womble retaining the right to use the agricultural portion of the land, for which he was to pay as rental the sum of $150 per annum, payable in advance. The agreement ran to the heirs and assigns of the respective parties. It was alleged in the complaint that said Womble delivered to defendant bank his deed as provided in said agreement and "thereupon instructed said bank orally and in writing, to hold said deed in escrow until the fulfillment or forfeiture of said contract on the part of the said I. R. Wilbur and not to deliver said deed unless all the moneys were paid to plaintiffs at the time and in the manner specified in said contract;" and alleged the said bank had knowledge of the contents of said agreement and accepted the trust of holding said deed in escrow for the purposes in the complaint alleged. The court found that this agreement was entered into on the day of its date, but that the defendant bank knew nothing of its contents or existence and accepted the escrow under an agreement thereafter and on the same day entered into between Womble and Wilbur as set forth in the answers. This agreement is as follows: "To the Stockton Savings Bank, Stockton, Cal.: There is herewith deposited by me with you a certain deed, of date October 18th, 1899, made by me to I. R. Wilbur of that certain land [description]. This deed is delivered to you in escrow, to be held by you subject to the following conditions: The said I. R. Wilbur is to pay into your bank, for me, the following sums of moneys at the following designated times, viz.: [same as in agreement first above set forth.] When all of such payments shall have been made in the sums and at the times specified, you will deliver the said deed to said I. R. Wilbur, or his assigns, or upon his written order. If the said payments be not made in the amounts and at the times specified and there shall be default in such payments to you for me, for the period of sixty days next after any of said dates, then and in that event such deed, on demand by me, shall be delivered by you to me. Witness my hand this 24th day of May, 1900. John T. Womble. I, the party grantee named in the deed this day deposited in escrow, hereby recognize the foregoing as a correct statement of the terms of the escrow. I. R. Wilbur. The foregoing trust is hereby accepted and the said deed specified in the foregoing instruction is accepted subject to the conditions above mentioned. Stockton Savings Bank. By Sidney Newell, Cashier."

The court found that Womble thereafter delivered said deed to defendant bank "pursuant to the terms of said instrument in writing herein last mentioned"; that on September 7, 1901, Wilbur transferred to defendant Braddock by deed deposited with said bank all his interest in said real property "arising under and by virtue of said instrument in writing and said deed so deposited in escrow * * * with the full knowledge, consent, and acquiescence of the plaintiffs John T. Womble and Adella Womble," to the latter of whom John T. had, on December 3, 1900, assigned "a one-half part of the moneys coming to him under the agreement deposited with the defendant Stockton Savings Bank"; that Braddock "had no knowledge of any contract or agreement" other than the agreement of escrow deposited with defendant bank and that the agreement first above mentioned was not recorded until December 8, 1902; that Wilbur first and Braddock after the transfer to him paid to defendant bank, as specified in said escrow agreement all the sums falling due, and plaintiffs received the same "without objection, save and except the last one of $5,625.00, due on the 10th day of January, 1904"; that Braddock, on January 9, 1904, tendered to plaintiffs the amount last above stated, "which was the last payment to be made in accordance with the written instrument deposited" by Womble with defendant bank, and plaintiffs refused to accept the same, and thereupon Braddock deposited said sum with said bank to plaintiffs' credit, who refused to accept the money from the bank and demanded from said bank the delivery of said deed, which was refused by reason of said bank "being a party to the above entitled action, which said action was then instituted but had not been tried." Finding 13 is that Wilbur has not paid "the interest reserved in said deed by the agreement hereinbefore mentioned, or any part thereof, and the whole thereof is unpaid," and it is further found therein that Womble "has paid unto said defendant I. R. Wilbur the rentals agreed to be paid in and by said agreement for the period of two years, and had made no other or further payment for or on account of said rentals." It is further found that John T. Womble and Adella after the assignment to her "at all times accepted all moneys paid" by Wilbur and Braddock, "and never demanded any interest of said defendant bank until the 29th day of October, 1903, at which time" plaintiff Womble demanded interest and also demanded delivery of his deed theretofore deposited by him. Finding 16 is that "the amount of the interest owing by the defendant I. R. Wilbur to the plaintiffs as set forth in finding 15 (should refer to finding 13 apparently), amounts at this date to the sum of $2,151, from which should be deducted the sum of $300 that is owing from said plaintiff to said defendant Wilbur, being for two years rental of said premises, in accordance with the terms of the agreement" first above mentioned. The court found that there were no rentals due to plaintiffs and nothing as attorneys' fees in the action.

Appellant contends: (1) That the contract first entered into was superseded by the escrow agreement which omitted all mention of interest. (2) That by their conduct plaintiffs placed a construction upon these contracts, showing that they regarded the first contract superseded by the second. (3) That plaintiffs waived any claim of interest by acceptance of the principal without further demand. (4) That judgment for interest against Wilbur cannot be rendered because he was discharged from liability by reason of the assignment to Braddock with plaintiffs' consent.

It was stated at the argument that the same case is also now pending in the Supreme Court on the appeal of plaintiffs, in the case Sac. No. 1325, 86 Pac.——, who are seeking the reversal of the judgment on grounds of which we are not advised and of which we cannot take notice.

Plaintiffs here contend that the points urged by appellant cannot be reviewed, in the absence of a statement or bill of exceptions, as they relate exclusively to questions of fact determined by the court under evidence adduced at the trial. Appellant replies by claiming that the findings themselves supply all the bill of exceptions required to justify his contention that the judgment imposing the payment of interest upon him is unsupported and unwarranted. His claim is that the facts found show "that the second agreement, as matter of law, was substituted for the first agreement, and Wilbur is not liable."

There are some facts found which doubtless were taken into account by the trial court as tending to support appellants' view of the case—for example, the receipt by plaintiffs of the installments without demanding interest; the omission of any mention of interest in the escrow agreement; the failure to notify the bank or Braddock of the first agreement. But these facts do not conclusively establish appellant's contention and may have been satisfactorily rebutted at the trial. Wilbur, in his answer, averred that the escrow agreement was entered into "in pursuance of the terms and conditions of the said agreement mentioned in said amended complaint," the first agreement. It is true, he also alleges that the escrow agreement "was in fulfillment of the terms and conditions of the said agreement dated May 24, 1900," the first agreement. But this is not an allegation that the escrow agreement was a substitution of the first agreement or was intended to supersede it, and no such or equivalent averment is found in any of the answers; and to aver that it "was in fulfillment" of that agreement is but a conclusion. There were several important covenants in the first agreement not carried into the escrow agreement, at least one of which must have been recognized by Wilbur as in force, for the court found that he received the annual rentals from plaintiffs for two years, one of which was subsequent to the transfer to Braddock, for the use of the agricultural lands, as provided in the first agreement, and the court allowed him credit for the unpaid portion of these rentals. That he did not claim any such credit in his answer does not change the fact that he received rentals under that agreement and, under the pleadings, the court properly gave the credit for the unpaid rentals. It was entirely competent for the parties to agree that the deed might be delivered on payment of the installments of the principal leaving the matter of interest between the parties, under the first agreement, as was left the matter of rentals, the right to work the mine and other matters. An examination of the first agreement will show that the instructions to be given the bank were to provide for payment "of the installments of purchase money hereinbefore provided for," and it was by a subsequent and independent clause that interest was provided for after certain installments had been paid and upon future installments. It will thus appear also that the right to withdraw the deed left in escrow was to accrue "if any of the installments of the purchase money shall remain unpaid for sixty days after it shall become due." It would seem that the escrow was in all respects, as averred by Wilbur, "in pursuance of the terms and conditions of the said agreement mentioned in said amended complaint;" it embodied substantially every thing which the first agreement contemplated should go into the escrow, leaving other covenants to stand as set forth in that first agreement.

We cannot agree with appellant that, as a matter of law, the facts found show a substitution of the escrow for the first agreement. The findings recite that "evidence both oral and documentary, upon the issues found by the said pleadings, was introduced by the respective parties." What this evidence was we do not know, nor to what extent it justified the findings. We must presume that there was evidence tending to show that both plaintiffs and Wilbur recognized that the first agreement was in force, for Wilbur received $300, being two years' rental for the agricultural land occupied by plaintiffs. Plaintiffs were not called upon to demand, nor had they the right to demand, interest when receiving installments at the bank; they had not provided by the escrow agreement that interest should be paid at the bank. The interest was payable annually, after July 10, 1901, while the installments were payable semi-annually from July 10, 1900, and the first agreement did not provide that the escrow agreement was to provide for payment of interest. There was nothing unusual or remarkable in the fact that the deed was to be delivered upon payment of the installments of the purchase price, leaving other matters to be settled according to the first agreement. The escrow agreement was independent of, and separate from, the first agreement, involved different parties and was for a distinct purpose stated in it. There being no direct issue that it was executed with intent to supersede the first agreement no finding was necessary on such issue and we do not think, in finding the execution of both agreements and in giving effect to both, that the court made conflicting findings; nor do we think that in finding the execution of the escrow agreement it follows, as matter of law, that the first agreement was superseded by the escrow.

The judgment appears to us to be a just and correct determination as based on the findings and is therefore affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

On Rehearing.

CHIPMAN, P. J. Upon the rehearing we discover nothing to justify a different conclusion from that heretofore reached.

For the reasons in our former opinion stated, and also for the reasons set forth in the opinion in the same case, numbered 206 (86 Pac. 916) the judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

149 Cal. 357

DAGGETT et al. v. YREKA MIN. & MILL. CO. (Sac. 1,154.)

(Supreme Court of California. June 25, 1906. Rehearing Denied July 23, 1906.)

1. Mines and Minerals—Location of Claims—Extralateral Rights.

Where mining claims were located in January, 1884, there must have been the discovery of a vein, the marking of the location so that its surface boundaries could be readily traced, and the end lines of the surface location must have been laid off parallel to each other, as required by Mining Law May 10, 1872, 17 Stat. 91, c. 152.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 36-44.]

2. Same—Notices—Posting—Recording.

There being no statute in January, 1884, when certain mining claims in controversy were located, requiring, authorizing, or giving any definite legal effect to the posting and recording of notices of location, the posting and recording of such notices did not, in themselves, constitute a location, but were only acts in pais, tending to show a proper marking of the surface locations, so that the boundaries of the claims could be readily traced.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 37-40.]

3. Same—Notice—Construction.

Where a notice of location of a mining claim recited a location 1500 feet of "this vein or lode of gold-bearing rock," etc., such recital indicated that the notice as posted on the ground was placed on the croppings of the lode, or in such close proximity thereto that the croppings appeared or had been exposed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 37.]

4. Same—Locations—Maps.

In trespass for the extraction of ore from mining ground claimed by plaintiffs, the introduction of a map in evidence purporting to show the lines of the location of plaintiffs' claims was of no value, where it was not supported by evidence of a person knowing the position of the monuments which defined the lines, and which departed widely from the data established by the best evidence plaintiffs could offer to prove the original location of their claims.

5. Same—End Lines.

The end lines of mining claims should be laid out at right angles to the vein.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 36.]

6. Same—Evidence.

In trespass for the taking of ore from plaintiffs' mining ground, evidence *held* insufficient to show that plaintiffs' claims had been so marked on the surface that the boundaries could be readily traced, or that the claims as marked had their end lines parallel, so as to entitle plaintiffs to follow the vein beyond the side lines of their claims into the ground in controversy.

7. Same—Pleading—Issues and Proof.

In an action for trespass on the extralateral dip of that part of a mineral vein having its apex within a valid location, it is not necessary for the plaintiffs to allege the existence of the vein having its apex within their surface boundaries, but departing from their side lines on its downward course, and that their end lines are parallel, in order to entitle them to prove that defendant has extricated ore from the locality in question, which was within plaintiffs' extralateral rights.

8. Same—Identity of Vein—Proof.

In an action for trespass on the extralateral dip of a vein having its apex within plaintiffs' location, plaintiffs are not bound to establish the identity of the vein by an actual tracing thereof from within the surface lines of their location to the point of the alleged trespass, but are only bound to show the continuity of the vein between the apex within their lines and the point at which defendant is mining by satisfactory evidence.

McFarland, Shaw, and Henshaw, JJ., dissenting.

In Bank. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by John Daggett and another against the Yreka Mining & Milling Company. From a judgment in favor of plaintiffs, defendants appeal. Reversed and remanded for new trial.

O'Neill & Butler and R. S. Taylor, for appellants. Gillis & Tapscott, for respondents.

BEATTY, C. J. This is an action to recover damages for alleged trespass, consisting in the extraction and removal of gold-bearing ore from mining ground claimed by the plaintiffs. The material allegations of the complaint are: That the plaintiffs for 20 years last past have been the owners, and, save for the interruptions alleged, have been in possession, of two certain quartz mines in Siskiyou county, known as the "Evening Star Quartz Mine" and the "Central Quartz Mine," more particularly described as follows: "That certain mine known as the 'Evening Star Quartz Mine,' situated on the headwaters of Eddy's Gulch, county and state aforesaid, commencing at a double top fir tree blazed 'Evening Star,' and on the N. W. corner of the claim; hence in an N. E. direction fifteen hundred feet, more or less, to a pillar of rock marked 'E. V.'; thence S. E. direction six hundred feet to a monument of stones and stake marked 'E. V.'; thence in a S. W. direction fifteen hundred feet to monument of stake and stones, stake marked 'E. V.'; thence in a N. W. direction six hundred feet to the place of beginning. The location notice of which said mining claim was dated on January 1st, A. D. 1884, and filed for record on the 8th day of January, A. D. 1884. Also that certain mine known as the 'Central Quartz Mining Claim,' it being an extension on the northeast of the 'Evening Star Quartz Mine,' and commencing at this notice, running thence in a northeasterly direction fifteen hundred feet to stake and mound of stones; thence in a northwesterly direction six hundred feet to stake and mound of stones, stake marked "X"; thence in a southwesterly direction fifteen hundred feet to a stake set in mound of rocks marked "X"; thence in S. E. direction to place of beginning.' The location notice of which said mining claim was dated January 1, A. D. 1884, and filed for record on the 8th day of January, A. D. 1884." That at various times since 1898 the defendant corporation has wrongfully, etc., entered upon said premises, and extracted, carried away, and appropriated large quantities of gold-bearing ore, etc., of the value of $50,000. Other allegations are added as a basis for equitable relief by injunction, receiver, etc., but these are not material to the questions to be considered. The defendant answered, denying all the material allegations of the complaint. The cause was tried by jury and a verdict found for plaintiffs for $1 damages, upon which a judgment was entered, whereby it was adjudged and declared that the plaintiffs were, and ever since September, 1887, had been, the owners and entitled to the possession of the Evening Star and Central Quartz mines, describing them as in the complaint, and awarding the damages and costs. From this judgment, and from an order subsequently entered denying its motion for a new trial, the defendant appeals, alleging certain errors in the rulings of the court, and claiming that in several material particulars the verdict is unsupported by the evidence. The questions of fact thus presented are the more important and will be first considered.

The place from which the ore in question was removed by defendant is altogether outside of the surface lines of the Central and Evening Star locations, but plaintiffs contend that defendant's mining was done in a portion of their extralateral claim, upon the dip of a vein covered by those locations. Specifically, their claim is that the ore removed by defendant was taken from a section of the vein included between perpendicular planes conforming to the end lines of the Central mine at a point about 1,000 feet east and 200 feet south of the northeast corner of the Central location, according to the survey of the ground made by them a short time before the trial of the action. The defendant denies the validity of the Central and Evening Star locations, and also contends that, even if valid, their end lines as actually located would not include the mining ground in controversy. Before entering upon a discussion of the evidence bearing upon these issues, it will be convenient to state a few well-settled legal propositions involved in their determination. There is no claim that the Central or Evening Star mine was located prior to the enactment of the mining law of May 10, 1872, 17 Stat. U. S. 91, c. 152. The claim is in fact that the locations were both made on the first day of January, 1884. Their validity, therefore, depends upon a substantial compliance by the locators with the requirements of that act. Among those requirements these were essential: First, the discovery of a vein; second, the marking of the location so that its surface boundaries could be readily traced; and, third, if the locator was to acquire any extralateral rights upon the dip of the vein, that the end lines of his surface location should be parallel. The act of Congress does not require any posting or recording of notices of location. It merely permits the enactment of local laws regulating that matter, with a proviso that every notice of location, in order to have any legal effect, must contain certain particulars. In this case it does not appear that the claims in question were, at the date of their location or at any time, included within an organized mining district. There is no evidence of any local law, and it was not until March, 1897, that the Legislature of California enacted a short-lived statute prescribing the manner of locating mining claims and providing for the posting and recording of notices. St. 1897, p. 214, c. 159, repealed March 20, 1899 (St. 1899, p. 148, c. 113), and February 8, 1900 (St. 1900, p. 9, c. 6). There was, therefore, nothing to give any definite legal effect to the posting and recording of the notices of location of the Central and Evening Star claims in January, 1884. They did not constitute in themselves a location, or any part of a legal location, of the claims, and are of no value except as acts in pais, to be considered in connection with the well-known customs and practices of mining prospectors as an item of evidence upon the question of compliance with the imperative behests of the mining law with respect especially to the marking of the surface location, so that its boundaries can be readily traced, which is the vital question in the present case.

As to the discovery of a vein within the lines of the Evening Star and Central claims there is no question. As long ago as 1874 a mine known as the "Klamath" was being profitably worked in ground adjoining the Evening Star at its southern boundary. The extent and direction of the surface boundaries of the Klamath are not shown, but one of its corners was at the forked tree which is designated in the complaint and notice of location as the northwest and initial corner of the Evening Star. The evidence shows that during the year 1874 original locations of the Evening Star and Central claims were made after the discovery of a vein within the present limits of those claims. For several years after these original locations work was actively prosecuted on the vein, extensive tunnels, drifts, etc., were run to and on the vein, and a large quantity of ore extracted and milled by the original locators. Finally, however, work on the mines ceased, and it seems that on the 1st of January, 1884, they were open to relocation as abandoned claims. At that time the croppings of the vein had been uncovered in a number of places within the surface now claimed by plaintiffs, and at the time this action was tried the testimony showed that they were exposed at the southwestern corner (erroneously designated in the complaint and notice of location as the northwestern corner) of the Evening Star, at the N. E. corner of the Central, and at a number of intermediate points. The underground work on the mine —the levels or drifts, extending many hundred feet between the foot and hanging walls—indicate that the course or strike of the vein within those limits is almost due north and south, and that its dip is to the east at an angle of 15 or 20 degrees from the horizontal. There is also evidence sufficient to sustain a finding that this vein is identical with that upon which defendant has been mining.

The remaining questions of fact are these: First. Were the locations of the Central and Evening Star ever so distinctly marked on the surface by visible monuments as to be easily traced within the meaning of the mining law of 1872? Second. If they ever were so marked, did the lines as defined by such monuments include in their extension the portion of the vein from which the defendant has been extracting ore? Third. If they did include such portion of the vein, were they parallel?

The evidence upon these points cannot be easily or clearly stated or comprehended without the aid of a diagram, and in order to present the matter more simply I have constructed a diagram based upon the evidence, and the maps and the model prepared and introduced by the plaintiffs, which shows the location of the two claims according to the notices of location and the remaining monuments, side by side with their location according to the survey and contention of the plaintiffs. The corners of the claims, according to the notices and monuments, are designated by the figures 1, 2, 3, etc. The corners, according to the maps, model, and surveys of the plaintiffs, are designated by the letters A, B, C, etc. The croppings of the vein are laid down as they appear in the model, or "illustrator," put in evidence by plaintiffs, and made part of the record on the appeal. The letter A and the figure 1 mark the point upon which all parties agree —the point where a forked tree formerly stood, and where its stump still stands (the "double-topped fir tree, blazed Evening Star" of the complaint, and notice of location), the initial point of the Evening Star, of which the Central is an extension; i. e., another coterminous location on the strike of the same lode. Besides this stump of a fir tree and the cropping of the lode, there is no other undisputed monument to mark any corner of either location. But there is one—a pillar of rock about 1160 feet northeast of the stump—which I think is very clearly shown to be the pillar of rock marked "E. V." at the northwestern corner of the Evening Star location, as the same is described in the complaint. There is about midway of the north end of the Central, a rock placed upon another rock, and which plaintiff contends marks the northern extremity of the center line of the Central; but there is very slight, if any, evidence to sustain this claim.

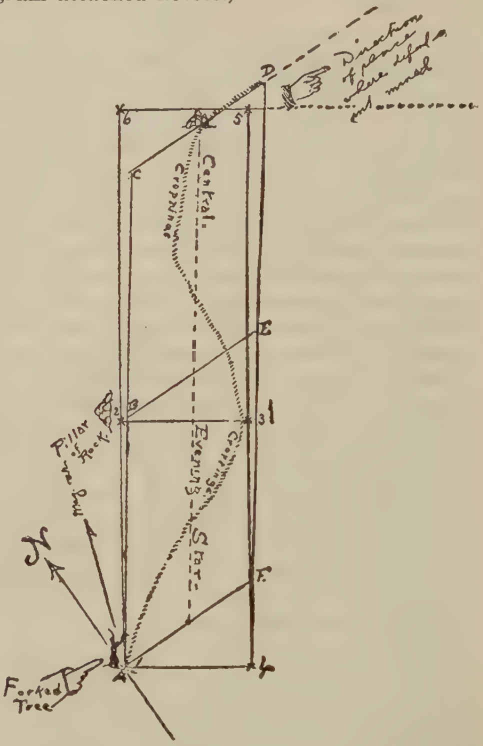
The location, or attempted location, of the Evening Star was made by one Keane, and that of the Central by one Rainey, on the same day—January 1, 1884. They performed the necessary assessment work on the claims until the fall of 1887, when they sold out to the plaintiffs, who have since done more than sufficient work to hold the claims, if they are otherwise good. Rainey is dead, and Keane had left the country before he sold to the plaintiffs in 1887. Their evidence, consequently, could not be had to prove what was done in the matter of marking boundaries, and there was no other direct evidence of any witness who saw any boundary stakes or other monuments placed to mark their location, or who ever saw any monuments on the ground, save those above mentioned, which clearly were not sufficient, in themselves, to enable any one to trace the boundaries of either claim. The indirect evidence introduced at the trial for the purpose of proving the marking of boundaries consisted exclusively of certified copies of the notices of their locations, which Keane and Rainey caused to be recorded in Siskiyou county on the 4th of February, 1884. These notices, as above shown, had no law behind them to give them any legal effect, and they were not competent evidence to prove even that they had been posted on the ground, and much less were they competent to prove the actual erection of the monuments which they called for, and which the law imperatively demands. The only competent evidence of the marking of boundaries is that of witnesses who saw the monuments placed, or who saw them standing after being placed. The contention on the part of plaintiffs that in the case of old claims which have been worked for years, and upon which no sufficient boundary marks can be found, proof of original marking should be dispensed with, and a presumption indulged that they must have been properly defined by visible monuments which have been removed, or destroyed by fraud or the action of the elements, is without any authority to sustain it, and is contrary to the policy of the mining law as expounded in scores of decisions of the state and federal courts. It has been held over and over again under the old district mining laws, and under the different acts of Congress, that the policy of requiring a clear definition of the boundaries of mining claims by visible monuments on the ground was to enable subsequent claimants to locate with safety upon the residue by preventing the swinging and floating of the earlier locations.

To subserve this policy, and as a matter of simple justice, the locators of mining claims are required, not only to mark their location at the time it is made, but to use reasonable diligence in preserving and restoring their boundary monuments as occasion may require. If they and their successors in interest neglect this precaution for a long series of years, as in this case, they expose themselves to the hazards incurred by these plaintiffs of losing, by the death or absence of the original locators and other witnesses, the necessary means of proving the validity of the original location by the only competent evidence of the essential requisites of such locations. The law puts locators of mining claims under no compulsion to procure patents for their claims within any limited period. They are allowed to hold them and work them without paying the government price of the land, or having their boundaries fixed by government surveyors, and by a public and authentic record, as long as suits their convenience; but in the meantime they must do a certain amount of work upon the claims every year. The necessity of doing this work involves the opportunity of performing annually the easy and obvious duty of inspecting and preserving their boundary monuments, and there is no necessity, in order to promote the just policy of the mining law, or any feature of it, for indulging the presumption that claims have been sufficiently marked merely because they have been known as such for a number of years. But this view of the law with respect to the presumption invoked by the plaintiffs—to sustain which they cite no authority—is of little consequence in the present instance, by reason of the fact that copies of the recorded notices of the location of the Central and Evenng Star locations were admitted in evidence wthout objection. By their silence counsel for defendant waived any objection to the incompetency of the notices, and so far as they tend to prove—together with the remaining monuments on the ground—that the boundaries of the claims were properly marked at the time they must be treated as evidence in the case. In this view they are to be considered as proving, at most, the things that they state, and for the purpose of determining what they do prove it is necessary to set forth their material contents.

That of the Evening Star reads as follows: "Notice is hereby given to all whom it may concern, that the undersigned * * * has located fifteen hundred feet of this vein or lode of gold-bearing rock, with surface ground six hundred feet in width, in Liberty mining district, county of Siskiyou, state of California, and known as the 'Evening Star Quartz Mine'; it being a relocation of an abandoned mine, and subject to relocation in accordance with the United States statutes in such cases made and provided, particularly described as follows: Situated on the headwaters of Eddy's Gulch, county and state aforesaid, commencing at a double top fir tree blazed 'Evening Star,' and on the N. W. corner of the claim; thence in a N. E. direction fifteen hundred feet, more or less, to a pillar of rock marked 'E. V.'; thence S. E. direction six hundred feet to a monument of stones and stake marked 'E. V.'; thence in a S. W. direction fifteen hundred feet to monument of stake and stones, stake marked 'E. V.'; thence in a N. W. direction six hundred feet to place of beginning. And I intend to hold and work the same as provided by the laws, customs, and rules of miners and the mining statues of the United States. Dated on the ground this first day of January, A. D. 1884. Location January 1st, 1884. Jas. E. Keane. Attest: B. W. Jencks. Frank Vargas."

The Central notice reads as follows: "Notice is hereby given to all whom it may concern that the undersigned * * * has located fifteen hundred linear feet of this vein or lode, with surface ground six hundred feet in width, situated on the head waters of Eddy's Gulch, Liberty mining district, county of Siskiyou, and state of California, and known as the 'Central Quartz Mining Claim'; it being an extension on the northeast of the Evening Star quartz mine, and this being a notice of relocation of an abandoned mine, and subject to relocation under the laws in such cases made and provided: Commencing at this notice, running thence in a northeasterly direction fifteen hundred feet to stake and mound of stones; thence in a northwesterly direction six hundred feet to stake and mound of stones, stake marked 'X'; thence in a southwesterly direction fifteen hundred feet to stake in mound of rocks marked 'X'; thence in a S. E. direction to place of beginning. And notice is hereby given that I intend to work and hold said claim as provided by local customs and rules of miners and the mining statutes of the United States. Dated on the ground this first day of January, A. D. 1884. Located January 1st, 1884. Attest: James Rainey, Locator."

These notices, it is to be remembered, are the evidence submitted by the plaintiffs, and the most substantial evidence they had to offer, for the purpose of proving the boundaries of their claims, and taking them as a guide, what do they prove? In the first place, it is to be noted that the Central was located as an extension of the Evening Star, and this means that the Evening Star was first laid off on the ground. Another point is that each notice claims 1,500 hundred feet of "this vein or lode," which indicates that each notice as posted on the ground was placed on the croppings of the lode, or in such close proximity to the point where the croppings appeared, or had been exposed, as to make the expression "this vein or lode" mean what it said. This is all the more probable from the well-known practice of miners to place their location notices so close to the point where the vein is exposed that one who sees the work on the croppings cannot avoid seeing the notice. The locators of the Evening Star and Central claims then proceeded as follows: They placed the Evening Star notice on the forked tree, which, as the diagram shows, stood within a few feet of the croppings of the lode. They then went to the pillar of rock on a course about 32 degrees east of north. Probably they did not measure the distance, because the notice calls for 1,500 feet when the real distance by actual survey is only 1,166 feet. From that point they must have gone on a course 32 degrees south of east to the next corner of the claim, for the claim is 600 feet wide, and the measured distance, from one corner to the other, is 600 feet; from which it results, as a mathematical necessity, that the end line must have been run at right angles to the side line. This, also, is exceedingly probable for other reasons, because miners know that the side lines of a claim ought to be parallel to its strike and its end lines at right angles to its strike. And they are well acquainted with the simple expedients by which a perpendicular can be raised from any point on a fixed line with no other aid than a tape measure—an article in universal use by prospectors and locators of claims. Another circumstance of peculiar significance is that a 600-foot line run at right angles to the line between the fir tree and the pillar of rock places the third corner of the Evening Star very little outside of the croppings of the vein, and so near as to explain the action of Rainey in selecting the monument placed at that corner for his starting point, instead of the more conspicuous monument at the other corner. His notice, like Keane's, calls for so many feet in length on "this vein or lode," and he naturally placed it on a corner where the vein appeared, in order that the words of the notice might show what vein was meant, and that the vein might show what the notice meant—that each might illustrate the other. Still another fact confirming the assumption that the end lines of the Evening Star were at right angles to its side lines, and extended in a northwest and southeast direction, is the designation in the notice of the initial corner as the northwest corner. The fact that the fourth corner was southeast of it is the only possible explanation of that mistake. If, as plaintiffs claim, the fourth corner was due east of the first corner, the mistake in calling the latter the northwest corner would seem inexplicable. So much for the evidence bearing upon the direction of the end lines of the Evening Star. According to the notice, monuments of stones with stakes marked "E. V." were placed at the third and fourth corners. (See reduced diagram attached hereto.)



If Rainey, in locating the Central, made it coterminus with the Evening Star, as the plaintiffs assume, and as its designation as an extension implies, his initial point was the northeast corner of the Evening Star—a highly probable assumption, as has been shown—and he measured (probably with a tape line) 1,500 feet in the same general direction to his northeast corner, which he marked with a stake in a mound of stones. According to the other calls of the notice he laid off a rectangle 1,500 feet long and 600 feet wide, marking the third and fourth corners with stakes and mounds of stones. The only monument now to be found answering to these calls, the only monument known to any witness in the case, is the monument, consisting of one stone laid upon another, which plaintiff contends marks the end of the center line of the Evening Star and Central mines. The ground of this contention does not appear. There is no call in the notices for a monument in the middle of the end line of either claim, and no witness testifies that any such monument was ever placed by any locator or owner. It is a much more probable supposition that it really marks the northeast corner of the Central as located by Rainey, for it is just about 1,450 feet from his starting point on a course varying somewhat less than 10 degrees from that of the line between the forked tree and the pillar of rock. In other words, it is quite as near the point called for in the notice as could be reasonably expected in a measurement of a line of that length in a rough country with no means of keeping the direction except sighting by natural objects.

I have now stated all that the notices tend to prove with respect to these locations, and, allowing them the effect of competent evidence upon the ground that defendant made no objection to their admission, it may be conceded that they establish a prima facie case of valid locations of the Central and Evening Star with end lines substantially parallel. But they establish end lines which do not include the ground in which the defendant has been mining. Referring to the diagram, the defendant's mining operations have been conducted at a point between the diverging lines, 5, 6, 7 and C, D, about 1,000 feet east of the corner marked 5, and within the surface lines of a claim called the "Golden Eagle," a claim which is in the possession of the defendant, and was located prior to the survey of their claims by the plaintiffs, for the purpose of definitely locating or relocating their side and end lines. The surveyor, Nolan, was not called as a witness at the trial; but a map based upon his field notes and made by John Daggett, together with a model, also constructed by him from the same data, were put in evidence, and his son, B. F. Daggett, who assisted in making the survey, testified in regard to what was done, and what was discovered on the ground. The figure marked on the accompanying diagram by the letters A, B, C, D, E, F, shows the lines of the Nolan survey in relation to a diagram of the claims according to the notices of location and the two certain monuments. It will be seen that they differ very radically; the most material difference being that the end lines of the Central, according to the Nolan survey, embrace that portion of the extra lateral dip of the vein where defendant had been mining, while the end lines, according to the notices of location, leave it outside. The question is, what has this map to support it? The notices of location and the existing monuments, including the croppings of the vein, certainly do not. It departs from them at every point, except the point of beginning. The testimony of B. F. Daggett is to the effect that the intention in making the survey was to follow the calls of the notices as controlled by existing monuments. The only monuments they found were the forked tree, where they commenced to survey, the pillar of rock 1,160 feet northeast of the tree, and the pile of stones which they assumed to be a mark of the middle of the Central on its north end. This assumption, based upon no evidence whatever, accounts for the form of the Nolan survey in all of its departures from the calls of the notices, and it is proper here to reiterate the fact that no such monument is called for in the notices, and that no witness testifies that any such monument was ever placed by the locators. In order to get it on the end of a center line, every certain, as well as every indefinite, call of the notices, must be disregarded, as in fact they were, in making the survey. Instead of running from the forked tree to the pillar of rock they ran on a line (N., 33½° east) which carried them 35 feet east of the rock, and instead of stopping at the rock they put their stake to mark the corner B exactly 18 chains (1,188 feet) from the tree. Then, continuing on the same course, they measured off another 18 chains, and stopped at C, where they discovered no sign of a monument; but it was a point from which a line drawn through the assumed center line monument would cross the strike of the vein at right angles. Then they went on to the other corners—D, E, F—without finding any traces of former monuments. The result is a map of two lozenge-shaped claims 600 feet wide, according to the scale, and involving these discrepancies: First. They have no corner at the pillar of rock. Second. Side lines of the Central are 1,188 feet in length, when the call is for 1,500. Third. All the end lines of both claims are 720 feet long instead of 600. Fourth. The point where Rainey is assumed to have posted his notice of location is over 150 feet from the croppings of the lode, which it designates as "this vein or lode." Fifth. The designation of the first corner in Keane's notice as the northwest corner is deprived of the small measure of propriety that it would have if the fourth corner of the Evening Star was at 4, instead of F.

All these departures from the calls which the survey assumed to follow are justified by the gratuitous assumption that the pile of rock at the north end of the Central was so placed by the locators to mark its center line. There is not a particle of evidence to warrant this assumption, and by reference to the diagram it will be seen that if the west side line of the claims had been run through the pillar of rock, instead of 35 feet to the east of it, this pile of rock would have been more than 70 feet from the true center line of the claim. A court cannot be expected to accept as evidence a map which departs so widely from the certain data established by the best evidence plaintiffs have to offer for the purpose of proving the original location of their claim. A map, in itself, proves nothing unless it is first shown by competent evidence to be a correct representation of the relative positions of the objects it purports to delineate. A map purporting to show the lines of a location of a mining claim is of no probative value, unless supported by the evidence of some one who knows the position of the monuments which defined those lines; for it is by the location monuments alone that their beginning, end, and direction can be determined. Here, as we have shown, there is no witness to the location of more than two of the corner monuments—the tree and the pillar of rock at the southwest and northwest corners of the Evening Star. For the positions of the others we have no better evidence than the calls of the notices of location—evidence offered by plaintiffs, and essential to their case, and to which all their other evidence is necessarily secondary. Are we to take the notices of location as evidence that the claims were duly located and reject them in favor of a theory or conjecture as to the situs of the location monuments? This, in fact, is what we are asked to do.

The plaintiff, John Daggett, who gave directions for the survey, stated more than once in the course of his testimony the theory upon which he contends the end lines of the locations should be fixed. The design of the law is that they should be at right angles to the vein, and, the deeper workings on this vein having shown that its course is north and south, the end lines should be extended east and west to conform to its dip, and therefore that the law itself gives him these lines. This is a theory fully supported by the provisions of the mining law of 1866 (14 Stat. 251, c. 262), as held by this court in the Argonaut Case, 131 Cal. 15, 63 Pac. 148, and it obtained among miners and lawyers for some time after the passage of the act of 1872. In one of the earliest cases arising under that act (Gleeson v. Martin White, 13 Nev. 442), I made it the ground of my decision upon a question as to the sufficiency of a surface location, and in the celebrated "Horseshoe" Case (Iron Mg. Co. v. Elgin Mg. Co., 118 U. S. 209, 6 Sup. Ct. 1177, 30 L. Ed. 98) it was the ground of the dissenting opinion of Chief Justice Waite, concurred in by Justice Bradley, on a question of extralateral right. But in that case the theory that the law will give to the locator any lines, except those which he has defined by visible monuments on the ground, was definitely rejected by the Supreme Court of the United States, the final arbiter upon such questions, and the same decision was made in a later case. Del Monte Mg. Co. v. Last Chance Mg. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72. This and other pertinent questions were reviewed by the late Justice Temple with his usual ability in his opinion in the Argonaut Case, supra, where we held with respect to a patent issued after 1872 upon a claim located under the act of 1866 that the law did establish end lines for the locator conforming to the dip of the vein, and gave him extralateral rights, notwithstanding the lack of parallelism in the end lines of the surface claim as patented. But the opinion in that case distinctly recognizes the change effected by the act of 1872 with respect to claims thereafter located, viz., that the locators acquire no extralateral rights to the dip of the vein, unless their end lines have not only been marked on the surface, but have been made parallel.

The following quotations from Mr. Daggett's testimony will be sufficient to show that his controlling idea in laying off the boundaries of his claims was the right of the locator to adjust his end lines to the true course and dip of the vein. On his cross-examination regarding the end lines of the claims as delineated on his map and model, he was asked: "Q. Why was it you made the end lines take a slant like that [showing]? A. Because I might say the Mountain Laurel done the same thing, and really because that is the proper method to work a mine—a mine on its surface is very little—on the surface —from the croppings on the surface here. Over 1,200 feet from here to here, and running on the vein, I have concluded that is the true dip of the vein [showing], and I am entitled to take that as the dip of the vein." The answer to the question is not strictly responsive, except at the end, where he makes it plain that he gave a slant to the end lines in order to make them conform to the dip of the vein as developed in the deeper workings in the mine. Again, when questioned as to the instructions given Nolan with respect to the survey, he explains why the west side line of the Central was ended at C (312 feet short of the call of the notice, and where no monument was found): "He was instructed to run a certain distance, which commenced in there—to run a certain distance, and the direction was given in the notice to run to a pillar of rock, and that is right in there. They, of course, commenced in here, and went as far north as would confine the croppings within the north end line, and we all concluded that we couldn't go any farther, because there was no vein up there [showing], and that took this line in the direction of the dip of the vein." Which means that they stopped at that point because the vein, according to its true course, extended no farther north within his side lines, and stopping there would take his end line in the direction of the dip. The position of the monuments was, in other words, a subordinate consideration—the dip of the vein a controlling consideration—in making the survey.

Throughout the argument of this case counsel for respondents have been challenged to point out the evidence in the record which supports a finding that the north end line of the Central mine will include the part of the vein from which defendant removed the ore in question, and on the reargument their attention was especially directed to this matter. They could point to nothing except the evidence of Mr. Daggett, Sr., who did state several times that he had always known, before and after he had acquired the Central mine, that its northern boundary was at the place where the croppings of the lode protrude under a certain flume, the position of which is not given on the maps, but which I have no doubt corresponds to his line as delineated on his map and model. This evidence would, perhaps, support the verdict, if Mr. Daggett had not frankly admitted on his cross-examination that he never knew of his own knowledge of but one monument at the north end of the Central. I quote his examination on this point: "Q. Then I don't understand you to say that you ever laid out the Central location by finding the monuments James Rainey erected, if he erected any? A. We found one. Q. You found one monument? A. One end central line. Q. One end central line? A. Yes, sir. Q. Was that the only monument you found? A. You had better get the surveyor on the stand. He will remember it. Q. Well, so far as you know? A. Yes. Q. That was the only monument you know about the Central mine —was the only monument you ever saw on the Central mine? A. From my own observation, yes. Q. You never run across any of the monuments, except the one you stated, of the Central mine as laid out by James Rainey? A. Yes, sir; that is all. Q. And what point on the Central mine would that be with reference to this map here? Show it to the jury, please. A. Just about there; right near the center. Q. That would be the north end center? A. Right on the north and center. Q. What was it? A. A rock placed on another rock, with a blazed tree around down from it; done years ago." This shows that Mr. Daggett was incompetent to testify as to the direction of the end line. No one can know the direction of a straight line without knowing two points on the line, and he knew but one. Of course, with a knowledge of this one point on the line, and of the dip of the vein, he could, upon his theory of the proper relation of the end lines to the dip, give the direction of the line; but, as above pointed out, it is the line fixed by the monuments, and not the line indicated by the dip of the vein, that controls in favor of intervening rights. Of course, it is not to be denied that before a patent, and before an adverse right has accrued to a subsequent locator, end lines may always be readjusted to conform to the true course and dip of a vein; but this can only be done by re-marking the surface location, so that its new boundaries may be readily traced, which is, in effect, an abandonment of the old location and the marking of a new one.

For the reasons here given I am convinced that there is no substantial evidence that the north end line of the Central mine was ever defined by any monuments on the ground as a line extending east and west. On the contrary, all the evidence introduced by the plaintiff tends strongly to prove that, instead of running from C to D, the north end line of the Central actually ran from 5 to 6, unless, as I consider highly probable, it ran from the pile of rocks at the north end of the claim 600 feet to the northwest, at right angles to a line drawn from 3 to said pile of rocks; for, if that pile of rocks was a monument of the claim as located, it can only have been a corner monument, and, if so, the monument placed to mark the northeast corner.

But there is another fatal flaw in plaintiffs' case, as to which there is an absolute failure of evidence. One of the specifications of particulars in which the evidence is insufficient to sustain the verdict is this: "There is no evidence that the claim as marked upon the ground had its end lines parallel, so as to entitle plaintiffs to follow the vein beyond the side line of the claim." To this proposition neither the record nor the argument of counsel furnishes any answer. If it could be conceded that the north end line of the Central ever was marked by visible monuments at C and D, or in any other way, there is not a particle of evidence that its south end line ever was laid off on the line B, E, or that the south end line of the Evening Star extended from the forked tree to F. No monument, or trace of a monument, was found at D, but a stake of the Nolan survey was placed there, because it was the point of intersection of a line (720 feet long) drawn due east from C, with a line parallel to the west side line and 600 feet distant therefrom on a perpendicular. The point E was determined by measuring merely—no sign of a monument appearing there—and point F in the same manner. There is no sort of evidence that any monuments ever stood at either of these points, but very persuasive evidence, as above shown, that Rainey's notice was posted on or near the croppings of the vein at the point marked 3, and that his end line extended from that point 600 feet to the pillar of rock. If this is so—and there can be no other conclusion based upon the evidence—plaintiffs have no extralateral rights whatever, unless their north end line ran from 5 to 6, which would not include defendants' claim. Upon any hypothesis the verdict is unsupported by the evidence.

Upon other points, including the question as to the identity of the lode upon which defendant is mining with that which has the outcrop within the lines of the Central, we think there was evidence sufficient to sustain the verdict.

Regarding the errors assigned upon the rulings of the court at the trial, the first to be considered is an exception to the admission of evidence that defendant had extracted ore from the locality above described. This evidence was objected to upon the ground that it tended to prove a fact not alleged—a matter without the issues; the point of the objection being that the complaint described only a surface claim, and alleged an entry and trespass upon "said premises," which it is contended is insufficient to authorize proof of a trespass outside of the surface so described. We do not think that, in an action for trespass upon the extralateral dip of that part of a vein which has its apex within a valid location, it is strictly necessary for the plaintiff to allege the existence of a vein having its apex within his surface boundaries, but departing from his side lines on its downward course and that his end lines are parallel (see, generally, Central Eureka Co. v. East Central Eureka Co., 146 Cal. 147–157, 79 Pac. 834); but it would be better pleading to allege the facts specifically, in order to present the issues more definitely and prevent surprise. In this case it does not appear that defendants were misled, and there is no occasion, with a view to a new trial, for any further discussion of the matter. There was a ground, however, upon which the objection to this testimony should have been sustained. The description of the Central claim in the complaint was substantially as it is delineated on the diagram by the figures 2, 3, 5, 6, and the mining of defendant was proved at a point not only without the surface lines of that claim, but altogether outside of its end lines extended in their own direction. It does not appear, however, that this point of objection was pressed upon the attention of the court, and, if it had been pressed, it could have been cured by amendment at the trial.

The only other objection to the ruling of the court seriously urged by the appellant relates to the evidence of lode identity. Counsel contend, in effect, that the only competent proof of a trespass upon the extralateral dip of a vein is by an actual tracing from within the surface lines of the location down to the point of the alleged trespass; a literal following down by continuous excavation between the hanging and foot walls. We do not find any authority supporting this proposition, and do not consider it reasonable. The burden of proof in all such cases is upon the plaintiff to show, by satisfactory evidence, the continuity of the vein between its apex within his lines, and the point at which the defendant is mining; but there are entirely satisfactory modes of proving identity in such cases, without an actual tracing, and, as above said, we think there was in this case sufficient evidence to sustain a finding that the defendants' mining was done on the same vein which has its apex within the lines of the Central mine.

There are no other points requiring notice. On the ground that the evidence does not sustain the verdict, the order and judgment of the superior court are reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings as advised.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.

We dissent, and adhere to the opinion heretofore delivered in department, and in the conclusion therein reached. We think that the judgment and order appealed from should be affirmed: McFARLAND, J.; SHAW, J.; HENSHAW, J.

NOTE.—The following is the opinion in department referred to in the dissenting opinion:

McFARLAND, J. This is an action to recover damages for alleged trespasses by defendant upon certain quartz mines of plaintiffs. The jury returned a verdict for plaintiffs with damages in the sum of $1. From the judgment, and from an order denying its motion for a new trial, the defendant appeals.

The only serious question in the case is whether, when a complaint describes a quartz mine by its name and the boundaries which constitute the surface location, and avers that the defendant wrongfully entered upon the premises and extracted valuable ore from the mine, a recovery can be had for ore taken from a place outside of the plaintiffs' surface location, but from a vein or ledge the apex of which is within plaintiffs' exterior surface lines, and which dips laterally beyond a side line. It is averred in the complaint that plaintiffs are, and for more than twenty years last past have been, the owners and in possession of "those certain quartz mines situated * * * and known as the 'Evening Star Quartz Mine' and the 'Central Quartz Mine,' which mines are particularly described as follows"; and then the surface location of each mine is given by metes and bounds, the one being an extension of the other. It is then averred that defendant wrongfully entered upon "said premises" and extracted and carried away from "said mines" large quantities of gold ore of a certain named value, and the prayer is for damages for such wrongful acts. Defendant by its answer denied that it entered upon said miles or took any ore therefrom. At the trial plaintiffs did not attempt to prove that defendant entered within or beneath the surface lines of their mines or took any ore therefrom. They introduced evidence, however, tending to show that a certain quartz ledge, the apex of which was within their surface lines, dipped laterally beyond one of the side lines of the surface location, and that defendant had taken ore from said ledge at a place beyond said side line. To this evidence defendant objected upon the ground that there was no averment in the complaint "that defendant had extracted gold outside of the vertical planes bounding the Central and Evening Star mines." The objection was overruled, and defendant excepted, and the question thus raised by this objection is the main one presented in the record; that is to say, if the owner of a quartz mine seeks to recover damages for trespass upon his ledge committed outside of the lines of the surface location, must he specially aver the particular place at which the wrongful acts were committed?

The question above stated seems to be a new one, and no precedent in point has been cited. If at a trial under such a complaint the defendant should be really surprised at plaintiffs' attempt to prove acts done wholly outside of his surface lines, perhaps the trial court might properly consider that fact a good ground for a motion for a continuance of the trial. But no such fact appears in the case at bar, no motion for a continuance was made, and the course of the trial shows that defendant knew that plaintiffs were suing for trespasses committed outside of their surface lines, and apparently was fully prepared to contest that issue. Therefore defendant was not actually prejudiced by what it asserts to be a failure in the complaint to cover the offered evidence, and the question presented is simply an abstract question of pleading. We think that the court was right in overruling the objection, and that the evidence was admissible under the complaint. The main thing of consequence and value to the owner of a quartz mine is the ledge the apex of which is within the surface lines of his claim. Such ledge, within his end lines, is a constituent part of his mine, no matter at what dip or angle it may go laterally downward in the earth. If it goes beyond his side lines, it is still as much a part of his property and estate as the part within such lines. The valid location of a quartz mine gives notice to all the world that the locator owns every ledge the apex of which is within his surface lines, no matter where it may be at certain depths below the surface. Therefore the description in a complaint of a quartz mine which gives the name of the mine and the boundaries of the surface location includes (within the end lines) as an integral part of the mine the whole of the ledge the apex of which is within the surface lines; and in a complaint for trespass on a quartz mine there is no more necessity for stating the particular part of the property on which the trespass was committed than there would be in an action for trespass on a placer mining claim, on a tract of agricultural land, or on a town lot.

It is contended that there was no sufficient evidence of a valid location of plaintiffs' claims—that is, that the boundaries were not sufficiently marked so as to be readily traced; but we do not think that this contention is maintainable. Plaintiffs claim under relocations made about 18 years ago. Long before that time the claims had been previously located, and a great deal of work done on them, and their boundaries were well known. Some of the marks on the old locations were used in the new locations. Considering that the locations were made a long time ago, and that the claims were in possession of plaintiffs and their grantors for a great many years, we think that there was a sufficient showing of marking by which the boundaries could be readily traced. Some, though not all, of the monuments were found. No doubt the evidence would have been more satisfactory if the two relocators, one of whom seems to have been dead and the other long absent from the state, had been witnesses. When the owners of a mining claim have owned, possessed, and worked it for a long period of time without any dispute as to its boundaries, they are apt to become careless in the matter of keeping up monuments on their corners and lines; and in such case, when the point made against them is that their entire title to the mine is void for want of sufficient marking, rigid proof in detail of the original marking of every part of the boundaries should not be expected. And in view of these considerations we think that there was reasonably sufficient evidence of the lines of plaintiffs' claims to answer the contention that for want of such evidence their entire title was invalid.

It is also contended that the evidence was insufficient to show that the ledge on which defendant worked was identical with the ledge the apex of which was within plaintiffs' surface lines. But this contention is also not maintainable. Of course, in such a case it is not necessary that the ledge should have been continuously exploited, uncovered, and absolutely traced from the apex to the point in dispute. It is sufficient if the identity be shown to the jury by a clear and strong probability. And we think that in the case at bar such probability of identity was clearly shown by the testimony of plaintiffs' witnesses, and particularly by the testimony of the plaintiff John Daggett when on the witness stand, as well as by the admission of the superintendent of defendant, which was admitted without objection.

The foregoing covers substantially all the points made by appellant. The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

3 Cal. App. 651

YARDLEY v. SAN JOAQUIN VALLEY BANK et al.

(Court of Appeal, Third District, California. May 24, 1906. Rehearing Denied by the Supreme Court July 19, 1906.)

1. HOMESTEAD—COMMUNITY PROPERTY—CONTROL OF HUSBAND.

Where community property of husband and wife became a valid homestead, it thereupon ceased to be community property, and the husband's right of absolute control over the same, as authorized by Civ. Code, § 172, immediately ceased.

2. SAME—EXEMPTIONS.

Where property became the homestead of a husband and wife many years prior to the recording of a judgment against the husband, such judgment could not become a lien thereon as provided by Code Civ. Proc. §§ 671, 690.

3. FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—SEPARATE PROPERTY.

A wife declined to sign a mortgage on the homestead, unless $500 of the proceeds of the loan to be secured should be used to purchase stock of a corporation in her name and for her separate use. This was agreed to, and the stock, though first purchased in the name of the husband, was subsequently changed so as to show on its face that it belonged to her, and the certificates were by her assigned to the mortgagee as additional security for the loan. *Held*, that as, under Civ. Code, § 3441, the homestead was not liable for the husband's debts, no gift of any part thereof was in fraud of his creditors and such stock was the separate property of the wife.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by John Yardley against the San Joaquin Valley Bank and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. R. C. Minor, for respondent San Joaquin Valley Bank. Plummer & Dunlap, for respondent Samson Iron Works.

BUCKLES, J. This action is to recover from the San Joaquin Valley Bank the possession of 500 shares of the capital stock of the Samson Iron Works, which plaintiff alleges he purchased at an execution sale on a judgment he obtained against defendant Joseph H. Condy, which stock stands in the name of "Mrs. Joseph H. Condy," the wife of the said Joseph H. Condy, and was deposited in said bank as a security. Judgment was for defendants, and the plaintiff appeals from said judgment.

Facts. The defendants Joseph H. Condy and his wife, Atlanta J. Condy, owned a piece of property on which they were living in Stockton and, on June 23, 1894, the wife declared a homestead on said premises, in due form, and the same was duly recorded on June 25, 1894. Ten years later, and on October 22, 1904, plaintiff recovered judgment against defendant Joseph H. Condy for the sum of $893.20. On July 19, 1902, the defendants, Joseph H. Condy and Atlanta J. Condy, duly made, executed, and delivered to the defendant (bank) their promissory note for the sum of $1,200, and at the same time made, executed, and delivered to said defendant (bank) a mortgage on all the homestead property. That, thereupon, and as a part of the same transaction, the sum of $500 of said money so borrowed was used in the purchase of 500 shares of the capital stock of the Samson Iron Works, which shares were purchased in the wife's name, and said shares were delivered to the said San Joaquin Valley Bank also as security for the payment of said $1,200 borrowed. On November 22, 1904, appellant took out an execution on his said judgment against the property of defendant Joseph H. Condy, directing the sheriff to levy upon and sell all of the interest of the said Joseph H. Condy in and to said 500 shares of stock of the Samson Iron Works. That in due time and after due notice given, on the 28th day of November, 1904, the sheriff sold to appellant all the interest defendant Joseph H. Condy had in and to said 500 shares of stock, and delivered to appellant a certificate setting forth such sale. That thereupon appellant went to the said San Joaquin Valley Bank, presented the said sheriff's certificate, and demanded that said bank deliver to him said 500 shares of stock, saying he would pay whatever the bank had against the said stock. He demanded also that the bank assign to him the said $1,200 mortgage of the Condys and that he would pay the note or whatever was due on it. The bank refused to comply with this demand, and also refused to give him the said stock. Appellant then went to the office of the Samson Iron Works and, presenting his said sheriff's certificate of sale, demanded that said Samson Iron Works issue to him a new certificate of stock for said 500 shares. This demand was not complied with.

At the time of giving the said mortgage Mrs. Condy declined to execute the same unless the 500 shares of stock (which had not then been issued) should be purchased for her and given to her. The negotiations for the purchase of said shares were made by Joseph H. Condy. It does not clearly appear whether Condy was to have employment in said iron works if 500 shares of stock were taken, but the president of the corporation, J. M. Kroyer, with whom the negotiations were in part made, testified as follows: "I told him I thought there would be an opening for him shortly after we were incorporated, and after the incorporation had run for a while, it proved that there was, and he was employed about the time he took out his stock." Mr. F. B. Hubbard, the secretary of the Samson Iron Works, testified that Condy said his wife wanted the stock and that he (Condy) wanted a job there and that was the object of getting the stock. It seems from the testimony that it was well understood by the Samson Iron Works that the stock was for Mrs. Condy. The testimony shows also that she signed and executed the mortgage upon the promise of her husband that $500 of the $1,200 to be borrowed would be used in the purchase of 500 shares of the capital stock in the Samson Iron Works for her and in her name. In the negotiations with the bank for the loan the bank was not willing to loan the $1,200 with no other security than a mortgage on the homestead, but would loan the sum providing the 500 shares of the Samson Iron Works, which the Condys had been negotiating to purchase, should be deposited also as security for the $1,200. This was agreed to, the mortgage given, the money loaned, the stock purchased and paid for by Condy out of the $1,200 and deposited in the bank as security. It appears from the testimony that the secretary in issuing the stock, though knowing it was for Mrs. Condy, inadvertently issued it in the name of Joseph H. Condy, and when Mr. Condy shortly thereafter returned the stock to him and called his attention to the fact the stock was in his name instead of his wife's name, as was the understanding, the said secretary wrote the letters "Mrs." in front of the name "Joseph H. Condy" and Mrs. Condy went to the office of the iron works and herself placed the letters "Mrs." in front of the name of Joseph H. or J. H. Condy as the same was signed on the stub of the stock book for said shares of stock. And the certificate for said 500 shares was indorsed on the back by her and she delivered it to the said bank in accordance with the prior agreement had with said bank. Joseph H. Condy declared he never had any interest in said stock and that in purchasing it he acted solely for his wife, and the testimony bears out this assertion. The stock was deposited with the bank about July 19, 1902, and appellant recovered his said judgment against defendant Condy on October 22, 1904. We are entirely satisfied this stock and mortgage transaction was free from fraud as against the appellant or any other person. Appellant claims the property on which the homestead was declared to be community property, and that the said 500 shares of stock, having been purchased from the money borrowed on the homestead was community property, and that therefore, the wife could not pledge, mortgage or dispose of it, and for that reason the said bank had no right in, claim to, or pledge of said stock. But we think this not tenable. The testimony shows the property, which was the homestead, was acquired in part by the joint effort of both husband and wife after their marriage, and in part by her separate property. The undisputed testimony of husband and wife shows that when they married in 1886 the wife had $700 or $800, and that nearly $600 of this money went into this homestead as purchase money and for improvements. The property, the homestead, was worth about $2,500 at the time of the trial. Whether the mixing up of her separate funds with the community interest would leave her holding an interest as separate property, or that it became all community property, is immaterial here. If it was community property (sections 164 and 687, Civ. Code, the moment it became a valid homestead it ceased to be community property and Joseph H. Condy ceased to have the absolute control over it as he would were it community property under section 172 of the Civil Code. The homestead was declared and recorded years before appellant obtained his judgment and, therefore, there is nothing he could have done to make his judgment a lien on said homestead. Sections 671 and 690, Code Civ. Proc.

It is clear that the judgment of plaintiff never became a lien upon the homestead, neither did it become a lien upon the $500 which was a part of the money borrowed on the homestead and which went to purchase the 500 shares of stock, for no levy was ever made thereon, nor did such judgment lien ever attach to the said 500 shares of stock unless by the levy attempted November 22, 1904. As to the ownership of said 500 shares of stock the court found, and the evidence of Joseph H. Condy and his wife supports such findings: "That the said defendant, Atlanta J. Condy, sued as Mrs. Joseph H. Condy, declined and refused to sign said mortgage upon said homestead property unless the stock and certificate to be purchased of the defendant, Samson Iron Works, should be her separate property purchased in her name free from any claim of ownership or interest therein by and on the part of her husband, and that said stock and certificate of stock so to be the property of the defendant, Atlanta J. Condy, sued as Mrs. Joseph H. Condy, should be issued to her." That it was thereupon agreed between the defendant Joseph H. Condy and his wife Atlanta J. Condy, sued as Mrs. Joseph H. Condy that the stock to be purchased in the Samson Iron Works should become and be her separate property and that the certificate thereof should be taken in her name." The court also found that this 500 shares of stock was the separate property of the said Atlanta J. Condy. If this 500 shares of stock was the separate property of the wife, then it was not subject to attachment for the husband's debts. Section 171, Civ. Code.

The agreement of the husband was, properly stated, to give the wife $500 out of the $1,200 raised on the homestead with which he was to purchase for her 500 shares of the capital stock of the Samson Iron Works which was a consideration for her executing the mortgage, and so far as the appellant's interests or demands are concerned this $500 became her separate property. As the homestead was not liable for any of the debts of the husband, any gift, sale, or pledge of the whole or any part thereof to the wife or to any one could not under any circumstances be held, as a matter of fact, to be with intent to defraud appellant or any creditor. Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; and section 3441, Civ. Code. The judgment of appellant was against Joseph H. Condy and not his wife, it being his debt and not hers, this 500 shares of the capital stock in the Samson Iron Works being her separate property was still not liable to be subjected to appellant's judgment. Payne v. Cummings, 146 Cal. 426, 80 Pac. 620, 106 Am. St. Rep. 47. As we view it there is no way possible for appellant to subject this 500 shares of stock to the payment of this judgment. Taking the view we have, that the 500 shares of stock in the Samson Iron Works is the separate property of the defendant Atlanta J. Condy, wife of the judgment debtor, it becomes unnecessary to consider other questions presented by this appeal. The findings are supported by the evidence and warrant this judgment.

Judgment affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

3 Cal. App. 750

PEOPLE v. OWENS.

(Court of Appeal, First District, California. June 21, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO MURDER—EVIDENCE—SUFFICIENCY.

On a trial for assault with intent to murder, evidence examined and *held* to sustain a verdict of conviction.

2. CRIMINAL LAW—DEFENSE—INTOXICATION.

Where, on a trial for assault with intent to murder, there was no evidence that accused was intoxicated to such a degree as to destroy his capacity for understanding the nature and effect of his acts, the defense of intoxication was insufficient to overcome a verdict of guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 64–70.]

3. SAME—APPEAL—OBJECTIONS NOT RAISED BELOW—CONDUCT OF PROSECUTING ATTORNEY.

Objection to the remarks of the district attorney in a criminal case cannot be made for the first time in the appellate court.

4. HOMICIDE—ASSAULT WITH INTENT TO MURDER—INDICTMENT—SUFFICIENCY.

An indictment under Pen. Code, § 217, prescribing a punishment for one "who assaults another with intent to commit murder," which alleges that accused assaulted another with "a deadly weapon," with intent to murder, is not bad for the use of the words "with a deadly weapon," though the prosecution is limited to proving the assault alleged.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 237–249.]

5. CRIMINAL LAW — TRIAL — INSTRUCTIONS — EVIDENCE.

Where, on a trial for assault with intent to murder, there was no evidence of a general felonious intent on the part of accused, a requested instruction that it was not sufficient to prove a general felonious intent, was properly refused.

6. SAME — REFUSAL TO GIVE INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Where, on a trial for assault with intent to murder, the court charged that the intent of accused to murder must be established as a fact, and that the burden of proving every element of the crime was on the prosecution, the refusal to charge that the burden of proving the intent was on the prosecution, was not erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1922, 2011.]

7. SAME—EVIDENCE—INSTRUCTIONS.

Where, on a trial for assault with intent to murder, there was no evidence authorizing a finding that accused used a pistol for the purpose of striking the prosecutor, the court properly refused to permit the jury to consider the hypothetical result of such a blow.

8. SAME—NEW TRIAL—MATTERS CONSIDERED.

Affidavits setting forth proceedings had at the preliminary examination of accused, and a charge to the grand jury given by another judge could not be considered in support of a motion for a new trial, such facts not being shown to have been connected with the trial or brought to the notice of the jury.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Bert Owens was convicted of assault with intent to murder, and he appeals. Affirmed.

S. J. Hinds and Lee J. Allen, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. The appellant was convicted of assault with a deadly weapon with intent to commit murder, and has appealed from the judgment thereon and from an order denying him a new trial.

1. One of the grounds of his motion for a new trial was that the evidence was insufficient to sustain the verdict. His counsel concedes that there was some evidence in support of the verdict, but contends that upon the preponderance of the evidence the jury was not authorized to find that the defendant had any intention to kill Mecartea, the prosecuting witness. There was testimony that the defendant had previously threatened to kill Mecartea; that on the day the assault was made upon him he drove in a buggy to the blacksmith shop where Mecartea was at work, and requested him to come out into the street; that Mecartea thereupon went out to the street, and the defendant, still remaining in his buggy, said to him that he had come to kill him; that Mecartea told him to go away, that he wished no trouble with him, and returned into the shop; that the defendant thereupon got out of his buggy, drew his pistol, and following Mecartea went into the shop, pointing his pistol at him. As he went into the shop he commenced to villify Mecartea, saying several times rapidly and in an excited manner as he approached him: "I came to kill you, and, damn you, I am going to kill you;" and as he did so stepped ahead, and they both stepped at the same time, and Mecartea knocked the pistol out of his hands, and they thereupon clinched, and fell to the floor. Whether it was the intention of the defendant to kill Mecartea was a fact to be determined by the jury from all of the testimony of the witnesses, and we cannot say that their verdict is not amply sustained.

The contention of the appellant that he was intoxicated at the time, and it is therefore apparent that he did not have such intention, is insufficient to overcome the verdict. There was no evidence that he was intoxicated to such a degree as to destroy his capacity for understanding the nature and effect of his acts and conduct; and it must also be assumed that the jury took this matter into consideration, and gave to the evidence on that subject its proper weight in determining their verdict.

2. Another ground for reversal urged by the appellant is the misconduct of the district attorney during the trial, both in his opening statement to the jury and in his argument at the close of the testimony, and also in the form of questions put by him to witnesses. This claim is general in its form, no special remarks or form of question being pointed out as objectionable, and it does not appear that at the trial any objection on this ground was made to either the opening statement of the district attorney or to his closing argument, or that the court was requested to interfere, or to instruct the jury in reference thereto. In the absence of such objection at the time it cannot be made for the first time in the appellate court. People v. Beaver, 83 Cal. 420, 23 Pac. 321; People v. Frigerio, 107 Cal. 151, 40 Pac. 107; People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Owens, 132 Cal. 469, 64 Pac. 770; People v. Bishop, 134 Cal. 682, 66 Pac. 976. We have, however, examined the record herein, and are of the opinion that such objection would not be tenable as to the questioning of the witnesses, or that the remarks of the district attorney to the jury exceeded the limits of legitimate argument.

3. The objection that the offense named in the indictment and in the verdict that the defendant was "guilty of an assault with a deadly weapon with intent to commit murder" is not made a crime by the Penal Code, is without merit. An assault with intent to commit murder is made a crime by section 217 of that Code irrespective of the mode or means by which the assault is committed. By placing the words "with a deadly weapon" in the indictment the people were limited to proving that particular kind of an assault, and the defendant was informed of the particular character of the assault which he was to meet. The words may have been surplusage, but they did not vitiate the indictment or the verdict.

4. The defendant requested the following instruction: "Upon the question as to with what intention the defendant used the pistol in question, if at all, the court instructs the jury the intention must be established as a fact, and proof of the said intention to kill and murder the prosecuting witness must not only show to a moral certainty that such an intention was entertained by the defendant, but such was his intention at the time of using such pistol. (And it will be remembered by the jury that it is not sufficient to prove a general felonious intent or any other than the particular intent alleged in the information or included therein, and the burden of proving the alleged intent is on the prosecution)." The court modified the same by striking out the portion within the parenthesis, and gave it as so modified. In thus modifying the instruction as requested, the court did not err. There was no evidence before the jury tending to show "a general felonious intent" on the part of the defendant, and for this reason the court was justified in modifying the instruction as requested. The testimony that he had previously threatened to kill the prosecuting witness was introduced for the purpose of illustrating the intent with which he made the assault upon him on the 25th of September; and when it was offered the defendant's counsel stated that he "had no objection to any threat made against Mecartea." The other portions omitted from the instruction as requested were elsewhere given to the jury; and in that portion of this very instruction which was given, the court told the jury that the intention of the defendant to murder Mecartea must be established as a fact and "that such was his intention at the time of using the pistol"; and the jury were repeatedly instructed that the burden of proving every element of the crime was upon the prosecution.

Other instructions requested by the defendant, to the effect that the jury must find that at the time the defendant made the assault with the pistol upon the prosecuting witness, he intended to murder him were properly refused upon the ground that the jury had been fully instructed upon that point. There was no evidence before them from which they would have been authorized to find that the defendant used the pistol for the purpose of striking the prosecuting witness, and the court properly refused to permit them to consider the hypothetical result of such a blow.

5. The bill of exceptions contains certain affidavits setting forth proceedings had at the preliminary examination of the defendant, and also a charge to the grand jury at about the time of the trial (not, however, by the judge of the court before whom the trial was had); but as it is not shown that these facts were in any respect connected with the trial herein, or brought to the knowledge of any of the members of the jury by whom the defendant was convicted, they were not entitled to be considered in support of the defendant's motion for a new trial.

The judgment and order denying a new trial are affirmed.

We concur: HALL, J.; COOPER, J.

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3 Cal. App. 696

NATIONAL BANK OF COMMERCE OF SAN DIEGO v. SCHIRM et al.

(Court of Appeal, Second District, California. May 31, 1906.)

1. EVIDENCE—WRITTEN CONTRACTS—VARIANCE BY PAROL—PRINCIPAL AND SURETY.

Parol evidence is admissible by the maker of an instrument who appears by its terms to be a principal to show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal, as provided by Civ. Code, § 2831.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1964.]

2. EVIDENCE—DECLARATIONS OF AGENT.

Where the vice president of a bank, who was also a director, acted as its agent in making certain loans to a government contractor by discounting certain notes, there was nothing in the relation of such officer to the bank inconsistent with his position as agent for the bank, and hence declarations and conversations between him and the contractor with reference to the application of certain payments on one of the notes was admissible as against the bank.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 893–907.]

3. PRINCIPAL AND SURETY — CONTRACT OF SURETYSHIP.

An instrument in the ordinary form of a negotiable note, except that it contained at the end thereof and before the signatures the added words: "Collateral for S. Bryan note. Note 58"—constituted a contract of suretyship as defined by Civ. Code, § 2831.

4. SAME—CO-SURETIES—SECURITIES—APPLICATION.

Where certain checks were assigned by a government contractor to P. as surety at least for P.'s own advances to the contractor, another surety of the contractor was entitled to the benefit of the securities held by P. to reduce such surety's liability as provided by Civ. Code, § 2849.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the National Bank of Commerce of San Diego against J. S. Schirm and another. From a judgment for plaintiff, defendant Schirm appeals. Reversed.

Powers & Holland, for appellant. Hendricks, Wright & Schoonover, for respondent.

SMITH, J. Appeal by the defendant Schirm from a judgment against the defendants, and from an order denying his motion for a new trial. The suit was brought upon the instrument set out in the complaint, made by the defendants to the plaintiff, which is in the ordinary form of a negotiable promissory note, with exception that at the end thereof, and before the signatures, it is added: "Collateral for S. Bryan note. Note 58." The note of Bryan thus referred to, which was of even date, was for the same amount and in similar terms. Bryan, the maker of the note, was a contractor with the United States government for the erection of government buildings at Ft. Rosecrans in the county of San Diego under several contracts, and the defendants had become sureties on his bond to the government on the first contract, and perhaps on the other contracts. From the facts disclosed in the evidence, it is to be inferred that it was contemplated that advances of money should be received by Bryan from the plaintiff, either directly or as loans to Powers, for the purpose of paying the amounts to become due to employés and others in the prosecution of the work; and Bryan had, prior to the date of the transaction in question, made an assignment to Powers "of the monthly checks" to become due to him from the government, presumably to secure these amounts. Whether the assignment included also the check to be given on the completion of the work does not clearly appear from the evidence. But this check, which was for the sum of $14,860, was received by him. There was evidence tending to prove that in the transaction in question Powers, who was vice president and a director of the plaintiff, acted as its agent in the transaction involved, and that it was at the time understood and agreed that the government check given on the completion of the work was to be paid on the note referred to in the instrument sued upon; and also evidence—though not altogether satisfactory—that upon the payment of this amount to the bank Bryan directed it to be applied on this note. There was other evidence also offered to establish these points, which was excluded by the court. The $14,860 check was paid into the bank on June 14, 1904, at which time the bank held the following notes of Bryan: Two notes to Powers of date October 13, 1903, the one for $3,000 and the other for $6,000, indorsed by Powers February 11, 1904; the note of Bryan referred to in the instrument sued on for the sum of $15,000, of date April 12, 1904, and another note of the same date, indorsed or otherwise signed by the defendant Schirm, for the sum of $1,200; a note of $3,000 of date August 14, 1903, to Powers, indorsed by him February 11, 1904; a note of $1,200 to the bank of date June 6, 1904; and a note of $1,000 to the bank of date June 11, 1904. When the government check was paid to the bank the proceeds were applied by the cashier upon the above notes in the order stated, with exception of the $15,000 note and the last note for $1,200, and the notes themselves were marked as canceled and delivered up to Bryan. But after this had occurred, Powers, having come up and looked over the notes, told the cashier that he had canceled the wrong $1,200 note, and thereupon, at his suggestion, and, perhaps, with the concurrence of Bryan, the cancellation of the first of the $1,200 notes was obliterated and the later note for that amount marked canceled. At the close of the evidence, on motion of the plaintiff, "all of the testimony in relation to suretyship and agency and the paying of the money was stricken out, and the jury [instructed] not to consider it." The jury were then instructed, in effect, to return a verdict for the plaintiff for the amount specified in the instrument sued upon, with interest, less a credit appearing thereon; and, the verdict having been returned accordingly, the judgment was thereon entered for the plaintiff.

Upon the record thus presented we are of the opinion that all of the propositions involved in the instructions of the court, and in its rulings in striking out the evidence, are untenable. The ruling of the court on the question of suretyship was, in effect, that the instrument sued upon was in its terms a promissory note made by the defendants as principals, and that evidence was inadmissible to vary its effect. But under the provisions of our Code, and the decisions bearing thereon, it is the established law of this state that parol evidence is admissible by the maker of an instrument, who appears by its terms to be a principal, to show that he is in fact a surety, "except as against persons who have acted on the faith of his apparent character of principal." Civ. Code, § 2832; Harlan v. Ely, 55 Cal. 340; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387; Leeke v. Hancock, 76 Cal. 130, 17 Pac. 937; California Nat. Bank v. Ginty, 108 Cal. 150, 41 Pac. 38; Eppinger v. Kendrick, 114 Cal. 624, 46 Pac. 613. In the present case, it is not altogether clear that the so-called note, on its face, can be construed otherwise than as a contract of surety; but, whether this be the case or not, the evidence stricken out and other evidence was competent to establish that this was the case, and should have been admitted.

As to the question of agency, we see nothing in the relation of the defendant Powers to the bank inconsistent with his occupying, in relation to the appellant, the position of agent for the plaintiff; and it was therefore error to exclude testimony upon this point, or to strike out the testimony that had been admitted. The admitted testimony, indeed, tended strongly to support the appellant's contention, and declarations of the defendant Powers and conversations with him bearing upon this issue were therefore proper to be considered by the jury and should have been admitted. The evidence of Bryan's directions as to the application of the proceeds of the last government check was also competent, and should not have been stricken out. The evidence, so far as it related to the application of those proceeds exclusively to Bryan's $15,000 note, is not altogether satisfactory, but still it was admissible. Besides, the evidence shows, without contradiction, that part of the proceeds of the check in question were in fact applied by the cashier to the payment of the first of the $1,200 notes above specified, and that note canceled; and this fact was certainly admissible.

Finally, even after the exclusion of all the evidence upon the above points, the plaintiff was not entitled, as a matter of law, to a verdict in his favor, at least, for the full amount of the note. The instrument sued upon, as we have said, is, we are strongly inclined to think, in terms, a contract of suretyship as defined in the Code. Civ. Code, § 2831. It, indeed, purports in some of its terms to be an absolute and unconditional promise to pay the amount specified; but this language is qualified by the express terms of the note that it was given as "collateral" for the Bryan note of even date, which can be construed only as meaning that the promise was made as security for that note and was therefore conditional upon its nonpayment. It can hardly be doubted that this was the intention and understanding of the parties, or that the contract should be construed according to that intention. Civ. Code, §§ 1636, 1642, 1648, 1650. The case in this respect is not to be regarded as the same as the case of notes of third parties assigned as collateral security; for here the instrument sued on is but a part of the one original transaction, which can hardly be construed otherwise than as we have construed it. Hence, assuming this to be the true construction, the appellant would be entitled to the benefit of these securities. Civ. Code, §§ 2849, 2819; 2 Parsons on Contracts, pp. 5, 6; Eppinger v. Kendrick, 114 Cal. 624, 46 Pac. 613. But, however this may be, it is at least certain from the facts in evidence that the checks assigned to Powers by Bryan were assigned to him as surety, at least for his own advances, and it follows as matter of law that the appellant was entitled to the benefit of the securities thus held by him. Civ. Code, § 2849. The proceeds of the last check of the government, therefore, should have been applied, either as contended for by the appellant, or to the Bryan note of April 12th and the notes previously given or to all the notes held by the bank pro rata; and it was inadmissible, under any view of the case, to exclude the two notes of April 12th—that is, the note for $15,000 constituting part of the transaction involved in the present suit, and the note for $1,200 of the same date—from the benefit of the payment.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 723

COLLINS v. GRAY.

(Court of Appeal, Second District, California. June 9, 1906. Rehearing Denied August 6, 1906.)

1. Easement—Finding—Effect.

In an action to restrain defendant from interfering with a pipe line located on defendant's land, or the water therein, a finding that plaintiff had an interest in the pipe line for the purpose of conveying sufficient water for irrigation, etc., in connection with a finding as to the extent of such interest, constituted a sufficient finding that plaintiff had an easement in the maintenance of the pipe line and owned the same to the extent claimed.

2. Trial—Findings—Definiteness.

Where, in a suit to restrain defendant from interfering with a pipe line located over his land, it was found that plaintiff had for more than five years exercised the right of carrying through such pipe line the water necessary for irrigating his land, and that the customary flow for such purpose was 40 inches of water, the finding was not fatally defective for failure to specify the particular standard of measurement, since the finding would be construed according to the customary water measurement of the locality.

3. Easements—Continuous Use.

In a suit to restrain defendant from interfering with a pipe line in which plaintiff claimed an easement, a finding that for more than five years plaintiff and others used the pipe line as often as required by them for irrigating purposes constituted a sufficient finding of continuous use.

4. SAME—SEVERAL RIGHT—PERMANENCY.

Where plaintiff for a period of more than five years had uninterruptedly with others used a pipe line laid over defendant's land under a claim of right, such use was sufficient to ripen into a permanent and several easement.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 17.]

5. ACTIONS—COMMENCEMENT—FILING—COMPLAINT.

The commencement of an action dates from the filing of the original complaint, regardless of the filing of an amended complaint, which falls into the place of and performs the same functions as the original complaint; there being no change in the identity of the cause of action.

6. APPEAL—JUDGMENT—FINDINGS—PRESUMPTION.

Where, in an action to restrain defendant from interfering with plaintiff's alleged easement acquired by adverse user, nothing to the contrary appeared, it will be presumed in support of the findings and judgment in favor of plaintiff that the original complaint presented the same issues and claims of right as were presented by the amended complaint, and that the findings answered the questions put in the original complaint, and fixed the time of commencement of the adverse use relied on more than five years before the commencement of the action.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by A. P. Collins against C. R. Gray. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. R. Gray, in pro. per. Purington & Adair and W. A. Purington, for respondent.

ALLEN, J. In this action defendant was enjoined from interfering with the pipe line, or the water carried through the same, used by plaintiff in irrigation, from which judgment defendant appeals.

The second amended complaint, which is the only complaint in the record, avers: (1) Ownership by plaintiff as tenant in common of an undivided two-ninths of a certain described pipe line having an alleged capacity of 100 inches of water; (2) facts which, if true, establish an easement in such pipe line to the extent of carrying through the same 40 inches of water for four days of each month during the irrigating season, for use on plaintiff's land. The court found against plaintiff as to the ownership of a definite interest in the pipe line, but found that plaintiff and his grantors have used such pipe line openly, notoriously, peaceably, exclusively, uninterruptedly, under a claim of right and title thereto, and adversely to defendant and to the whole world, and with defendant's knowledge and acquiescence, for more than five years last past for conveying water to the plaintiff's said premises, sufficient to irrigate the same thoroughly and in a proper manner; that plaintiff and his grantors have used said pipe line exclusively, as often as required by them, for irrigating purposes; that defendant, while the owner of the land upon which such pipe line is constructed, permitted the same to be constructed over his said land; that, in consideration of the defendant's giving a right of way for such pipe line, the defendant was given the right to use said pipe line over his said lands; that since its construction defendant has used the same with plaintiff and others for conveying irrigating water therethrough, but with no other property or rights in said pipe line that the right to use the same to convey therethrough water for irrigating his premises, and for domestic use thereon. That the customary flow of water for plaintiff's premises so used upon plaintiff's lands is 40 inches of water for four days in each month during the irrigating season, and that for more than five years last past the customary flow of water upon said premises and through said pipe line on defendant's land has been 40 inches of water for four days of each month during the irrigating season. That such pipe line has been kept in repair by the users, and not by the defendant.

Appellant contends that the finding of adverse use is not the equivalent of a finding of ownership of an easement. There is, however, a finding that plaintiff has an interest in the pipe line for the purpose of conveying sufficient water for irrigation, etc. The extent of this interest is found. Reading the findings together, they are sufficient as finding an easement and the ownership thereof in plaintiff to the extent claimed. The finding of defendant's interest disposes of his contention that he is the absolute owner of the pipe line as a part of his real estate.

It is next contended that the findings are uncertain and indefinite, in that it nowhere appears that plaintiff has used the pipe line for carrying any specific quantity of water. It is found that plaintiff has for more than five years exercised the right of carrying through said pipe line the water necessary for irrigating his lands, and, further, that the customary flow for such purpose has been 40 inches of water for four days of each month during the irrigating season. But it is insisted that the finding of 40 inches is indefinite, in that the inch of water is not characterized as a "miner's inch," or any other particular standard of measurement. If we assume that the word "inch" would apply to either a miner's inch or some other standard of measurement with equal force, yet to the extent of the water actually used the right is established. That is certain which can be made certain; and if any particular kind of water measurement has been in use in that locality, such customary measurement would apply in a determination of the extent of plaintiff's ownership in the carrying capacity of the pipe line.

Appellant further contends that there is no finding of continuous use. There is a finding that for more than five years plaintiff and others used the same as often as required by them for irrigating purposes. This is a sufficient finding as to continuous use, having the character of use in view. Hesperia Land, etc., Co. v. Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209. In addition, the court finds that for more than five years the use by plaintiff was uninterrupted, which of itself comprehends a continuous use to the extent required. The use of the pipe line under a claim of right by plaintiff, with others, would ripen into a permanent and several right to use, just as several parties can use and acquire rights in a public road. Abbott v. Pond, 142 Cal. 396, 76 Pac. 60.

It is finally insisted that the finding that plaintiff has used the pipe line adversely for more than five years is not the equivalent of a finding that such use was for five years preceding the commencement of the action. The case was heard upon a second amended complaint. An amended complaint falls into the place of the old complaint and performs the same functions. Barber v. Reynolds, 33 Cal. 501. The commencement of the action dates from the filing of the original complaint, and there is no change in the identity of the cause of action. Easton v. O'Reilly, 63 Cal. 308. The only purpose of the findings is to answer the questions put by the pleadings. Dam v. Zink, 112 Cal. 93, 44 Pac. 331. Nothing to the contrary appearing, it will be presumed in support of the findings and judgment that the original complaint presented the same issues and claims of right as the amended complaint, and that the findings answer the questions put in said original complaint and fix the time of the commencement of the adverse use more than five years before the commencement of the action. In this way only could the findings answer the questions presented by the complaint.

We find no error in the record, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 633

DONDERO et al. v. O'HARA et al.

(Court of Appeal, Third District, California. May 23, 1906.)

1. Ejectment—Title to Support Action—Possession.

The rule that in ejectment plaintiff must recover on the strength of his own title, and not upon the weakness of his adversary's, is not applicable in an action based solely on the prior actual possession of plaintiff as against a mere trespasser, or one claiming only under a later possession.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 280, 296.]

2. Same — Pleading — Evidence Admissible Under Pleading.

In ejectment, evidence that defendant was in possession under a contract with plaintiff's grantor was an equitable defense, not admissible where not pleaded.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 233.]

3. Same—Reception of Evidence—Right to Object—Waiver.

Where, in ejectment, a certain equitable defense was not pleaded, but two of defendant's witnesses testified to it without objection, there was no error in admitting other evidence thereof.

4. Waters and Water Courses—Contracts.

In ejectment to recover possession of a water ditch, evidence considered, and *held* insufficient to show that plaintiff's grantor had given defendants the right to use the ditch and water without any limit whatever as to time, place, or quantity, but to show an agreement that defendants might use the water for certain specified purposes.

5. Ejectment—Pleading — Answer—Admission of Ouster.

In ejectment, defendant's denial of plaintiff's title and right of possession is an admission of ouster by defendant.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 187, 220.]

6. Same—Plaintiff's Title—Occupancy.

Under Code Civ. Proc. § 1006, providing that occupancy for any period confers title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession, plaintiff in ejectment was entitled to recover by reason of his occupancy, as against defendants, showing no title through any of the sources excepted in the statute.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 280.]

7. Same—Common Source of Title.

Where, in ejectment, the alleged possession of defendants was subsequent to that of plaintiffs, and both parties claimed through a common source, it was only necessary for plaintiff to show a better title through his common source.

8. Same—Findings—Sufficiency.

In ejectment, a finding that plaintiff was seised in fee and possessed of and entitled to the possession of the property supported a judgment for plaintiff, though the evidence did not justify a finding that plaintiff was seised in fee within the meaning of such an estate as defined by Civ. Code, § 762, as plaintiff's right to possession was sufficient.

9. Same—Pleading—Ouster.

In ejectment a cross-complaint alleging possession in defendants which is not denied by plaintiff is a sufficient proof of ouster.

10. Same—Evidence — Admissibility — Acts of Possession—Payment of Taxes.

In ejectment it was proper as showing possession to permit plaintiff to testify that he had paid taxes.

11. Appeal—Harmless Error — Evidence—Facts Otherwise Established.

Where the possession of a water ditch during a certain period was in issue in ejectment to recover possession of the same, testimony of one of plaintiffs that his partner in the construction and maintenance of the ditch had paid some taxes thereon during such time was harmless, where plaintiff had testified to payment of some of the taxes by him.

12. Ejectment — Evidence—Admissibility—Acts of Possession—Tax Assessment.

In ejectment as tending to show acts of possession on the part of plaintiff, it was proper to admit in evidence the assessment roll, showing that the property was assessed to plaintiff.

13. Evidence—Admissions—Partners.

Code Civ. Proc. § 1870, subd. 5, provides that, after proof of a partnership, the act or declaration of a partner within the scope of the partnership and during its existence may be given in evidence. *Held*, that in ejectment to recover possession of a water ditch claimed by defendants under succession from their father, a mining partnership between him and another having been shown, and the use of the water having been connected with the partnership business, it was proper to admit evidence that plaintiff's grantor, claimed by plaintiff to have constructed and maintained the ditch, gave defendants' father permission to use the ditch.

Appeal from Superior Court, Tuolumne County; R. C. Rust, Judge.

Action by Louis Dondero and another against John F. O'Hara and another. From a judgment in favor of plaintiff's and from an order denying a new trial, defendants appeal. Affirmed.

J. P. O'Brien and A. A. Smith, for appellants. F. W. Street, for respondents.

CHIPMAN, P. J. Ejectment. Plaintiffs had judgment, from which and from the order denying their motion for a new trial, defendants appeal. The cause was tried by the Hon. R. C. Rust, judge of the superior court of Amador county, presiding at the trial by request of the judge of the superior court of Tuolumne county. We find printed in the brief of counsel for respondent the following opinion, filed in the case by the presiding judge, which seems to us to clearly present the grounds upon which the decision rests, and satisfactorily meets the principal points now made by appellants, namely, that the evidence is insufficient to justify the findings and that the decision is against law:

"This is an action of ejectment brought by the plaintiffs to recover the possession of a certain water ditch in the complaint fully described. The complaint is in the usual form. The answer denies that plaintiffs are the owners or entitled to the possession of the water ditch described in the complaint, and denies that defendants, without right or title, entered into the possession of said ditch, or ousted or ejected the plaintiffs therefrom, and denies that defendants now unlawfully withhold possession thereof from the plaintiffs. Defendants by way of cross-complaint allege that they are the owners of a certain water ditch, formerly known and called the 'Ophir Water Ditch and Flume,' and formerly known as and called 'Woods Ditch,' and sometimes called 'Smith's Ditch,' and particularly described in the cross-complaint, and allege that it is the same ditch described in plaintiffs' complaint; that plaintiffs claim to have some interest and estate in and to said water ditch and premises adverse to defendants; that the claims of plaintiffs, and each of them, of, in, and to said water ditch and property, is without any right whatsoever, and that said plaintiffs have not, and each of them has not, any estate, right, title, interest, or claim whatsoever of, in, or to said water ditch and property or any part thereof, and follow with the usual prayer for a decree quieting defendants' title thereto.

"The evidence at the trial showed without dispute that there had been a ditch, known as the 'Smith and Wood Ditch,' conveying water along about the same line as the ditch now claimed by the plaintiffs, but that it had been abandoned for a period of more than 20 years; that John Ferguson, the grantor of plaintiffs, constructed a new ditch from a point on the east side of the road leading from Sonora to Columbia that runs parallel with Wood's Creek, a distance of 200 or 300 feet, and constructed it across the said road before the ditch entered the lands of James O'Hara, Sr., the father of defendants; that John Ferguson obtained permission of said James O'Hara, Sr., to dig his ditch across the lands of said O'Hara, Sr., provided he made use of the old Smith and Woods ditch line as the site for the construction of the ditch; said John Ferguson constructed his ditch along this line, and on to the Dane gardens in the town of Sonora, where the water was used for irrigating and running a still; and that the ditch had been so used continuously each year ever since its construction, a period of more than 10 years. James O'Hara, Sr., one of the defendants, worked upon the construction of the ditch for said John Ferguson, and was paid by him for his work. James O'Hara, Sr., the owner of the land, was paid by John Ferguson for removing dirt excavated in digging the ditch from his land to the county road. Sometime after the ditch was constructed by John Ferguson, James O'Hara, Sr., obtained permission from John Ferguson to wash a dump at his incline tunnel with water from this ditch, and used the ditch for this purpose on two different occasions for a period of two or three months each. Afterwards James O'Hara, Jr., obtained permission from John Ferguson to convey water to his water wheel at the incline tunnel on his father's land and which he was operating under a lease from his father. During all of this time John Ferguson was conveying water through the ditch to the Dane garden and to other places in Sonora and selling it. Other parties also used water through this ditch without paying for it, but always after asking and receiving permission from John Ferguson and cleaning out and repairing the ditch for him. John Ferguson and his partner, Dondero, paid the taxes assessed against the ditch each year and exercised other acts of ownership over it. After this evidence was introduced on behalf of plaintiffs, defendants abandoned their cross-complaint and endeavored to show title in a third party, viz., their father James O'Hara, Sr., upon the principle of law that in actions of ejectment plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary.

"Plaintiffs contend that defendants cannot invoke this rule for the reason that plaintiffs are not relying upon a paper title, and that this rule only applies to those claiming under a paper title. I am of the opinion that this contention of plaintiffs is correct, for I find the rule to be that in an action of ejectment, brought solely on the prior actual possession of the plaintiff, the defendant being a trespasser, the latter cannot justify the act by showing title to be outstanding in a third person. Bird v. Lisbros, 9 Cal, 1, 70 Am. Dec. 617; Carleton v. Townsend, 28 Cal. 219–224; Niagara M. Co. v. Bunker Hill M. Co., 59 Cal. 612; Foot v. Murphy, 72 Cal. 104, 13 Pac. 163; Kitts v. Austin, 83 Cal. 167, 23 Pac. 290. The preponderance of the evidence clearly shows to my mind that defendants were using the ditch in controversy under the permission of plaintiffs' grantor, John Ferguson, and that when they asserted a right to the ditch as against plaintiffs, who were prior possessors, they became trespassers. Hutchinson v. Perley, 4 Cal. 34, 60 Am. Dec. 578; Hawxhurst v. Lander, 28 Cal. 331; Zilmer v. Gerichten, 111 Cal. 77, 43 Pac. 408.

"Defendants endeavored to avoid the force of this rule by the introduction of evidence given by themselves and their father, James O'Hara, Sr., that John Ferguson obtained the right to construct the ditch on and across the lands of James O'Hara, Sr., on condition that he should have the right to use the ditch, and to run and use water through it, and that defendants, as tenants of James O'Hara, Sr., had permission from him to use the ditch. Plaintiffs objected to this testimony on the ground that this was an equitable defense and that defendants had not pleaded it, and therefore could not avail themselves of it, and in support of the objection cite the following cases: Cadiz v. Majors, 33 Cal. 288; McCauley v. Fulton, 44 Cal. 362; Hicks v. Lovell, 64 Cal. 18, 27 Pac. 942, 49 Am. Rep. 679; Arguello v. Bours, 67 Cal. 450, 8 Pac. 49. These cases, in my judgment, support the objection, but as two of defendants' witnesses had testified to that effect without objection I permitted the others to testify and overruled the objection. James O'Hara, Sr., thereupon testified to a conversation he had with John Ferguson in the presence of his two sons, the defendants in this action, at the time the ditch was dug that John Ferguson should have permission to dig his ditch over the land of said James O'Hara, Sr., and that said James O'Hara, Sr., should use the ditch and water without any limit whatever, as to time or place or quantity. His sons, the defendants in this action, also testified to this conversation. John Ferguson is dead, and I am deprived of the benefit of his version of this conversation, and therefore must look to the surrounding circumstances, and to the reasonableness of the agreement as testified to by the defendants and their father. Defendants upon cross-examination testified there was no water for stock on their father's land until John Ferguson dug this ditch; that no claim was ever made by defendants' father to the ditch until the trial of this action. Defendants themselves never mentioned to any one that they claimed any rights in the ditch until the trial, except that they testified on cross-examination that they informed their counsel of their claim when they first employed him. But the fact that this equitable defense was not pleaded would lead me to believe they are mistaken in this particular. It was generally known as "John Ferguson's ditch," and every one that used it first obtained permission from John Ferguson. The defendants' leases from their father do not mention the ditch or water, but refer entirely to the mine. And one of the parties to the lease, A. R. Elsbury, testified that his brother, one of the lessees of the mine before him, told him that he had obtained permission from John Ferguson to use the ditch to convey water to the wheel.

"As to the reasonableness of the agreement or understanding at the time of the conversation testified to by the O'Haras between their father and John Ferguson, it seems to me to be extremely unreasonable to suppose that John Ferguson would employ men and spend money in the construction of a ditch to convey water to Dane garden and vicinity of Sonora for the purposes of irrigation and for sale and then enter into such an agreement as that testified to by defendants and their father that practically gave Ferguson no water at all, and the O'Haras the right to use all the water the ditch would carry at any point, and for any purpose and at any time. All these circumstances convince me that the O'Haras' recollection of this agreement or conversation that occurred so long ago is faulty and that the only reasonable interpretation of it is that O'Hara, Sr., should use the water for his stock and on the occasions mentioned for washing his dump, and that the defendants and Elsbury had permission to use it for the wheel, and that the evidence produced by the defendants would not substantiate this defense if they have the right to be heard upon it. Defendants' denial of plaintiffs' title and right of possession is an admission of the ouster of plaintiffs by them. Busenius v. Coffee, 14 Cal. 91–93; Woodworth v. Knowlton, 22 Cal. 164; Salmon v. Wilson, 41 Cal. 595.

"Plaintiffs' grantor constructed the ditch and he and his successors in interest have been in the occupancy and possession thereof ever since until the ouster by defendants last year, and such possession and occupancy ripened into a perfect title and entitles them to a decree of this court as prayed for in the complaint. Civil Code, §§ 1006, 1007."

Plaintiffs' claim, as against defendants', need not rest upon a right of prescription nor upon paper title. They may and do claim by occupancy. The possession under which they claim was taken for the purpose of constructing a ditch and was taken by leave of the owners of the land over which the ditch ran, including O'Hara, Sr. "Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession" (Civ. Code, § 1006); and defendants claimed by neither of these latter sources of title. Their evidence of an agreement with the builders of the ditch, by which it was claimed they had the right to the use of the water, was not accepted by the court as satisfactory. Defendants denied ownership or right of possession of plaintiffs, or either of them; denied that they "without right or title, entered into possession of said ditch or ousted or ejected the plaintiffs therefrom; and they deny that the defendants now unlawfully withhold possession thereof from the plaintiffs." The cross-complaint of defendants averred that they were the "owners of and in the possession of and entitled to the possession" of the ditch in question. The pleadings are verified. The alleged possession of defendants was subsequent to that of plaintiffs, and the possession under which they claim was through O'Hara, Sr., a source common to both plaintiffs and defendants. It was only necessary for plaintiffs to show a better title through this common source than defendant was able to show through the same source. Am. & Eng. Ency. vol. X, p. 491, citing Spect v. Gregg, 51 Cal. 198; Frink v. Roe, 70 Cal. 296, 11 Pac. 820. Plaintiffs were called upon to prove only that they were entitled to possession, and this was sufficient, unless defendants showed a prior possession or title which they failed to do. The court found that plaintiffs "were seised in fee and possessed of and entitled to the possession of all that certain water ditch," etc., and it is claimed that there is no evidence to sustain this finding. It was only necessary for the court to find possession, or right of possession, and this would support the judgment, even though it be conceded that the evidence did not justify the finding that plaintiffs were "seised in fee" within the full meaning of an estate in fee defined by section 762 of the Civil Code. The answer admits the ouster by its form of denials. It denies only that defendants "without right or title" entered into possession. It also puts in issue plaintiffs' title and right of possession, and their cross-complaint avers possession in defendants which is not denied by plaintiffs, and this has been held sufficient proof of ouster. Salmon v. Wilson, 41 Cal. 595.

Appellants cite numerous cases to the point that at the trial the defendant could defeat the action by showing title or right of possession in some third person. This is the rule ordinarily, but is not the rule where plaintiff claims under a prior actual peaceable possession as against a mere trespasser on the land or one claiming only under a later possession. See cases arising in this and other states, cited in Am. & Eng. Ency. vol. X, pp. 486, 487.

Certain assignments of errors in the admission of evidence remain to be noticed. A certain agreement was offered in evidence and admitted between John Ferguson, Rosalie (his wife), John P. Dart, and M. B. Harmin, first parties, and Louis Dondero, second party, concerning certain water rights to the water of Woods creek and thereabouts and certain ditches leading in part along the course of the ditch in question. The objection of defendants was that John Ferguson has not been shown to be the owner of any ditch in controversy, and that the agreement refers to the Jaynes Blue ditch, which is not in controversy. As near as we can discover from the evidence, the Jaynes Blue ditch was at the upper end of the ditch in question and above the O'Hara land. It seems to have been a part of the old system for taking water from Woods creek. This agreement was made in connection with the construction of the ditch in question, and in some degree was intended to fix the rights of the parties to the water conveyed through it. One of the parties claimed the Jaynes ditch and was to convey it in consideration of the construction of the ditch in question. It seems to us that the evidence was admissible, and if not it was harmless. The assessment roll, showing that the ditch was assessed to Ferguson and Dondero, was admitted; and also the testimony of Dondero that the taxes were paid by either himself or Ferguson—sometimes one and sometimes the other. The objection was that the witness "could not positively testify whether Mr. Ferguson paid them except by hearsay." Dondero testified: "Sometimes I would pay the taxes and sometimes Mr. Ferguson would pay the taxes. I don't know who paid them. I don't know whether he paid them; but sometimes I paid them, and sometimes he paid them, and then we would come to a settlement afterwards." There was no objection that the receipts were the best evidence, and should have been produced or their loss explained. Dondero testified that he paid the tax sometimes, and the objection to this testimony was properly overruled. As to taxes paid by Ferguson, he testified that he did not know except through settlements with him. As tending to show acts of possession the assessment roll and payment of taxes by Dondero were admissible and what Dondero testified as to Ferguson was harmless. Carl Ferguson was permitted to testify against objection of defendants that his father gave permission to defendant James O'Hara to use the ditch. The permission was given to Eugene Elsbury, who was the mining partner of O'Hara in the O'Hara mine, where the water was used. The objection was that it must be shown that the permission was communicated to O'Hara, otherwise it would be inadmissible. The partnership being shown, and the use of water being connected with the partnership business, the evidence was admissible under subdivision 5, § 1870, of the Code of Civil Procedure. Under the same section of the Code the testimony of A. E. Elsbury was admissible.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

3 Cal. App. 732

GRAHAM v. REDLANDS HEIGHTS WATER CO. et al.

(Court of Appeal, Second District, California. June 14, 1906.)

LICENSES—OPERATION—SCOPE.

Under a license to enter on plaintiff's land to contruct a pipe line of a specified capacity of good substantial material and workmanship for the conveyance of water to the licensees' premises, the latter were not entitled to enter on the land to construct a pipe line which was substantially defective in character and likely to be productive of unnecessary damage to plaintiff.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 108.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Jonathan Graham against the Redlands Heights Water Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Halsey W. Allen, for appellants. E. C. Campbell, H. B. Ely, and Walter M. Campbell, for respondent.

SMITH, J. The suit was brought against the corporation defendant and defendant Ruggles and wife for trespass on plaintiff's land, and an injunction. The case was tried on the answer of the defendant corporation only, and judgment entered against it. The appeal is by the defendant corporation from an order denying its motion for a new trial.

The alleged trespass consisted in the entry of the defendant by its agents on the land of the plaintiff for the purpose of digging a ditch for a pipe line, specifically described in the complaint, from the main pipe line of the defendant corporation to the land of the defendants Ruggles; and by the judgment the defendant corporation is perpetually enjoined from entering on the plaintiff's premises for the purpose of excavating the ditch or trench thus specifically described, and from laying therein the proposed pipe line as set forth in the complaint, "and from laying any new or additional pipe line therein." The trespass complained of was actually committed by the defendant Ruggles. But it appears that Mr. Ruggles was a director and secretary of the defendant corporation, and that he acted under a resolution of its board of directors, of date August 9, 1901, referred to below; and it was claimed by the plaintiff that, in entering upon the plaintiff's land and upon the construction of the ditch complained of, he acted as the agent of the appellant-defendant. This is denied by the defendant; but the finding of the court on this issue is in his favor and we cannot say that it is not justified by the evidence.

The defendant corporation justifies the trespass under deeds of conveyance of plaintiff's predecessor in title, claimed to give it a right of way for its pipes over the plaintiff's land; and to the construction and effect of these deeds, much of the findings and argument of the counsel are addressed. But from the defendant's answer and the evidence it appears that the acts of the defendants Ruggles in entering upon plaintiff's land and commencing the construction of the proposed pipe line was under a mere license of the appellant to them to construct a pipe line of the capacity specified, "of good substantial material and workmanship," at their own expense and for their own use, "for the conveyance of domestic water to their premises; said pipe line to be constructed and, so far as the conveyance of water is concerned, * * * to be owned by said A. B. and S. S. Ruggles," etc. But assuming, for the purposes of the decision only, that the defendant's rights under the deeds in question are as claimed, we do not think that such a license can be regarded as a legitimate exercise of the rights of the appellant-defendant under its deeds, or as coming within their provisions; and still less can it be regarded as justifying a pipe of the description of the pipe in question, which, it is found by the court, is of a substantially defective character and likely to be productive of unnecessary damage to the plaintiff.

The justification pleaded, therefore, fails in this respect, and the findings of the court must be regarded as sufficient to sustain the judgment of the court, which goes no further than to enjoin the appellant-defendant from excavating the ditch specifically described in the complaint, and from laying the pipe line so specifically described, or "any new or additional pipe line therein." This disposes of all the matters in issue in the case and leaves undetermined the construction of the deeds set up in the defendant's answer and any claims it may have to a right of way over lands of the plaintiff or others claimed thereunder.

The order appealed from must be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

FACEMIRE v. REDLANDS HEIGHTS WATER CO. et al.

(Court of Appeal, Second District, California. June 14, 1906.)

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Amanda J. Facemire against the Redlands Heights Water Company and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Halsey W. Allen, for appellants. E. C. Campbell, H. B. Ely, and Walter M. Campbell, for respondent.

SMITH, J. The case is substantially similar to the case of Graham v. Redlands Heights Water Company (Civil 203, this day decided) 86 Pac. 989, and upon the authority of that decision the order denying the appellants' motion for a new trial is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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3 Cal. App. 754

STEVENSON et al. v. WOODWARD et al.

(Court of Appeal, Second District, California. June 22, 1906.)

1. Mechanic's Liens—Action to Enforce—Questions for Jury.

In an action to enforce on a building a mechanic's lien for work done for a tenant, the question whether the materials had been so affixed to the building as to become a part thereof, was a question of fact.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 587, 588.]

2. Appeal—Review—Findings by Court.

The finding by the trial court as to a fact decided on the weight of the evidence will not be reviewed.

3. Same—Evidence—Admissibility.

In an action to enforce on a warehouse a mechanic's lien for constructing an iceroom therein for a tenant, it was proper to admit evidence as to cutting a door through the wall of the building into the iceroom, though the work connected therewith was not contained in the claim of lien, as it was competent as tending to show the character of the room in relation to its permanancy and the apparent intent of the owner of the property in relation to its future use.

4. Same—Improvement by Tenant—Lien on Leased Building.

Where an improvement of a building is made under a contract with a tenant thereof in such manner as to affix the improvement to the real estate, and the laborer has no information that it will be regarded otherwise than as suggested by the manner of construction, a right of lien will attach to the real estate, which cannot be defeated by another agreement between the owner and tenant that the improvement may thereafter be demolished by the tenant at the expiration of the lease, or any other time.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 71–73.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by O. M. Stevenson and others against I. C. Woodward and others. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant Albert Casner appeals. Affirmed.

R. E. Bledsoe, for appellant. Hight & Hight, for respondents.

ALLEN, J. Action to foreclose a mechanic's lien. Judgment for plaintiffs. Appeal by defendant Casner from the judgment and an order denying a new trial.

Appellant Casner was the owner of a warehouse in San Bernardino. He leased floor space therein to one Woodward, then engaged in the ice business, and Woodward employed plaintiffs to construct an iceroom 10 by 16 by 8 feet in dimensions in said space so leased, with the knowledge and consent of Casner. Plaintiffs furnished materials and did the work in the construction of such iceroom, and regularly filed their notice of lien. No notice was posted by the owner to the effect that he would not be responsible for the work done or materials furnished in the construction of such iceroom. The court finds that said iceroom was built in said warehouse as a part thereof, and was securely attached to said warehouse so that the same could not be removed without injury thereto, nor without injury to such warehouse, and that said iceroom is a part of said warehouse.

It is claimed by appellant that such iceroom is but a trade fixture and as such was the personal property of the lessee, and no lien could be acquired against the real property of the appellant by reason of its construction. "Whether the materials furnished by the appellant were so affixed to the building as to become a part thereof was a question of fact to be determined by the court upon the evidence before it." Bianchi v. Hughes, 124 Cal. 28, 56 Pac. 610. There is ample evidence in the record to support the finding of the court that such iceroom was a part of the building, and the uncontradicted evidence was that the ice box as constructed could not be removed from the building without tearing it to pieces. "The finding of a court as to a fact decided upon the weight of evidence will not be reviewed." Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

There was no error in receiving testimony as to cutting a door through the wall of the building into the ice house, notwithstanding the work and labor connected therewith was omitted from the claim of lien. This was competent as tending to show the character of the iceroom in relation to its permanency, and the apparent intent of the owner of the property in relation to its future use. The character of the improvement controls when the rights of a lien claimant are involved, and where an improvement is constructed in such manner as to affix it to the real property, and the laborer has no information that it will be regarded otherwise than as suggested by the manner of construction, he may well assume that he is making an improvement upon real property, and that a right of lien may attach, and this right will not be defeated by any secret agreement between the owner and lessee that the improvement may thereafter be demolished by the lessee at the expiration of the lease or at any other time. That the iceroom became a part of the warehouse building removes any question as to the right to maintain a lien upon an iceroom as distinguished from other structures covered by the mechanic's lien law.

We find no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 706

YOUD et al. v. GERMAN SAVINGS & LOAN SOCIETY.

(Court of Appeal, Third District, California. May 22, 1906.)

1. MORTGAGES—REDEMPTION—TENDER—SUFFICIENCY.

Code Civ. Proc. § 701, provides that real estate sold under execution may be redeemed by any creditor having a mortgage or judgment lien subsequent to that on which the property was sold, such person being known as a redemptioner, and section 703 provides that if property be redeemed by a redemptioner, another redemptioner may redeem from him. Land was sold under mortgage foreclosure by the first mortgagee and purchased by him. Thereafter the second mortgagee redeemed and the certificate of redemption was assigned to the first mortgagee, and subsequently the land was sold at judicial sale under proceedings instituted by creditors against whom the mortgages were valid. Subsequently the purchaser at such sale demanded a deed of the commissioner in the foreclosure suit. The purchaser had with him blank checks which he intended to draw if the commissioner accepted his offer, which, was to pay the amount which the first mortgagee had paid with interest at the mortgage rate. The offer did not include anything for taxes, costs, or amount due the second mortgagee as a prior redemptioner. The purchaser did not offer to pay any specified sum or draw any checks. *Held* that there was no sufficient tender.

2. APPEAL — PRESUMPTIONS — EVIDENCE TO SUPPORT FINDINGS.

The evidence must be construed on appeal in the light most favorable to the findings and judgment of the trial court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3675.]

3. FRAUDULENT CONVEYANCES—WHO MAY ASSERT—SUBSEQUENT CREDITORS—INVALIDITY.

Where land was sold at judicial sale subject to a mortgage lien acquired before the creditor instituting the proceedings had any interest in the property, he could not attack the lien on the ground that the mortgage was invalid as to the mortgagor's creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 632.]

4. JUDICIAL SALE—TITLE AND RIGHTS OF PURCHASER—PRIOR MORTGAGES—REDEMPTION.

Code Civ. Proc. § 700, declares that on a sale of real estate under execution, the purchaser acquires all right and title of the judgment debtor. *Held*, that where a second mortgagee redeemed from a foreclosure of the first mortgage and subsequently the land was sold at judicial sale under proceedings instituted by creditors as against whom the mortgages were valid, though the second mortgagee was not a qualified redemptioner, the title did not vest in the purchaser at such judicial sale, since if no redemption was effected the title remained in the first mortgagee, and otherwise, passed to the second.

5. CORPORATIONS — ULTRA VIRES ACTS — PERSONS ENTITLED TO QUESTION VALIDITY.

Const. art. 12, § 9, provides that no corporation shall engage in any business other than that expressly authorized in its charter, and Civ. Code, § 574, enumerates the property which may be owned by a savings and loan company. After a second mortgagee redeemed from foreclosure of the first mortgage, he assigned the certificate of redemption to the first mortgagee, a savings and loan company, which had purchased at the mortgage sale, and subsequently the land was sold to plaintiff at judicial sale under proceedings instituted by creditors as against whom the mortgages were valid. *Held*, that conceding that the assignment of the certificate was violative of the Constitution and statute, such fact was of no avail to plaintiff as an extinguishment of the first mortgage lien.

Appeal from Superior Court, Merced County; Jos. H. Budd, Judge.

Action by William Youd and another against the German Savings & Loan Society. From a judgment in favor of defendant, and from an order dening a new trial, plaintiffs appeal. Affirmed.

J. W. Knox, for appellants. W. S. Goodfellow and T. C. Law, for respondent.

McLAUGHLIN, J. Action to quiet title. The court found against the plaintiffs on the vital issue and the sufficiency of the evidence to support such finding is challenged of the appellants. All the parties to the action claim title under A. E. & Thomas Upton who purchased the land from one Martin in 1881. The said owners mortgaged the land to respondent, and as a result of an action to foreclose such mortgage, the property was sold to respondent by a commissioner on July 10, 1897, for the sum of $30,475, and a certificate of sale in due form was thereupon issued to the said purchaser. On December 18, 1897, T. C. Law, who held a mortgage on an undivided one-half of said land, executed and delivered to him by A. E. Upton on February 15, 1896, served a notice of redemption in proper form on the commissioner who made the sale under foreclosure, and at the same time paid to said commissioner the amount for which the land was sold, with two per cent. per month thereon, and thereupon a certificate of redemption in due form was issued to him. After receiving such certificate, Law assigned the same to W. S. Goodfellow, who was the attorney for respondent in the foreclosure suit, and the latter thereafter assigned it to respondent. On February 18, 1898, the commissioner executed and delivered a deed to respondent, who claims title thereunder. In January, 1890, Thomas Upton commenced an action to dissolve the partnership then existing between the owners of said realty. This action finally resulted in an agreement of compromise, containing the terms of a judgment which was duly entered on March 5, 1896. In such judgment it was decreed that the realty was purchased as partnership property, for use in the partnership business, but that the legal title thereto was conveyed to Thomas and A. E. Upton, as equal tenants in common thereof. This recital as to the title was followed by a paragraph wherein it was distinctly and positively adjudged that A. E. Upton was the owner of an undivided one-half of said realty, and that the estate of Thomas Upton, then deceased, owned the other undivided one-half. After decreeing that neither of the parties to said litigation had any claim against the other, A. E. Upton, who had possession of the real and personal property owned by said partnership, was directed to deliver such property to a receiver in the suit to dissolve the partnership and for an accounting. Meantime several attachments issued in suits against A. E. Upton, individually, and as surviving partner of the firm of A. E. & Thomas Upton, had been levied upon the property, and A. E. Upton on March 13, 1896, was compelled to file his petition and schedule in insolvency. On October 9, 1897, the assignee in the insolvency proceedings and some of the creditors filed a petition in the action to dissolve the partnership, praying that said Deane, as receiver, be directed to sell "the equity of redemption belonging to said partnership of T. & A. E. Upton and to the estate of said A. E. Upton, an insolvent, in and to the land in controversy, subject to the mortgage lien of the German Savings and Loan Society."

Such order was duly made, and on December 18, 1897, the court confirmed the sale of the portion of the lands sold under foreclosure involved in this action, made by said receiver to appellants, reciting in said order of confirmation that the sale conferred upon appellants the right to redeem said land from the previous sale thereof to respondents in the foreclosure suit. On January 10, 1890, appellants served a written notice on the commissioner who had made the foreclosure sale, reciting their rights acquired by purchase from the receiver, and notifying him that the lien held by respondents had been fully paid and discharged; that Law was not a qualified redemptioner, and had no right to make such redemption. The notice concluded with a formal demand that he, as commissioner in the foreclosure suit, execute and deliver to them "a commissioner's deed to said land." No offer to pay any sum of money or tender of any kind was made when this notice was served, and no other notice or paper of any kind was served upon or delivered to the commissioner at that or any other time. Appellants visited the commissioner at a later hour on the same day, and the circumstances under which such visit was made, as well as the substance of the inquiry, or offer then made, are gleaned from the testimony of appellants, construed, as it must be, in the light most favorable to the finding and judgment of the trial court. It appears that they had not made any estimate or calculation of the amount of principal or interest due, or necessary to effect a redemption of the parcel of land claimed by them, which was but a small part of the lands sold to the respondent at the foreclosure sale. They then had with them about $500 in cash, but had a check book containing blank checks which they intended to fill out and sign if the commissioner consented to accept the offer they made. Under these circumstances they offered to pay the amount which respondent paid for this particular part of the land at the foreclosure sale, with interest on said sum at the regular rate paid by the Uptons to respondent; that is to say at the rate mentioned in the mortgage, if the commissioner would execute a commissioner's deed conveying that particular parcel of land to them. This offer did not include anything for taxes, costs, or the amount due Law as a prior redemptioner, and it clearly appears that they did not intend to pay any money whatever unless they obtained the commissioner's deed, and that they neither paid nor offered to pay any specific amount of money, and never filled out or signed any checks. The commissioner refused to execute and deliver a deed on the terms stated, but offered to accept the money and issue a receipt therefor. The appellants, however, declined to pay any money unless they received the commissioner's deed, and there the matter ended. That there was no sufficient tender was apparent, but if the mere offer or inquiry made be treated as a formal tender by one entitled to redeem, it is clear that such tender did not conform to the requirements of the law. Code Civ. Proc. §§ 701–703.

It is argued that as Law was not a qualified redemptioner, and hence acquired no rights by virtue of his redemption, his payment to the commissioner was a satisfaction of respondents' claim, which was thereby extinguished, leaving the title without cloud or flaw in appellants who then held the equity of redemption. Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169, is cited in support of the proposition that Law was not a qualified redemptioner, but we fail to see how any rule there announced can be applied here. His mortgage interest was acquired long before appellants had any claim to or interest in the property, and was therefore perfectly valid as to them. Such being the case, they are not concerned with, nor can this court pass upon, the rights of creditors not parties to this action who may perchance be in a position to assert that the mortgage was invalid. But taking the view most favorable to appellant, and conceding that the redemption by Law was utterly abortive, we are at a loss to understand how it could be impotent as to him, but potent to destroy the rights respondent acquired by virtue of its purchase at the foreclosure sale. If the certificate of redemption was void as to Law, it certainly was void in toto. It is well settled that a purchaser of real property at an execution sale acquires the legal title thereto, and equally well settled that such title can only be divested by a valid redemption. Code Civ. Proc. § 700; Pollard v. Harlow, 138 Cal. 393, 71 Pac. 454, 648; Thresher v. Atchison, 117 Cal. 75, 48 Pac. 1020, 59 Am. St. Rep. 159. Hence, if no redemption was effected, the title remained in respondent, and if Law's redemption was effectual, the title passed to him. Viewed in any light or from any standpoint, it certainly did not vest in appellants who neither redeemed nor made a valid offer to do so. It is next contended that the assignment of the certificate of redemption by Goodfellow to respondent was void under section 574 of the Civil Code and section 9 and article 12 of the Constitution. Conceding without deciding that this contention is sound, the appellants can derive neither comfort nor title from the invalidity of an assignment to which they were strangers. Appellants have neither paid nor offered to pay the amount necessary to effect a redemption of this property to respondent or anyone else, and we know of no law which makes them the beneficiaries if the certificate was improvidently issued or improperly assigned. It nowhere appears that the respondent ever received the money paid by Law to the commissioner, and under the circumstances we can hardly indulge in any presumptions or inferences on this point. It is the duty of an appellant to show error affirmatively, and for aught that appears in this record the respondent may have repudiated the redemption and refused to accept the redemption money from the commissioner. If such was the case, the validity or invalidity of the assignment to respondent would be of no moment, and if any intendment or presumption is to be indulged, it must aid the conclusion of the trial court.

Respondent makes the point that the receiver in the proceeding to dissolve the partnership had no power to sell the equity of redemption or any other interest in this land, but we deem it unnecessary to pass upon the question thus presented.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J., BUCKLES, J.

GIVENS v. GERMAN SAVINGS & LOAN SOCIETY.

(Court of Appeal, Third District, California. May 22, 1906.)

Appeal from Superior Court, Merced County; Jos. H. Budd, Judge.

Action by E. T. Givens against the German Savings & Loan Society. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

J. W. Knox, for appellant. W. S. Goodfellow, for respondent.

McLAUGHLIN, J. The facts in this case are almost identical with the facts in Youd v. German Savings & Loan Society (this day decided) 86 Pac. 991. The only difference between the two cases is that the appellants here purchased the equity of redemption in and to a separate part or parcel of the land sold under foreclosure, and failed to make any offer to redeem from the purchaser at the foreclosure sale, or from Law as redemptioner.

On the authority of the case above mentioned, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

3 Cal. App. 757

SAN PEDRO LUMBER CO. v. WEST et al.

(Court of Appeal, Second District, California. June 22, 1906.)

1. Mechanics' Liens—Action to Enforce—Issues and Proof.

In an action to enforce a materialman's lien, the lien declared on and filed stated that the contract was that plaintiff should furnish all materials to be used in the building, the same to be paid for at market rates, and it appeared from the evidence that plaintiff, after receiving the list of the materials required by the contractor, figured up, before delivery, the value of the order at current market rates and agreed to furnish the materials for such sum. *Held*, that the mere fact that the aggregate market value was so ascertained did not show a contract other than that relied on.

2. Same—Performance of Contract—Evidence.

Where a materialman, in an action to enforce a lien, relied on a contract to furnish all materials at current rates, and the notice of lien showed a delivery of certain materials, but neither the contract nor the notice of lien purported to state the aggregate of all materials necessary, evidence that the contractor had purchased some materials of another materialman did not show that plaintiff had not carried out his contract.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the San Pedro Lumber Company against J. D. West and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant West appeals. Affirmed.

John E. Daly, for appellant. A. C. Lawson, for respondent.

ALLEN, J. Judgment foreclosing lien of materialmen. Appeal by defendant West from the judgment and order denying a new trial. It appears that defendant Thurlow contracted to construct a building for appellant West for a sum in excess of $1,000. That plaintiff corporation agreed with Thurlow to furnish all materials to be used in such construction; the same to be paid for at the market value and at a date not later than the completion of such building. It may be inferred that Thurlow agreed to buy all of such materials from plaintiff. That under this contract plaintiff furnished for use, and there was used in such construction, lumber of the value of $873.25, less $25 worth of lumber not used in the construction of the building, upon which payments to the amount of $470 were made, leaving unpaid at the date of the filing of the lien $378.25. That the lien was regularly filed within the time required by law. Judgment was rendered against the contractor for the full amount unpaid, and a lien to the extent of $378.25 was declared against appellant's property, together with attorney's fee and costs of recording lien; and the lien was foreclosed and appellant's property ordered to be sold in default of payment.

Appellant's chief contention is that the lien declared upon and filed did not contain a true statement of the actual contract, and that the findings of the court that the contract was as set out in the lien has no support in the evidence. We think that there is nothing in this contention. It appears from the evidence that plaintiff, after receiving a list of the materials required by the contractor at that time, figured up the value of such order at current market rates, which was a certain list price less certain deductions, and the aggregate amounted to $873.25, for which sum plaintiff agreed to furnish such materials so ordered and comprehended within the bill. The mere fact that the aggregate market value was ascertained before delivery did not change the nature of the contract as established by the evidence. The price agreed to be paid was the current market value of the materials.

It is contended further that the record shows that certain other dressed and planed lumber was purchased by the contractor from one Stephens, and by Stephens furnished and by the contractor used in the construction of said building; and a lien was filed therefor, which was assigned by Stephens to the plaintiff and relief asked on account thereof in the complaint; and that by reason thereof it affirmatively appears that plaintiff never carried out its contract. This cannot be maintained. The notice of lien stated that the plaintiff was, by its agreement, to furnish all the materials at current rates, and it delivered certain materials. Neither the contract nor the notice of lien purported to state the aggregate of all materials necessary to complete the structure. It may be true, and the record discloses, that the contractor, after making his contract with the plaintiff and ordering and receiving part of the lumber, in violation of such contract purchased part of the material elsewhere. This being true in no wise renders the statement as to the contract, either in the complaint or notice of lien, untrue. The only thing it demonstrates is that the contractor did not avail himself of the contract with plaintiff, but this did not prevent the plaintiff from filing a lien based upon the contract for such materials as it actually furnished thereunder. It may be observed that no lien was given for the materials furnished by Stephens. Why this is so is not made to appear in the record, but appellant cannot complain that his property is relieved from a burden which might have been, but was not, imposed upon it. The statement in the notice of lien that plaintiff furnished materials for the contractor, that they were used in the construction of a building belonging to appellant, and the other statements showing that they were furnished so to be used, with the other statements contained in the notice of lien, were sufficient notice of lien and to entitle the plaintiff to its relief.

The motion for nonsuit was properly denied, and we see no error prejudicial to appellant in the record.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

3 Cal. App. 727

LEWIS et al. v. LEWIS et al.

(Court of Appeal, Second District, California. June 11, 1906.)

1. POWER—EXECUTION.

A deed executed while Civ. Code, §§ 905, 909, 918–922, vesting in the holder of a power an estate in fee simple in favor of creditors, purchasers, etc., was in force, reserved to the grantor for his benefit the power to sell the land conveyed. The grantor subsequently conveyed the same to a third person. *Held*, that a reconveyance by the third person was immaterial on the issue of the rights of the original grantee.

2. SAME.

Civ. Code, § 922, provides that every power of disposition is deemed absolute by means of which the holder is enabled to dispose of the fee in possession for his own benefit. Section 1069 provides that a reservation in a grant shall be interpreted in favor of the grantee. A deed reserved to the grantor the power to "grant, bargain and sell to any person, for such price and on such terms" as to him seemed advisable. *Held*, that the reserved power, literally construed, gave to the grantor the right to convey the premises, if he deemed a conveyance beneficial to him or his estate.

3. SAME.

A deed executed while Civ. Code, §§ 905, 909, 918–922, vesting in the holder of a power an estate in fee simple, etc., was in force, reserved to the grantor the power to sell as to him seemed advisable. He conveyed to a third person for the express consideration of $100, which sum was inadequate, as compared with the actual value of the premises, but such sum might not have been the only benefit received. *Held*, that the court could not say that the conveyance was not for the benefit of the grantor, and not a proper exercise of the power.

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by William Leachman Lewis and others against Dozier Lewis, administrator of Henry Lewis, deceased, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Rehearing denied by Supreme Court August 8, 1906; BEATTY, C. J., and SLOSS and ANGELLOTTI, JJ., dissenting.

Thomas O. Toland, E. W. Squier and John J. Squier, for appellants. B. F. Thomas, Richards & Carrier, and Cushing, Grant & Cushing, for respondents.

PER CURIAM. The suit is to quiet title to the land described in the complaint. The judgment was for the defendants, and the plaintiffs appeal therefrom and from an order denying their motion for new trial.

The plaintiffs deraign title under a deed of date November 1, 1873, wherein their father, the deceased Henry Lewis, is party of the first part and they are parties of the second part. This deed purports to be in consideration of natural love and affection and to grant to the parties of the second part the property in question. But the granting part of the deed and description of the land is followed by certain reservations, which, so far as material, are as follows: "I, Henry Lewis, the above named grantor, do hereby reserve to myself, and for my own benefit, the power, during my natural life, to reside upon, occupy, improve, and cultivate, the real property above granted, and to apply the profits derived therefrom to my own use. And I do hereby reserve to myself, for my own benefit, the power, at any time during my natural life, to make and execute, according to my pleasure, such mortgage or mortgages upon said property, or any part thereof, as I may think necessary to secure the payment of any sum or sums of money, to any person whatever. And I do hereby reserve to myself, for my own benefit, the power, at any time during my natural life, to grant, bargain and sell all of said property, or any part thereof, to any person, for such price, and on such terms as to me shall seem advisable and to make, execute and deliver good and sufficient deeds for the same, and to apply the proceeds of such sales to my own use. This reserved power is to be construed as reserving to myself the power to sell said property, or any part thereof, at any time although I may have previously (under this power) leased or mortgaged, or both leased and mortgaged the same," etc.

The defendants claim under the will of the deceased, which devises to the defendant Rebecca Lewis a life estate in the lands in question, with remainder to certain of the other defendants and of the plaintiffs; and it is found that Henry Lewis, deceased, at the time of his death was the owner in fee simple of the land in question. This finding is based upon a deed of the deceased in his lifetime, of date October 2, 1879, to one Newell and a reconveyance from Newell of the same date to himself; both deeds purporting to be in consideration of the sum of $100, and both being recorded on the day of their execution—the former at 2 o'clock p. m., and the latter at five minutes past 2. The deed from Lewis to Newell appears from its recitals to have been made in pursuance of the power "to grant, bargain and sell" contained in the deed of the former to his children; and the question is whether it was a due execution of this power. The deed was executed during the period in which the title on powers of the Civil Code was in force. The effect of the deed is therefore to be determined by the provisions of that title; and we are of the opinion that, under the provisions of sections 905, 920, and 922, the effect of the deed was to reserve and leave vested in the grantor an absolute fee. See, also, Civ. Code, §§ 909, 918, 919, 921. The effect of the provisions last cited is to vest, or leave vested, in the holder of the power an estate in fee simple in favor of creditors, purchasers, and incumbrances, and, of the sections first cited, to extend the principle to all cases.

The reconveyance by Newell is an immaterial circumstance. It would be otherwise, had the power been held by Lewis in trust or for the benefit of the plaintiffs. But, as the matter stands, the power was wholly for his benefit, and it could make no difference to the plaintiffs whether the land was reconveyed to Lewis or otherwise.

By the provisions of section 922, in force when the deed to plaintiff was executed, "every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose of the entire fee in possession, or in expectancy, for his own benefit." Section 1069, then and now in force, provides that "a grant is to be interpreted in favor of the grantee, except that a reservation in any grant * * * is to be interpreted in favor of the grantor." The power of disposition reserved by Henry Lewis was to "grant, bargain and sell to any person, for such price and on such terms" as to him seemed advisable, and to execute deeds therefor, applying the proceeds to his own use. Giving to this reserved power the liberal construction to which, as a reservation, it is entitled, it is a power to convey the premises, if deemed advisable by Lewis and for his benefit so to do. The benefit to the grantor must include anything pecuniary or otherwise which, in his opinion, was beneficial to him or his estate. While it may be true that the consideration of $100, expressed in the deed to Newell, was inadequate as compared with the actual value of the premises granted, this sum may or may not have been, in a pecuniary sense, the only benefit he received. "A written instrument is presumptive evidence of a consideration." Civ. Code, § 1614. The adequacy of consideration passing to Lewis on account of this deed, whether of pecuniary value or beneficial in other regards, was a matter which, by the terms of the power reserved, was peculiarly within his discretion as to amount or character. Nothing in the record to the contrary appearing, we may not say that it was not satisfactory to him in every regard, nor that the conveyance was not for his benefit in the sense requisite to the exercise of the power to convey. The objections, therefore, of plaintiffs to his introduction of the Newell deed were not well taken, and the deed thus in evidence was sufficient to support the findings of the court.

Entertaining these views, the other specifications of error are immaterial and need not be discussed.

Judgment and order affirmed.

3 Cal. App. 738

Ex parte LEWIS.

(Court of Appeal, Second District, California. June 16, 1906.)

1. Criminal Law—Warrant—Sufficiency.

A warrant can have no support in a complaint not having the date of the complaint referred to in the warrant.

2. Infants — Juvenile Delinquents — Custody—Complaint—Sufficiency.

St. 1905, p. 81, c. 84, § 3, provides that any dependent or delinquent child may be committed to the state school for juvenile offenders, and page 806, c. 610, § 2, subsec. 1, defines the phrases "dependent child" and "delinquent child," the latter being among other things, an "incorrigible minor." *Held*, that a complaint under the statutes was insufficient where it contained no averment bringing the minor within the statutory definitions, though the prayer of the complaint described her as an incorrigible minor.

3. Same.

St. 1905, p. 806, c. 610, § 2, subsec. 1, defining and providing for the control of dependent and delinquent children, makes the statute applicable only to children under the age of 16 years, and Id., p. 81, c. 84, § 3, authorizes the commitment of any dependent child to the state school. *Held*, that a complaint praying for the commitment of a minor to such school was fatally defective where it alleged the minor over 16 and under 18 years of age.

4. Same.

The marriage of a minor female takes her out of the class known as "children and minors" under St. 1905, p. 806, c. 610, § 2, subsec. 1; and Id., p. 81, c. 84, § 3, providing for the commitment of delinquent and dependent minors to the state school.

Application of D. C. Lewis for habeas corpus to obtain the release of Nellie M. Lewis from custody under a warrant issued on a complaint praying for her commitment to the State School for Juvenile Offenders. Prisoner ordered discharged.

Henry E. Wills and Hester & Ladd, for petitioner. J. G. Rossiter and Chas. E. McComas, Dep. Dist. Atty., for respondent.

GRAY, P. J. In this matter the prisoner, Nellie Mundell Lewis, must be discharged for several reasons: The warrant returned here by the sheriff as his authority for holding the prisoner was issued out of the superior court on June 6, 1906, and is by its terms based upon a complaint filed in said court on February 21, 1906, "praying for the commitment of the above-named minor to the Whittier State School for juvenile offenders." To this warrant is attached what purports to be a copy of a complaint sworn to on the 2d day of May, 1906. At the hearing of the matter the sheriff introduced in evidence the copy of another complaint differing in several respects from the copy attached to the warrant returned. This copy of complaint introduced in evidence was also sworn to upon the 2d day of May, 1906. Neither of these two complaints, copies of which are before me herein, can be treated as supporting the warrant in question, for the reason that they are not as appears by date referred to in the warrant, nor is either of them the basis of said warrant. There was, as I find by examination of the records of this court, a complaint filed against the prisoner in said superior court on the date stated in the said warrant, the 21st day of February, 1906. That complaint was, however, before the District Court of Appeal on a previous application for a writ of habeas corpus, and it was then held by the court that such complaint was entirely insufficient to support an order committing the prisoner. See Ex parte Edward Mundell (Dist. Ct. of App., 2d Dist., Crim. No. 30; April 30, 1906) 86 Pac. 833. For the reasons stated in that opinion, that complaint I hold to be entirely insufficient to support the further detention of the prisoner. Nor are either of the complaints before me sufficient to warrant the further holding of the prisoner. The complaint attached to the warrant fails to state that the home of the prisoner is an unfit place for her for any reason. It also fails to state that she is incorrigible, or a vagrant. There is also an entire absence of any averment bringing her under the provisions of subsection 1 of section 2, c. 610, on page 806, St. 1905, either as a dependent child by virtue of the amendment contained in that section, or as a proper subject to be sent to the Whittier school by virtue of the amendment contained in section 3, c. 84, on page 81, St. 1905. To be sure, in the prayer of this complaint the prisoner is described as an "incorrigible minor," but it is neither asserted, averred, nor charged that she is an incorrigible minor. If the person swearing to the complaint were charged with perjury in having falsely sworn that the prisoner was incorrigible, he might well answer that he did not so swear. People v. Bartman, 81 Cal. 200, 22 Pac. 592.

As to the complaint introduced at the hearing, it is fatally defective in that it is therein alleged that the prisoner is over 16 and under 18 years of age; whereas the dependent child act under which it is drawn affects children under 16 years only. See St. 1905, p. 81, c. 84, § 3; and page 806, c. 610, § 2, subsec. 1.

I might stop here, but there is yet another reason why the prisoner must be discharged. It appears from the sworn petition herein that since the filing of all the complaints hereinbefore referred to, the prisoner has been married and is now the wife of the man who makes the petition herein in her behalf. This allegation of the petition is not denied, and must be taken as true. I am of opinion that, if we concede the validity of the complaints, still her marriage takes the prisoner out of the class known as "children and minors" under the Whittier act and the act concerning dependent children, and makes of her an adult person so far as those acts are concerned; and that no court has any further jurisdiction of her person on any charge based upon either or both of those acts. I do not believe that married minors come within the provisions of those acts. In this my associates agree with me.

I, therefore, order that the said Nellie Mundell Lewis be discharged from custody, and that her cash bail be restored to the owner thereof.

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3 Cal. App. 734

BECKMAN v. WATERS et al.

(Court of Appeal, Second District, California. June 15, 1906.)

1. Actions—Joinder of Causes.

By express provision of Code Civ. Proc. § 427, claims to recover real estate and rents and profits thereof may be united in one action.

2. Pleading—Demurrer—Separating Causes of Actions.

That causes of action properly joined in one action are not separately stated is not a ground of demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 113, 433.]

3. Limitation of Actions—Trusts—Demurrer.

The admission of defendant by his demurrer, in an action to recover real estate and rents and profits thereof, that at all times prior to two years before commencement of the action he held possession of the property, and received the rents and profits as trustee for defendant, disposes of his claim that the claims were barred by limitations.

4. Vendor and Purchaser—Failure to Perform Option Contract—Action to Recover Possession.

The repudiation of the contract by one in possession of land under an option to purchase it, and his refusal to pay the balance entitling him to the property, entitles the vendor to maintain an action to recover the property, in the nature of an action to quiet title, on account of the vendee's claim of ownership of the property.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 832–836.]

5. Same—Terminating Option—Notice.

The commencement of an action to recover property by one who has given an indefinite extension of an option to purchase it is sufficient notice of termination of the option.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 23, 87.]

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Elias Beckman against William G. Waters and another. Judgment for defendants. Plaintiff appeals. Reversed and remanded.

J. F. Conroy, for appellant. W. S. Day and Henley C. Booth, for respondents.

ALLEN, J. Action to recover possession of real property, and for rents, issues, and profits. Demurrer to complaint sustained, and judgment thereon, from which plaintiff appeals.

The complaint alleges that plaintiff, in February, 1892, was the holder of the legal title to certain real property, known as "San Miguel Island," and certain live stock thereon, together with implements of husbandry, and a sloop used in the business of said island. That on said date plaintiff executed to defendant Waters a certain written instrument, set out in the complaint, by which he granted to said defendant the option and privilege of purchasing all of said property at any time within three years from the date thereof, for the sum of $7,000 and interest; upon payment of which sum plaintiff obligated himself to execute to said Waters proper conveyances for the whole of said property, except such as was sold in the meantime, and in the event of such payment with interest when the same became due, to credit the amount of such sales upon such indebtedness. Time was made of the essence of the contract. That plaintiff retained possession of all of said property; that in March, 1892, defendant paid on account of said purchase price $1,000 and thereafter, and before May, 1896, plaintiff received on sales of property so included in said option an additional sum of $1,500, which amounts were all the sums received by plaintiff on account of said option to sell. That after May, 1896, until March, 1897, defendant Waters assumed control of said island for plaintiff and in his own behalf as prospective purchaser. That in March, 1897, the defendant corporation was formed, of which Waters was the principal stockholder and general business manager; and Waters conveyed to said corporation all of his interest in and to said property described in said option, and the same was accepted by said corporation with full knowledge of the rights and interests of the respective parties. That said Waters, until the formation of said corporation and the said corporation after its organization, held possession of said island and property as trustee for plaintiff, and not otherwise. That between March, 1897, and the date of the commencement of the action, defendants received from the rents, issues, and profits of said island and the other property, more than $20,000, which they kept and appropriated to their own use and refused to account for the same to plaintiff. That ever since March, 1904, the defendants have disavowed their fiduciary relation to plaintiff and claimed ownership to all of said property adversely to plaintiff and denied plaintiff's right of possession thereto. Plaintiff alleges that the defendants are disposing of said property and threaten to dispose of all thereof; that defendants are insolvent, and will, unless restrained, continue to sell said property to plaintiff's irreparable loss and injury. Plaintiff alleges that the option so granted was extended indefinitely. The prayer of the complaint is for a decree divesting defendants of all claims or demands to said property and an accounting for rents, issues and profits and a judgment therefor, and for other relief. Defendants demurred to the complaint generally, and also specially upon the ground of ambiguity and uncertainty, and upon the ground that several causes of action are improperly united, and not separately stated; and further that the claims of plaintiff are barred by the statute.

We think the court erred in its order and judgment sustaining the demurrer. The action is clearly one to recover possession of real property and for rents, issues, and profits; and under section 427 of the Code of Civil Procedure, such action may be united. That the causes of action so proper to be united were not separately stated is not grounds of demurrer. City Carpet Works v. Jones, 102 Cal. 510, 36 Pac. 841; Murphy v. Crowley, 140 Cal. 150, 73 Pac. 820. We perceive no ambiguity or uncertainty in the complaint. It comprehends a statement of facts admitted by the demurrer to be true, which entitles the plaintiff to relief in equity. The admission that the defendant at all times before 1904 held possession and received the rents, issues and profits as agent and trustee of the plaintiff, and not otherwise, disposes of all questions involved in the plea of the bar of the statute. The defendants having admitted that they have repudiated the contract under which they hold possession, and that they have refused to pay the balance which entitles them to the property, plaintiff can maintain the present action in the nature of an action to quiet his title on account of defendant's asserted claim and interest therein. Woodard v. Hennegan, 128 Cal. 302, 60 Pac. 769. There is nothing in the complaint from which we may infer that mortgage rights are claimed. While the extension of the option was indefinite, such extension was a privilege given by plaintiff which he might revoke upon notice, and the bringing of the action is a sufficient notice that the option has been terminated.

The judgment is reversed and cause remanded, with instructions to the trial court to overrule the defendants' demurrer to the amended complaint.

We concur: GRAY, P. J.; SMITH, J.

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3 Cal. App. 716

Ex parte BAXTER.

(Court of Appeal, Second District, California. June 2, 1906.)

Criminal Law — Commitment — Conviction in Police Court.

St. 1905, p. 940, c. 15, constituting the charter of the city of San Bernardino, section 95 (page 956) provides that the judicial power of the city shall be vested in a police court, consisting of one police judge. Section 14 (page 944) provides that such judge shall be elected at a general municipal election to be held on the first Monday of April, 1907. Section 13 (page 944) provides that the police judge and recorder shall continue to hold office and act as such until the second Monday of May, 1907, but that the first election of city officers under the charter shall be held on the second Monday of April, 1905. Section 51 (page 952) provides that the mayor shall fill all vacancies in an elective office, but that at the next municipal election an election shall be held for the office vacated, to fill the unexpired term. The incumbent of the office of recorder died prior to April, 1905, and on such date an election was held at which a judge of the police court was elected, but he was called the "recorder" instead of the police judge. *Held*, that with reference to the interval of time between the adoption of the charter and the second Monday of May, 1907, the terms "recorder" and "police judge" were used synonymously, though the charter did not continue in existence the recorder's court previously existing, and hence the fact that a warrant of commitment issued by the judge elected in 1905 was signed by him as "city recorder," did not render it insufficient so as to entitle the prisoner to release on habeas corpus.

Application by William Baxter for habeas corpus to obtain his release from the custody of the sheriff of San Bernardino county. Prisoner remanded, and writ dismissed.

Henry W. Nisbet, for petitioner. Ralph E. Swing, for respondent.

SMITH, J. The petitioner is held in custody by the sheriff of San Bernardino county, under a warrant of commitment issued under a judgment for a misdemeanor in a case lately pending against him, entitled, "In the Recorder's Court of the City of San Bernardino," etc., and signed by W. L. Vestal, "City Recorder." A similar application, and upon the same grounds, was made to Judge Bledsoe of the superior court of San Bernardino county, by whom the writ was discharged and the prisoner remanded. The facts in the case, with the questions involved and the provisions of the charter and statutory provisions and authorities bearing upon the case are fully stated in the opinion of the judge, which is appended, and to which reference is made for a more specific statement of the case.

We concur in the conclusion reached in the opinion referred to and in much of the reasoning. But we are of the opinion that the charter is to be construed, not as continuing in existence the recorder's court previously existing, but as simply designating the "recorder" or "police judge," in office when the charter took effect, as judge ad interim of the police court provided for in sections 95, et seq. It follows that upon the death of the incumbent there was a vacancy in the office of judge of the police court. This vacancy might have been filled by the mayor under the provisions of section 51 of the act, but the officer thus appointed could not have held "beyond the next general municipal election," at which time, it is expressly provided, "an election shall be held for that office so vacated to fill the unexpired term." Under this provision it was required by the law that at the first "general municipal election"—which was held on the second Monday of April, 1905—a judge of the police court should be elected; and such an election was in fact held, to which no objection can be urged, except that the officer elected as judge of the police court was called "recorder," instead of "police judge." But this, we think, was immaterial. The proposed judge of the police court, ad interim, is designated in section 13 of the act (St. 1905, p. 944, c. 15) by both terms; and it seems to be clear, with reference to the interval of time between the adoption of the charter and the second Monday of May, 1907, that the two terms are used in the charter as synonymous. The judge of the police court during this interval, therefore, may, with equal propriety, be called "recorder" or "police judge," and the court either the "recorder's court" or the "police court."

It follows that the prisoner must be remanded to the custody of the sheriff, and it is so ordered, and the writ is dismissed.

We concur: GRAY, P. J.; ALLEN J.

The following is the opinion referred to in the decision (Bledsoe, J.):

"The petitioner herein alleges that he is in the custody of the sheriff, under a commitment issued by W. L. Vestal as city recorder of the city of San Bernardino; but that such detention is illegal, in that there is no recorder's court in the city of San Bernardino, and that consequently he is imprisoned without authority of law. The sole question in the case is as to the existence or nonexistence of any municipal court in the city of San Bernardino. If there is such a court, and it is a recorder's court, duly constituted, then the judgment of W. L. Vestal, who is the de facto judge thereof, is a valid and subsisting judgment, and petitioner is not entitled to discharge.

"Petitioner's point is that the city, under its charter (St. 1905, p. 940, c. 15), and under prior decisions of the Supreme Court (People v. Toal, 85 Cal. p. 333, 24 Pac. 603, and decisions following that) could not provide for any court except a 'police court', as permitted in section 8½, article 11 of the Constitution. Prior to the enactment of that act in 1896, it was held that the cities by freeholder's charters could not establish any municipal court, such power being granted to the Legislature alone. The court will take judicial knowledge that San Bernardino, prior to the adoption of its charter, was acting under the municipal incorporation act of 1883, providing for the government of cities of the fifth class; that under such act elections for officers, including a recorder, were held in 1903. It is also apparent, from the city charter above referred to, that it was the intention of the framers thereof that all persons then in office, and to which they had been elected at the last municipal election, should hold their full term, as prescribed by said act, to wit, until 1907. Pursuant to such intention, it is provided that a city election should be held in 1905, but that only certain officers, not including those who were to hold over, should be elected. It was specifically provided in section 13 that certain officers, including a recorder, 'shall also continue to hold office and act as such under the charter, until said second Monday of May, 1907.' Of course as long as the recorder acted 'as such,' he would constitute the recorder's court.

"By section 14 (page 944) it is provided that in April, 1907, and regularly thereafter, a police judge, with certain other officers mentioned, should be elected. The police judge was to act ex officio as city treasurer. By section 75 (page 954) it was provided that until the second Monday in May, 1907, the duties of the marshal, treasurer, and recorder shall be those prescribed for marshal, treasurer, and recorder, respectively, by chapter VI of the aforesaid act of the Legislature, enacted in 1883, which chapter refers to cities of the fifth class. In section 223 (page 975) it was provided that 'all laws, ordinances and resolutions relating to the city of San Bernardino, now in force and not inconsistent to this charter, shall be and remain in force after this charter takes effect, until repealed or changed by the proper authority.' The effect of this provision would be to keep the law (Municipal Incorporation Act) in force until repealed or changed by proper authority (to wit, this charter). Section 224 (page 975) provides that "in all matters pertaining to municipal affairs, concerning which provision is not made in the charter, the general laws of the state, in force at the time, shall be in force in the city, so far as the same may be applicable to the class of cities to which this city may belong." By the provisions of the general law, approved March 2, 1883 (St. 1883, p. 24, c. 17), the class to which a city belongs or may belong, in the absence of a special enumeration, is determined by a reference to the last federal census; of this the court takes judicial knowledge, and from the same it appears that the city of San Bernardino at the present time belongs, and at the time of the adoption of such charter belonged, to the fifth class.

"As I read these provisions, it is apparent therefrom that the framers of the charter intended to constitute the recorder's court, precisely as the same existed prior to the adoption of the charter, as the municipal court of the city until the election of the police judge, which is not to occur until May, 1907. It is true, article 5 of the charter does, in express terms, provide that the judicial power of the city shall be vested in a police court; but it also provides immediately thereafter that such court is to consist of one police judge. There being no police judge provided for until the end of the recorder's present term, there is no police court until then. The sole question remaining to be determined is whether or not, under the power granted the freeholders by the constitution, they could establish and constitute a recorder's court as the municipal court of the city. I am constrained to believe that the freeholders have such power.

"Petitioner's point would seem to be that because the term 'police court' was used in the amendment to the Constitution, that the city could only establish a police court, eo nomine.

"To hold this would be to grasp at the form and disregard the substance; it would be to hold, in effect, that the city could establish any court and give it any jurisdiction it pleased, so long as it was called a 'police court.' This, I am satisfied, was not the intention; but, on the contrary, I think it stands without question that the intention was to enable the city to establish the usual and necessary municipal court, having merely a municipal jurisdiction, and belonging to the class of courts universally known and recognized, on account of their extremely limited jurisdiction, as 'police courts.' The term 'police court' is not defined in the Constitution, and we must therefore look at the accepted definitions of the term to be found elsewhere. The Century Dictionary defines a police court as a court for the trial of offenders brought up on charges preferred by the police. Anderson's Law Dictionary, sub. nom. police court, defines it as 'an inferior court (in America) having a jurisdiction wholly or chiefly criminal in nature and very limited in extent; usually discharges merely functions of a justice of the peace, but have power to try some minor offenses. A limited civil jurisdiction is sometime also conferred upon it.'

The jurisdiction of the recorder's court, as established by the charter, being of course the same jurisdiction granted to it by the Legislature (Municipal Incorporation Act, § 806; St. 1883, p. 265, c. 49), falls clearly within these limits.

"Pursuant to authority given by the constitution the Legislature has at various times provided for so-called 'police courts' viz.: Sections 229, 390, 560, and 690 pages 173, 200, 219, 242, of the aforesaid municipal incorporation act which provide for such courts for the first four classes of cities, respectively. A similar provision was made in the general law. Pol. Code, § 4424, et seq. Some of these courts (section 560, supra) were made courts of record; the others were not. I can discover no difference in the jurisdiction granted to them and that granted by recorders' courts provided for cities of the fifth and sixth classes by sections 806 and 882 (pages 265, 278), of said municipal incorporation act. It would seem probable that the framers of section 8½, the aforesaid amendment to the Constitution, in using the term 'police court' had in mind such a 'police court' with the jurisdiction conferred as had been theretofore established in this state by the Legislature, and which courts so established, while differing slightly, had certain inherent characteristics as to jurisdiction and situation.

"Anderson's Law Dictionary in defining the word 'recorder' says: 'He is a judicial officer, in many cities, whose jurisdiction is chiefly confined to the trial of criminal prosecutions;' thus showing that the jurisdiction of his court, which is the essential characteristic and substantial feature of any court, is the same as that of the police court. This is further shown by the decision In re Carrillo, 66 Cal. p. 3, 4 Pac. 695, where our Supreme Court, holding that a mayor might act as a police justice, say: 'The mayor of the city is therefore by the charter, ex officio police justice, and authorized to hold a police court for the city; for 'the term "police court" as used in the Penal Code, includes police judges' courts, police courts, and all courts held by mayors or recorders, in incorporated cities or towns.' Section 1461, Pen. Code. We have here the express declaration of the Supreme Court, paraphrasing the language of the Penal Code, that a recorders' court is the substantial equivalent of a police court. So, in Prince v. Fresno, 88 Cal. 407, 412, 26 Pac. 606, 607, the Supreme Court, in discussing the power of the recorder of the city of Fresno, used that term interchangeably with that of police judge. So, in Uridias v. Morrill, 22 Cal. 473, on page 478, the Supreme Court say, of the use of the phrase 'municipal courts' as used in the Constitution: The term "municipal courts" has a legal meaning and signafication and clearly includes mayors' and recorders' courts, as those were well known and universally recognized as being of that character.' People v. Provines, 34 Cal. 520, is to the same effect. It was held in Mathie v. McIntosh, 40 Wis. 120, that the 'police court' of a certain city was a 'municipal court' within the meaning of the Constitution.

"For the foregoing reasons, I am led to believe that it was intended by the framers of the constitutional amendment to permit cities framing charters to provide for the establishment of an inferior court, which should correspond in substance, jurisdiction and standing with ordinary police courts; that the term 'police courts' was used in said amendment as merely descriptive of the court which might be established in any city, and that there was no intention, to be gathered from the instrument itself or elsewhere, that a city was to be limited to the establishment of a police court, under that name only.

"It is ordered that the writ be discharged and the prisoner remanded."

149 Cal. 496

LOWER TULE RIVER DITCH CO. v. ANGIOLA WATER CO. (Sac. 1,301.)

(Supreme Court of California. July 26, 1906.)

1. Waters and Water Courses—Irrigation—Appropriation.

One, to get water to irrigate his land, made a cut in the levee confining the water of a river, and diverted the water into an excavation that he had made along the outside of the levee. He made use of the excavation to conduct water to the land, and by means of it irrigated the same. *Held* to show an appropriation as against a subsequent diversion and use.

2. Same.

One making an appropriation of water from a natural stream may make use of any natural or artificial channel available and convenient for the purpose of conducting the water, so long as other persons interested in such conduit do not object, and his appropriation so made will be as effectual as if he had carried it through a dith or pipe line made for that purpose and no other.

3. Same.

A person making an appropriation of water from a natural stream need not construct any headgate at the place of diversion, and if a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use.

4. Same.

A person making an appropriation of water from a natural stream for the purpose of irrigating his land had also the purpose of drawing off flood water from other land owned by him. *Held*, that the purpose to drain one tract did not destroy the right to take the water for irrigation of the other tract, nor impair the right acquired by such appropriation to use it as against a subsequent appropriator.

5. Same.

Since the method of acquiring a right to the use of water of a stream prescribed by Civ. Code, §§ 1415–1421, is not exclusive, a person may, by a prior actual and completed appropriation and use, without adopting the method prescribed by the Code, acquire a right to the water beneficially used, which will be paramount to the title of one making a subsequent appropriation in the manner provided by the Code.

In Bank. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the Lower Tule River Ditch Company against the Angiola Water Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. G. Lamberson, for appellant. H. Scott Jacobs and Bradley & Farnsworth, for respondent.

SHAW, J. The court found, in effect, that plaintiff was seised of a prior right, as against the defendant, to divert from Tule river a stream of the water thereof amounting to a continuous flow of 23 feet per second, and gave judgment enjoining the defendant from interfering therewith. Neither party is a riparian owner on the stream, both claiming solely by appropriation and use. The claim of defendant is based on a notice of appropriation under the Code, posted on August 27, 1897, and a subsequent diversion and use in pursuance thereof. With respect to the plaintiff's claim the finding is, in effect, that it is founded on an appropriation and use made by N. P. Duncan, plaintiff's grantor, in May, 1897. The sole objection presented on this appeal is that the evidence is insufficient to show a diversion and use by Duncan, prior to the posting of the defendant's notice of appropriation, or to show that such diversion was made with the intent and purpose to apply the water to any beneficial use, or that any beneficial use was made thereof prior to such posting.

We think there is sufficient evidence on these points to uphold the findings and judgment. Duncan was a witness for the plaintiff and testified, in substance, that in May, 1897, in order to get water to irrigate his land, he had a cut made in the levee confining the water of the river, thereby diverting the water into an excavation that had been made along the outside of the levee; that he made use of this excavation, which was, for practical purposes, a ditch, to conduct the water to his land; that he got the water to irrigate his land at that time, and that by means of it he irrigated about two sections of his land for the purpose of growing thereon wild grasses and feed. H. Clawson also testified that he saw the water, in May, 1897, running from the river through the cut in the levee, and that the water thus taken was used during that season to irrigate all of Duncan's land, together with lands of others, amounting in the aggregate to somewhere near 4,000 acres. There was no evidence offered in contradiction of this testimony. This was sufficient proof of the intent, the diversion or appropriation, and the beneficial use prior to the posting of the defendant's notice. A person who is making an appropriation of water from a natural source or stream, is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other. Hoffman v. Stone, 7 Cal. 49; Butte C. & D. Co. v. Vaughan, 11 Cal. 150, 70 Am. Dec. 769; Simmons v. Winters, 21 Or. 35, 27 Pac. 9, 28 Am. St. Rep. 727; McCall v. Porter, 42 Or. 56, 70 Pac. 822, 71 Pac. 976; Richardson v. Kier, 37 Cal. 263. For the same reasons it is unnecessary that there should be any headgate of boards or masonry at the place of diversion. If a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use. There was some testimony indicating a dual intent on the part of Duncan—that is, a purpose not only to get water to irrigate his land, as stated, but also to draw off the flood water from, and prevent it flowing to, some other land owned by him on which he then had growing a crop of grain. This purpose to drain one tract of land did not vitiate or destroy the right to take the water for irrigation of other tracts, nor impair the right, acquired by such appropriation and use, to take and use it for the latter purpose. The two purposes are not inconsistent. In order to make a valid appropriation it was not necessary for Duncan to post and record a notice of appropriation as provided in the Civil Code, §§ 1415–1421. The method of acquiring a right to the use of water as there prescribed is not exclusive. One may, by a prior, actual, and completed appropriation and use, without proceeding under the Code, acquire a right to the water beneficially used, which will be superior and paramount to the title of one making a subsequent appropriation from the same stream in the manner provided by that statute. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; De Necochea v. Curtis, 80 Cal. 401, 20 Pac. 563, 23 Pac. 198; Watterson v. Saldunbehere, 101 Cal. 112, 35 Pac. 432; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Taylor v. Abbott, 103 Cal. 423, 37 Pac. 408; McGuire v. Brown, 106 Cal. 672, 39 Pac. 1060, 30 L. R. A. 384; Cardoza v. Calkins, 117 Cal. 112, 48 Pac. 1010; McDonald v. Bear R., etc., Co., 13 Cal. 238; Kimball v. Gearhart, 12 Cal. 29; Kelly v. Natoma W. Co., 6 Cal. 105; Hill v. King, 8 Cal. 336; Hoffman v. Stone, 7 Cal. 46.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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149 Cal. 482

OLENDER v. CRYSTALLINE MINING CO., Limited. (Sac. 1,335.)

(Supreme Court of California. July 23, 1906.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CORPORATIONS.

St. 1899, p. 111, c. 94, requiring a foreign corporation doing business in the state to designate by writing a person as its agent on whom process may be served, or otherwise the service may be made on the Secretary of State, is not invalid as depriving a foreign corporation of its property without due process of law, for it will have notice of the commencement of an action against it by complying with the law and appointing an agent, and by its failure it indicates its willingness to have the service made on the Secretary of State.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 929.]

2. JUDGMENT—VACATION FOR INSUFFICIENCY OF SERVICE.

A defendant seeking to vacate a default judgment based on insufficient service of process, without asserting a meritorious defense, is not entitled to invoke the rule that a default will be set aside, and defendant allowed to try the case on its merits when there is any reasonable ground for such action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 292, 293.]

3. CORPORATIONS—PROCESS—SERVICE.

St. 1899, p. 111, c. 94, requiring a foreign corporation to designate by writing a person as its agent on whom process may be served, or otherwise the service may be had on the Secretary of State, substitutes the service of process on the Secretary of State, in an action against a foreign corporation having designated no agent in the state, for the service by publication prescribed by Code Civ. Proc. § 412, providing for a service of summons on a foreign corporation by publication when it has no agent within the state.

4. SAME.

The allegation in the complaint in an action against a foreign corporation, that at all times therein mentioned the corporation was "doing business in the county of T. and State of California," was sufficient, without a further showing of the continuance of such business, to bring the case within St. 1899, p. 111, c. 94, requiring a foreign corporation doing business in the state to designate by writing a person as its agent on whom process may be served, or otherwise it may be served on the Secretary of State.

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by S. Olender against the Crystalline Mining Company, Limited. From a default judgment for plaintiff, and from orders denying a motion to quash the service of summons and to vacate the judgment, defendant appeals. Affirmed.

J. P. O'Brien, for appellant. J. C. Webster, for respondent.

McFARLAND, J. This is an action to recover of defendant $433.01, with interest, money laid out and expended by plaintiff for defendant at the latter's request. Default of defendant was entered, and judgment rendered according to the prayer of the complaint. Defendant appeals from the judgment and also from orders denying its motion to quash the service of summons, and denying its motion to vacate the judgment by default based on such service.

Appellant is a foreign corporation created and existing under the laws of Great Britain and doing business in California. By an act of the Legislature of this state, approved March 17, 1899 (St. 1899, p. 111, c. 94), it is enacted that a foreign corporation doing business in this state must designate, by a writing filed with the Secretary of State, some person as its agent upon whom process may be served, and that if it fail to do so, service of summons in civil actions against it may be served on the Secretary of State. In the case at bar the defendant did not designate such agent, and service of summons was made on the Secretary of State. The main contention made by appellant is that said act of the Legislature is unconstitutional and void; but this contention is not maintainable. The positions taken are that the state cannot arbitrarily appoint as an agent for appellant one between whom and appellant there is no actual relation of principal and agent; that the law does not require the Secretary of State to communicate to a defendant any information of the service of summons; that if the service be held sufficient, appellant would have no notice of the proceeding and no opportunity to be heard; and, therefore, a judgment on such service would deprive appellant of his property without due process of law. These positions are not tenable. The cases of Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398, and Willey v. Benedict Co. (Cal.) 79 Pac. 270, cited by respondent, are not direct decisions on the point, although they seem to assume the constitutionality of the act in question; but, upon principle, we think that the respondent's contention is clearly maintainable. When a foreign corporation undertakes to do business in this state it is bound to know the existing law as to its right to do such business; and in the case at bar the appellant knew that as a condition of its doing business here, it must, under the law, appoint an agent upon whom process could be served, and that if it refused to appoint such agent, service could be made on the Secretary of State. There is nothing unjust or unconstitutional in such a law. The appellant would have had full notice of the commencement of the action, and an opportunity to be heard, if it had put itself in the position of having such notice by simply complying with the reasonable requirement of the law that it appoint an agent to receive such notice; and by its failure to do so indicated its willingness to have such notice given to the Secretary of State. It is, therefore, in no position to invoke the constitutional doctrines that a defendant must have notice of an action against him and an opportunity to be heard therein.

Appellant says that the tendency of the decisions of this court has been toward holding that a default should be set aside and a defendant allowed "to try the case upon its merits" whenever there is any reasonable ground for such action. But the appellant did not assert any meritorious defense nor ask to be allowed to come in and make such defense. If it had averred that the default and judgment had been taken against it through its inadvertence or surprise, and that it had a good defense to the action and desired to be allowed to try the case on its merits, the trial court would, very probably, have set aside the default and allowed it to make such defense. But it does not ask to defend; it merely asks that it be allowed to escape the necessity of making any defense. Appellant contends that the service was not complete because section 412 of the Code of Civil Procedure provides for a service of summons on a foreign corporation by publication when defendant has no managing agent or officer within the state, and there was no summons by publication in the case at bar. But the act of March 17, 1899, above referred to, evidently substitutes the service upon the Secretary of State for the service by publication formerly prescribed by the Code in cases where a defendant has no agent here.

The averments in the complaint that at all times therein mentioned the appellant was a foreign corporation "doing business in the county of Tuolumne and state of California" were sufficient to bring the case within the provisions of the said act of the Legislature, without further showing of the continuance of such business.

The judgment and orders appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

149 Cal. 521

TRIPPET v. STATE. (L. A. 1,870.)

(Supreme Court of California. Aug. 10, 1906.)

1. TAXATION—COLLATERAL INHERITANCE TAX LAW — STATUTORY PROVISIONS — VESTED RIGHTS OF STATE.

The collateral inheritance tax law (Act March 23, 1893 [St. 1893, p. 193, c. 168]), as amended, imposing a tax on property passing by will or by the intestate laws of the state, and declaring that the tax imposed shall be "due and payable at the death of the decedent," creates a vested right in the state at the death of the decedent to the tax imposed, which cannot be surrendered by a legislative act, and (St. 1905, p. 374, c. 325), constituting a new law on the subject and expressly repealing the act of 1893, does not affect the right of the state to taxes on the estates of persons dying before the law of 1905 went into effect, though no steps had been taken prior thereto to collect the taxes on such estates.

2. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—INHERITANCE TAX LAW—VALIDITY.

The collateral inheritance tax law (Act March 23, 1893 [St. 1893. p. 193, c. 168]), imposing a tax on property passing by will or by the intestate laws of the state, does not deprive one of property without due process of law, in violation of the fourteenth amendment to the federal Constitution, though it declares that the right of the state to its portion of the inheritance is vested at the death of the decedent, for it provides a means of ascertaining the amount of the tax, and for notice and appraisement.

3. INJUNCTION—QUESTIONS DETERMINED.

One seeking to enjoin the state from collecting a collateral inheritance tax imposed by Act March 23, 1893, on the ground that the state has no right to the tax, is not entitled to a determination of the question whether after the adoption of the inheritance tax law (St. 1905, p. 374, c. 325), expressly repealing the act of 1893, a method remains for the collection of the tax; the state seeking no relief against plaintiff.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Oscar A. Trippet, executor of the will of Jacob Gruendike, against the state. From a judgment for the state, plaintiff appeals. Affirmed.

L. L. Boone, Oscar A. Trippet, Garoutte & Goodwin, S. F. Leib, and Wilson & Wilson, for appellant. U. S. Webb, Atty. Gen., and Casius Carter, Dist. Atty., for the State.

SLOSS, J. This action was brought by the executor of the will of Jacob Gruendike, deceased, pursuant to the provisions of the act approved March 20, 1905 (St. 1905, p. 374, c. 325, authorizing the bringing of an action against the state by the personal representatves of a decedent for the purpose of having it determined that any property belonging to such decedent's estate is not subject to any lien for taxes under the act of 1893, and the acts amendatory thereof, imposing a tax on collateral inheritances. St. 1893, p. 193, c. 168. From the allegations of the complaint it appears that Jacob Gruendike, a resident of San Diego county, died testate on April 8, 1905, leaving estate in said county and elsewhere of the value of between $300,000 and $400,000. On April 28, 1905, the superior court of San Diego county duly admitted the decedent's will to probate and appointed the plaintiff executor. By the will, which is set out in full in the complaint, the residue, comprising nearly the whole of the estate, is given to the testator's living brothers, sisters, nephews and nieces, and the children of deceased nephews and nieces. There are some forty beneficiaries, each of whom, with two or three exceptions, takes under the will, an interest of the value of from $7,000.00 to $10,000.00 The defendant claims that all of the interests devised and bequeathed by the will are subject to a tax under the act of March 23, 1893, entitled "An Act to establish a tax on collateral inheritances, etc.," and its various amendments, while the plaintiff claims, and prays a decree accordingly, that all of the provisions of this act have been repealed by an act approved March 20, 1905 (St. 1905, p. 341, c. 314), and that by such repeal the state has lost any right which it may have had under the earlier act to collect a tax. (There are two acts approved —March 20, 1905—the one allowing the institution of such an action as this, and the other imposing inheritance taxes and purporting to repeal the collateral inheritance tax law of 1893.)

It is alleged that prior to the repeal of the act of 1893 no proceedings had been taken for the appraisement under said act of any of the interests devised or bequeathed by the Gruendike will. The complaint further asserts a right arising under the federal Constitution by alleging that the act of 1893 has been construed by this court as vesting "a five per cent. interest in the state at the death of the decedent regardless as to whether or not there has been any appraisement and notice to the parties in interest, and before the ascertainment of the amount of the inheritance, devise or bequest," and that the act, as so construed, deprives persons of property without due process of law. A general demurrer to the complaint having been sustained, and plaintiff declining to amend, judgment was entered for defendant. The appeal is from this judgment.

By its terms the act of March 20, 1905, which, it is claimed, repealed the act of 1893, went into effect on July 1, 1905. Gruendike's death occurred on April 8, 1905, when the old law was still in force. Passing, for the moment, the constitutional point suggested above, the substantial and, indeed, the only question, is what was the effect of the act of 1905 on estates of persons dying before it went into effect, where no steps had been taken to collect the tax imposed by the law in force at the date of the death. The act of March 23, 1893, was the first enactment in this state on the subject of inheritance taxes. It provided in section 1 that all property passing by will, or by the intestate laws of this state, or by an instrument made in contemplation of death, except to the use of the father, mother, wife, lawful issue, brother, sister, the wife or widow of a son, the husband or a daughter, the adopted child, or any lineal descendent of the decedent, or any corporations or institutions exempted from taxation, should be subject to a tax of $5 on every $100 of the market value of such property. Section 4 (page 194) provided that all taxes imposed by the act should be "due and payable at the death of the decedent," and that interest from the date of such death should be collected in certain events. Other sections of the act provided for the appraisement of interests subject to the tax, for the duties of executors, administrators, and public officers, and for other matters connected with the ascertainment, collection and disposition of the tax. The act so passed has been repeatedly amended by succeeding Legislatures (St. 1895, p. 33, c. 28; St. 1897, p. 77, c. 83; St. 1899, p. 101, c. 85), the amendments of 1895 relating to appraisements and the duties of certain officers in the collection of the tax, and those of 1897 and 1899 altering the classes of persons or corporations exempt from the tax under section 1 of the act. The Legislature of 1905, instead of amending the old act, undertook to pass a new law covering the whole subject. By this law the old plan of a flat tax of 5 per cent. is abandoned, and a sliding scale, ranging from 1 to 15 per cent. of the interest passing, is adopted; the rates varying according to the remoteness of kinship and the amount of the inheritance or gift. The system of exemptions is also materially changed, no heirs or relatives of the deceased being absolutely exempt under the new law, while under all the prior enactments there was no tax on gifts to or inheritances by the father, mother, husband, wife, lawful issue, wife or widow of a son, husband of a daughter, adopted child, or legitimate lineal descendant of the decedent. In other respects the new law re-enacted substantially the provisions of the old with regard to the appraisement of interests subject to the tax, time, and manner of payment, penalties and interest, duties of officers, and all machinery connected with the ascertainment and collection of the tax. Section 27 (page 350) of the new act reads as follows: "An act entitled 'An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of the proceeds,' approved March 23, 1893, and all amendments thereto, and all acts and parts of acts in conflict with this act are hereby expressly repealed." There is in the later act no clause expressly saving or preserving rights accrued under the old.

The argument of the appellant is that by the repeal of the law all inchoate rights existing under that law are ended, and that the right of the state to the tax in this case was inchoate; no steps for its appraisement and collection having been taken before the alleged repealing statute went into effect. The doctrine relied on, which is well established, is stated by this court in Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322, in the following words: "It is a rule of almost universal application that where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." The applicability of the rule to the present case depends upon two conditions: First, that the statute creating the right be repealed; and, second, that, if repealed, the rights declared by it be inchoate, and not vested. It is urged by the state that, notwithstanding the explicit language of section 27 of the act of 1905, the act of 1893 is not thereby repealed in toto; that, as stated in Suth. Stat. Const. (2d Ed.) § 238, "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." Whether the authorities support this broad statement of the rule, and whether, if so, the act of 1905 should be deemed to have intended an absolute repeal of the act of 1893, are, however, questions which we do not deem it necessary to decide in this case, for the reason that this court in Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, has decided that the right of the state to the tax under the law of 1893 is, immediately upon the death of the decedent, a vested right which cannot be surrendered by legislative act. In that case the decedent had died in June, 1893.

Under the act of March 23, 1893, then in force, there was no exemption of legacies or devises to nephews, nieces, or educational institutions. Pending an appeal from an order directing the executrix to pay taxes on certain legacies to decedent's nephews and nieces resident in the state and to the trustees of the Leland Stanford, Jr., University, the Legislature in 1897 passed an act amending the act of March 23, 1893, by adding such nephews and nieces and educational institutions to the classes of beneficiaries exempted from the tax under section 1 of the act, and providing specifically that the additional exemption should apply to the estates of persons who had died prior to the passage of the amending act. St. 1897, p. 77, c. 83. In holding that the attempt to give the exemptions a retroactive effect was in conflict with several provisions of the state Constitution, and therefore ineffectual, the court used the following language: "In answer to the contention on the part of the respondent that by the amendatory act of 1897 it is attempted to give or donate public money or thing of value, appellants' counsel say 'that the state has never had possession of any part of the accumulations or acquisitions of Leland Stanford, deceased; * * * and he [respondent] has not shown how the state could give away what it never had.' In other words, it is claimed that one not in possession of property is not the owner of it. The law of 1893 repeatedly declares that the portion coming to the state 'shall be due and payable at the death of the decedent.' And it is further provided that from that time until paid over in the course of administration the sum so due the state shall bear interest, and the interest shall be paid on the sum so due the state. It would be absurd to exact interest for the detention or use of money or property not belonging to the party who demands it. It is elementary law that the right of inheritance, including the designation of heirs and the portions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the Legislature. It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate; and the Legislature can provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the Legislature in this case having determined that 95 per cent. of the decedent's estate may go to his heirs and beneficiaries and 5 per cent. be retained to the state, it is too clear for argument that this 5 per cent. vested in the state at the same time that the 95 per cent. vested in the heirs or other beneficiaries. 'An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment.' (Kent's Commentaries, 202.) The state here, from the death of the decedent, had a present fixed right of future enjoyment to the 5 per cent. of his estate. This is property or a thing of value belonging to the state. * * * In substance, if not in form, to turn over the fund in question belonging to the state to the appellants would be to make a gift or donation of the same, and the law regards substance rather than form. We are, therefore, of the opinion that to give retroactive effect to the law of 1897 would conflict with the provisions of the Constitution prohibiting the Legislature from making any gift or donation of any public money or thing of value."

It was also held that the amending act of 1897 was in conflict with certain provisions of the state Constitution regarding special legislation. It is urged on behalf of appellant that the present case is distinguishable from the Stanford Case, in that the act of 1905 was an absolute repeal and not a mere amendment, and that here (as is claimed) no question of special legislation arises. But we are unable to find any valid ground of discrimination. We have quoted at some length from the opinion in the Stanford Case in order to show that the act of 1897 was held invalid upon the grounds, first, that under the law of 1893 an interest amounting to 5 per cent. of certain specified inheritances, devises, or bequests, vested in the state upon the death of the decedent; and, second, that, where such interest had once vested in the state, it was beyond the power of the Legislature to make a gratuitous surrender of the interest to the beneficiary. These propositions, if sound, are as applicable to this as to the Stanford Case. If the surrender, without consideration, of a right vested in the state be a gift or donation, within the meaning of article 4, § 31, of the Constitution, such surrender must be as obnoxious to the constitutional provision when sought to be accomplished by means of a repeal of the law creating the right as by any other method. Nor can it be said that what was laid down in the Stanford Case as to the "gift or donation" clause was dictum. While the holding of the invalidity of the amending act of 1897 might have been placed solely on the ground of "special legislation," it was not. The enactment was held to violate two provisions of the Constitution, and the ruling as to one was as necessary to the decision as the ruling regarding the other. The various counsel who have filed briefs on behalf of appellant argue, with much force and ability, that the court was in error in holding in the Stanford Case that the law of 1893 created a vested right in the state upon the death of the decedent. Without reviewing the arguments advanced and the authorities cited, we deem it sufficient to say that the Stanford Case was decided by the court in bank, upon a rehearing ordered after a contrary conclusion had been reached in department. The case was elaborately argued and carefully considered, and we adhere to the doctrines declared.

There remains to be considered the point that the act of 1893, as construed by this court, deprives plaintiff of property "without due process of law," contrary to the provisions of article 14 of the amendments to the Constitution of the United States. The proposition, as stated by appellant, is that "in ad valorem tax matters the due process provision of the federal Constitution requires that the state must provide a means of ascertaining the amount of the tax, and for notice and appraisement. Until these things are done, the state has no power to take private property." But if this principle be applicable to a tax like the one under consideration, the law of 1893 did provide a means of ascertaining the amount of the tax and for notice and appraisement. Section 11 provides that, when the value of an interest subject to the payment of the tax is uncertain, the court shall appoint an appraiser, whose duty it shall be to make an appraisement after having given notice to all persons known to have or claim an interest in the property of the time and place at which he will appraise such property. The tax is to be fixed by the court from the report made to it by such appraiser. St. 1895, p. 34, c. 28. The beneficiary under the will, or the heir, is in no way deprived of the benefit of these provisions because the statute enacts or the court holds that the state's right to the tax vests on the decedent's death. The right, although vested, is still, as to actual collection, subject to the appraisement provided for. There is no legal inconsistency in the idea of a right being vested, although the possession may be postponed or contingent upon the performance of certain acts. An apt example is to be found in the right of the heir himself. It is the settled law of this state that upon the death of an owner of property, intestate, his estate at once descends to and vests in his heirs, subject to the possession of the administrator for all purposes of administration. Civ. Code, § 1384; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Brenham v. Story, 39 Cal. 179. But the heir must await the completion of administration and the determination of his heirship by the decree of administration before he can enter upon the enjoyment and possession of his vested right. So here, the fact that the right of the state to the tax is vested on the death of the decedent does not carry with it the right to take possession of the interest so vested without performance of the conditions (of appraisement, notice, etc.) to which its right of possession may be subject. The mere fact that the right of the state to its proportion of the gift or inheritance is declared to vest, prior to any appraisement, does not deprive the beneficiary or heir of any substantial right where the law affords him the opportunity to be heard as to the amount of the tax before there is any actual collection or payment thereof.

For the purposes of the present case, it is not necessary to express an opinion regarding appellant's further point that, assuming the act of 1893 to have given to the state a vested interest which could not be surrendered, the act of 1905 repealed all provisions for notice and appraisement as to estates of persons dying before July 1, 1905, and left a bare right in the state without any constitutional means of enforcing it. The plaintiff comes into court seeking, as against the state, a determination that it has no right to any tax. The state is not here seeking any affirmative relief against the plaintiff. The judgment merely denies plaintiff the decree sought by him declaring that the defendant has no right to any tax. Since, as we have seen, the defendant has a vested right to such tax, an adjudication that the estate is free from any claim for such tax would be manifestly improper. Whether or not there remains a legal method of collecting the tax will be a question for decision when the state seeks to enforce its right. This is substantially an action to quiet title. Section 2 of act of March 20, 1905 (St. 1905, p. 375, c. 325). If there be a valid claim against such property, the plaintiff cannot, in this equitable proceeding, quiet his title against such claim, even though the same may be unenforceable by legal proceedings, without paying the claim. The case is analogous to that of a mortgagor, who seeks to quiet his title against a mortgagee whose right to foreclosure is barred by lapse of time. It has been repeatedly held that he cannot do this without paying the amount due on the mortgage. Booth v. Hoskins, 75 Cal. 276, 17 Pac. 225; Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

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149 Cal. 516

ELLIOTT v. PARDEE, Governor.

(S. F. 4,524.)

(Supreme Court of California. Aug. 9, 1906.)

1. Municipal Corporations—Detaching Territory—Effect.

A city detached territory for the purpose of disincorporating itself. The territory detached at one election exceeded more than half the area and nearly three-fourths of the population. The territory detached at a subsequent election excluded more than three-fourths of what remained, leaving only one-tenth of the original territory of the municipality, and not more than five electors. The trustees, in conducting both elections, failed in many particulars to observe the requirements of the statutes regulating elections. *Held*, that the detachment of the territory was void, and the city continued to exist and to include the territory embraced within its original limits.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 77.]

2. Same—Nonuser of Franchise—Effect.

A municipal corporation does not lose its existence by nonuser of its franchise.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 138.]

3. Mandamus—Acts of Governor—Ministerial Acts.

St. 1885, p. 136, c. 147, empowers the Governor, on being presented with a verified petition of not less than 75 electors of a city having no officers, and on his being satisfied of the truth of the averments in the petition, to appoint commissioners of election for the municipality. A city was without officers, and 75 electors presented to the Governor a petition which complied with the conditions of the statute. *Held*, that mandamus would lie to compel the Governor to act on the petition by deciding on the truth of its allegations, and, on his finding it true, to appoint commissioners of election.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 150–157.]

In Bank. Original proceedings in mandamus by E. E. Elliott against George C. Pardee, Governor, to compel respondent to appoint a board of election commissioners to reorganize a city. Heard on demurrer to petition. Demurrer overruled.

Edward F. Sherer, Emmet H. Wilson, for petitioner. U. S. Webb, Atty. Gen., for respondent.

BEATTY, C. J. This is an original proceeding in mandamus to compel the Governor to appoint a board of election commissioners to reorganize the city of Compton, pursuant to the requirements of the act of March 14, 1885, entitled "An act to enable municipal corporations of the sixth class to elect officers." St. 1885, p. 136, c. 147. By section 1 of that act it is provided that, whenever a corporation of the sixth class shall have failed from any cause to elect officers in accordance with its charter, and there are no officers to carry on the city government or call an election, the Governor, upon presentation of a verified petition of not less than 75 electors of the corporation setting forth certain particulars, is authorized and empowered, upon being satisfied of the truth of the matters so set forth, to appoint three persons as commissioners of election for said corporation. The following sections of the act define the duties of the commissioners which are, in brief, to call a special election, give due notice of its date and of the polling places, appoint election officers, canvass the returns, and induct the persons chosen to fill the various municipal offices—in short, to do everything necessary to set the corporation going again. By the petition filed in this proceeding it is alleged that a municipal corporation of the sixth class was organized in 1888 under the name of the city of Compton; that it has for a number of years been without officers; that the Governor has been petitioned to appoint election commissioners and has refused to act. Upon the filing of the petition an alternative writ of mandate was issued, in response to which the Governor presents a demurrer and answer. He demurs, generally upon the ground that the facts alleged in the petition are not sufficient to entitle the petitioner to any relief, and more specifically upon the ground that the proceeding is barred by the statute of limitations. By his answer he puts in issue several of the material allegations of the petition. The parties have stipulated, and the court has consented to a separate submission of the demurrer, leaving the issues of fact to future determination in case of an adverse ruling upon the demurrer. It appears from the petition that Compton was duly incorporated as a city of the sixth class in May, 1888; that in April, 1890, five trustees, a clerk, a treasurer, and a marshal were duly elected, and that they qualified and assumed the duties of their respective offices; that no election of officers has since been held; that two of the five trustees are dead, and two have been nonresidents of the city for many years, leaving only one at present residing within the corporate limits; that about the 3d day of January, 1891, all of the city officers wholly ceased to perform, and have never since resumed the performance of, their respective duties. That in September, 1890, a pretended election was held at which an attempt was made to submit to the electors of the city a proposition to exclude certain of its territory, and that a majority voted in favor of such exclusion; that in January, 1891, another pretended election was held, at which the electors were invited to vote upon a proposition to exclude another large portion of the city's territory, and that a majority again voted in favor of the exclusion; that both of said elections were void because of the failure of the trustees in many particulars to observe the requirements of the statutes regulating special elections, and for the further reason that the proposition submitted at the first election was to exclude more than half of the area and nearly three-fourths of the population of the city, thus practically destroying the corporation, and because the proposition submitted at the second was to exclude more than three-fourths of what remained of the territory of the city after the first exclusion, leaving as a final residuum only one-tenth of its original territory, and not more than five electors. It is further alleged that the real purpose of these proceedings was to disincorporate the city under the pretense of excluding territory. The remainder of the petition sets forth the steps taken by the petitioner in conjunction with more than 75 other citizens, residents, householders, and freeholders of Compton, to induce the Governor to appoint election commissioners, and his refusal to act upon their verified petition. It is not necessary to set forth in detail the steps so taken, because it is not denied that the petitioners proceeded regularly under the statute. The questions raised by the demurrer relate, not to the regularity of the steps taken by the citizens of Compton to induce action by the Governor, but to their right to invoke his action at all after so many years of nonuser of the corporate franchise, and to the right of the court to review the decision of the chief executive of the state now upon a matter which, as counsel contends, has been committed to his discretion.

As to the statute of limitations there can be no doubt that it may be pleaded as a bar to the proceeding by mandamus, and there remains equally little doubt that the right to demand performance of official duties may be lost by delay in making the demand. Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. But this doctrine of laches cannot be applied in such a case as the present. It is clear, and apparently is conceded, that all the proceedings taken for the purpose of excluding territory of the city of Compton were utterly void; and a municipal corporation does not lose its existence by nonuser of its franchise. Swamp Land District v. Silver, 98 Cal. 54, 32 Pac. 866. The city of Compton, therefore, still exists and includes the same territory that it embraced at the date of its original organization. As such municipal corporation its right to have officers continues, and so long as that right continues there is a constantly recurring right to petition for the appointment of election commissioners, which may be exercised whenever 75 qualified electors are able to unite in taking the necessary measures to that end. They have now, according to the allegations of the petition, done everything that the statute requires to be done in order to authorize and empower the Governor to act.

In such case can the Governor refuse to act? The statute provides that: "Upon the presentation of the petition to the Governor he may either act upon the petition or require additional evidence of the matters set forth in the petition. Upon being satisfied of the truth of the matters set forth in the petition, the Governor is authorized and empowered to appoint three persons as commissioners," etc. The Governor must be satisfied of the truth of the matters set forth in the petition, and this means that he has the right to decide that question for himself. But, if he is not satisfied by the verified petition, he should give the petitioners a reasonable opportunity to supply the additional evidence which the case demands, and then make his decision. If the essential facts are not proved to his satisfaction, he may, and ought to, refuse to appoint the commissioners; but, if they are proved, it is his duty to appoint. Power and authority conferred upon a public officer to perform an act not discretionary, in which the public or third parties have an interest, make the exercise of the power obligatory whenever a proper case for its exercise is presented, and mandamus will issue even to the chief executive of the state to compel the exercise of a ministerial function defined by statute. Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432.

In this case, the duty imposed on the Governor to decide upon the truth of the petition, and, if he finds it true, to appoint commissioners, is statutory and ministerial. He cannot refuse to act in any way upon the petition of the electors of Compton, as it is alleged he has done.

The demurrer to the petition is overruled, and counsel are requested to specify the issues of fact which they desire to have tried.

We concur: SLOSS, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

149 Cal. 435

KIMBALL v. McKEE. (S. F. 3,421.)

(Supreme Court of California. July 12, 1906.)

1. EVIDENCE—JUDICIAL NOTICE.

Judicial notice will be taken that under the laws of the United States and the regulations of the land office no sales of public lands are made until the plat and field notes of the subdivisional survey of the township in which the lands lie have been returned and approved, and that the patents issued describe the lands patented as they are delineated on the approved plat, and that there is a uniform method of numbering and designating the sections and their smaller subdivisions.

2. SAME—PRESUMPTIONS.

In surveying land bounded on one side by the ocean, there is a presumption, in the absence of evidence to the contrary, that the meander line was run along the beach, if the beach was passable, and if not, by some other method that would enable the surveyor correctly to locate the line of ordinary high tide.

3. BOUNDARIES—CONFLICTING CALLS—COURSES AND DISTANCES.

Both under the express provisions of Code Civ. Proc. § 2077, and independent thereof, courses and distances are controlled in fixing boundaries by visible monuments, unless there are other sufficient circumstances to corroborate the former.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 18.]

4. SAME—PUBLIC LANDS—RESURVEY.

Where a township was resurveyed under government authority and a plat made according to the field notes of such resurvey, such field notes, which were duly filed for record, superseded the notes of the original survey.

5. TRESPASS—TITLE TO LAND—EVIDENCE.

In an action for trespass, evidence *held* insufficient to sustain a survey under which plaintiff claimed title to the land on which the trespass was alleged to have been committed.

Shaw, J., dissenting.

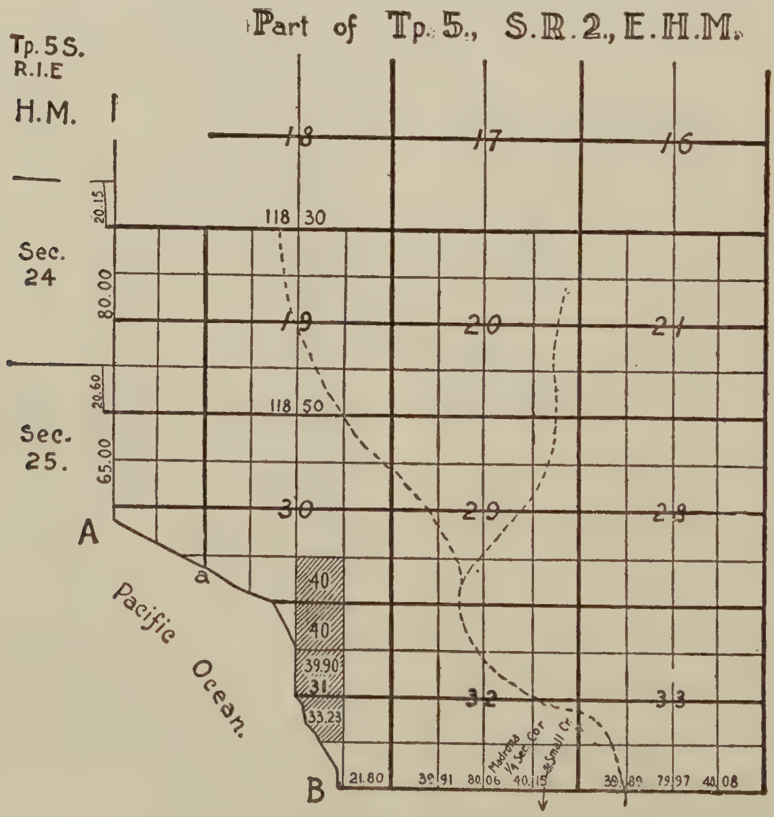
In Bank. Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by J. A. Kimball against F. A. McKee. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

McGarvey & Bledsoe, for appellant. McNab & Hirsch and Seawell & Pemberton, for respondent.

BEATTY, C. J. This is an action of trespass in which the defendant is charged with having stripped the bark from a large number of trees growing on plaintiff's land, described as lots 1, 3, and 4 in section 31, township 5 south, range 2 east, Humboldt meridian, and the southwest ¼ of the southeast

¼ of section 30 of the same township. The shaded portion of the accompanying map shows the position of these lots in their relation to each other as well as in relation to the township lines and the principal natural objects and artificial monuments delineated and noted on that portion of the official map of the township survey to which reference must be had in construing the patent and determining the location of the land. The plaintiff, as successor in interest to the original patentee, is the unquestioned owner of the lots of land thus delineated and described, and the only serious question in the case is as to their real boundaries on the ground. Whether, in other words, the stripping of the bark, which is not denied, was done upon plaintiff's land or upon other subdivisions of the said section 31, or in an adjoining section. The plaintiff succeeded in convincing the jury that the defendant had trespassed upon his land, and was awarded damages in the sum of $5,000. The appeal by the defendant is from the order of the superior court overruling his motion for a new trial.



Part of Tp. 5., S.R. 2., E.H.M.

The cause was first submitted in department, where the order of the lower court was affirmed. The opinion then rendered contains a very full and generally satisfactory discussion of numerous alleged errors in the rulings of the superior court upon objections to evidence, and in the instructions given to the jury, and with a few trifling exceptions, hereinafter noted, is here readopted as to those points. The rehearing, indeed, was granted only because we desired to consider more carefully the question whether the verdict of the jury was supported by the evidence, or, to state the question more specifically, whether the plaintiff's land was correctly located by the survey upon which he rested his case. With the opportunity of examining and comparing the voluminous and somewhat confusing evidence contained in the record, in the light of the additional argument on that point, we are convinced that the location contended for by plaintiff, and upon which his case depends, was not correctly made, and that in this respect the verdict of the jury is wholly unsupported.

In disposing of its public lands the government causes them to be laid off into townships six miles square, bounded by meridian lines on the east and west and by parallels of latitude on the north and south. This, at least, is the ideal township, but owing to faulty location of the boundary lines or to proximity to the seacoast, or both causes, as in this case, and to the convergence of meridian lines—as in all cases—a township never contains 36 sections, each exactly a mile square, into which they are supposed to be divided. The rules for making the subdivisional surveys, however, are well understood and there is a uniform method of numbering and designating the sections and their smaller subdivisions, of all of which matters the courts take judicial notice. Section 31 is at the southwest corner of the township, next on the east is section 32 and so on to section 36 at the southeast corner. We also take judicial notice that, under the laws of the United States and the regulations of the land office, no sales of public lands are made until the plat and field notes of the subdivisional survey of the township in which they lie have been returned and approved, and that the patents issued to purchasers describe the lands patented as they are delineated on the approved plat—which remains a public record in the office of the Surveyor General, and copies of which, officially certified, are deposited in the local land office. We also know that it is made the duty of the surveyors employed to make these subdivisional surveys to mark the section corners with posts properly lettered, or other monuments, and also the intersection of quarter-section lines with the section lines, and more especially to preserve accurate field notes of their surveys showing the natural features of the country, such as streams, mountain ridges, the ocean shore, nature of the soil, whether barren or fertile, wooded or meadow; distance and bearing of witness trees from section and quarter section corners, etc. These field notes are, like the township plat, preserved in the office of the Surveyor General as a public record, and their principal purpose is to enable the purchasers of public lands, and their successors, to correctly relocate the section and quarter section corners within the township when, by accident or design, the artificial monuments placed by the official surveyor have been removed or destroyed—a very common occurrence, as the records of this court, and the decisions of other courts, abundantly prove.

And so in this case, when the plaintiff came to the conclusion that the defendant was collecting tan bark by stripping his trees, he found himself under the necessity of employing a private surveyor to find the corners of section 31 in which his land is situate. The evidence offered by him at the trial (the map and field notes of the official surveyor) shows that these corners, as well as the quarter-section corners, were marked by posts, or other monuments, properly lettered at the time of the survey and many of them identified by the distance and bearing of witness trees, as well as by their relation to the shore of the ocean, the stream known as "Whale Gulch" and the crest of the high ridge dividing that stream from the ocean. There is no evidence in the record that any search was made for the corner posts or witness trees, which, if found, would have ended the question as to the true location of plaintiff's land. But, assuming that the proper effort was made to find the corner posts, and witness trees, and that it was fruitless, the most obvious alternative was to trace the township line to its intersection with the line of ordinary high tide on the ocean shore—that being the southwest corner of the township—then measure 1.80 chains east from that point and thence 20 chains north for the southeast corner of plaintiff's land, then 80 chains on the same course for the northeast corner, thence 20 chains west for its northwest corner, thence south to the ocean shore, thence along the shore to a point due west of the southeast corner, and then close upon that.

This, indeed, is precisely what plaintiff's surveyor (Chapman) undertook to do, but did not do. There is a very serious question in the case, whether he ever found the line which bounds the township on the south. He places it in utter disregard of the field notes and plat of the official survey which he had in his hands and pretended to follow. But assuming for the moment that he may have found the true south boundary of the township, his method of tracing it to the ocean and his views as to what constitutes the shore of the ocean are most peculiar. The township plat and the field notes of the official surveyor show that the trend of the ocean shore is from northwest to southeast for many miles north and south of the township line; that east of the ocean shore at a distance of 86.20 chains this line intersects a small creek (Whale Gulch) which flows south and empties into the ocean about one mile south of that point. Between this stream and the ocean is a high ridge rising from the shore at a very steep angle for a distance of 25.80 chains, more gently for about 14 chains further and thence descending somewhat less abruptly than on the ocean side to Whale Gulch. Chapman, in order to find the intersection of the township line with the ocean shore, went over into Whale Gulch, where he discovered an "old settler" who pointed out to him the quarter-section post on the south line of section 32. This corner, which, according to the plat and field notes, ought to have been found 25 chains west of Whale Gulch, was at some distance east of that stream, but the old settler showed him a line indicated by "old blazes" on trees, which led him to what he assumed to be the quarter-section corner, and having by this remarkable process located the quarter-section corner in defiance of the official plat and field notes, he immediately falls back upon the same field notes for the purpose of locating the ocean shore. They tell him that this quarter section is 61.80 chains east of the shore, and, therefore, of course, he has only to go that distance west from the corner to find himself on the beach. He accordingly goes due west to a point exactly on the crest of the ridge which divides the water shed of the ocean from that of Whale Gulch, and, having measured the distance, finds that, by a happy coincidence, he is just 61.84 chains west of the "old settler" corner, and knows, therefore, that he is at the ocean shore, or to be strictly accurate, that he is four links beyond it. Here, again, he forgets his field notes, which tell him that this ridge is at least 25.80 chains east of the shore line on the southern boundary of the township (and its summit, judged by the angle of ascent, about 800 feet above the sea level). He is not, however, daunted by a trifle like this, but plants his post to mark the southwest corner of the township right on the "crest of the ocean" or the "cone of the ocean" according to his own varied and picturesque terminology. Having fixed this point, the rest of his task is easy. He has only to measure 20 chains north and 1.80 chains east, to find the southeast corner of plaintiff's land; thence north 80 chains, west 20 chains, south to the intersection of a meander line somewhere east of the shore line, thence with its meanders to a point due west of the southeast corner and east till he closes on that point. This he proceeds to do and the result is he has located plaintiff's land on the eastern slope of the ridge in Whale Gulch, when the field notes of the official surveyor show that not only those subdivisions of section 31 belonging to plaintiff, but the whole section extending 20 chains further east, is on the western slope of the ridge, looking down upon the ocean. And, of course, no portion of it touches the ocean shore, or comes any nearer the ocean shore than a point 1.80 chains east of the summit of the ridge. Mr. Chapman reconciles this discrepancy by assuming that the shore line of the township is coincident with the meander line by which it was measured, and he gratuitously assumes that the meander line was run along the summit of the ridge. There is not in the whole record any credible evidence to show that the meander line was so run, and in the absence of testimony the presumption is that it was run along the beach if the beach was passable, and if not, by some other method that would enable the surveyor correctly to locate the line of ordinary high tide—that being the line to which the public surveys extend. There is no evidence that the beach northward from the township line is impassable at any point, while it does affirmatively appear that south of the township line as far as the mouth of Whale Gulch it is passable, and that the same government surveyor (Perrin) who measured the west boundary of section 31 north of the line, also measured south as far as Whale Gulch, and that his measurements were made along the beach. Besides, the meander line is not itself the shore line. It is only a means of measuring and correctly locating the shore line. The survey itself extends to the line of ordinary high tide, and all the land included within that line passes to the patentee of the subdivisions shown to be so bounded by the township plat. Mr. Kimball, therefore, owns to the ocean shore on the south half of his claim. Nothing can stop him short of that natural boundary. Not even the government can come between him and the actual shore line. If, therefore, Mr. Chapman's survey is to prevail, he has made the plaintiff a present of a strip of land extending a half mile along the shore and as wide as the distance between the line of ordinary high tide and the summit of the dividing ridge between the ocean and Whale Gulch. And in doing this he has deprived plaintiff's coterminous owner on the east of a strip of equal width and a whole mile in length. I have said that there is no credible evidence to support the claim that the meander line of the seashore was run along the summit of the ridge. There was, on the contrary, conclusive evidence in Mr. Chapman's hands, at the time he chose to make that assumption, that it was not so run. He had the field notes of Perrin, who ran the meander line of the shore to the township line and the township line eastward from the ocean as far as the quarter section corner in section 34. He had also the field notes of Foreman, who made the official subdivisional survey of the township, and whose field notes of the township line correspond exactly with Perrin's—one (Perrin) measuring from the west, the other (Foreman) measuring from the east. Now take Perrin's notes, commencing at the end of his meander line, which was run for the sole purpose of locating the township line at its intersection with the ocean, they read as follows:

> "East, of corner., Tp. 5 s., R. 2 E., H. M. set post 4 ft. long, 4x4 in mound of rock 4 ft. base, 2 ft., high.
> Cor., fractional sec. 31, from which cor. I run East on south boundary sec. 31.
> Varia. 17 degs. 35 min. East.
> Ascending steep rocky sides.
> 21.80 Set post 4 ft. long, 4x4 in mound of rock 8½ ft. base 2 ft. high, cor., Secs. 31 and 32 land rough and broken;
> Soil 3rd. rate, rocky.
>
> February 14th, 1876.
>
> East, on south Boundary Sec. 32.
> Vari. 17 degs. 35 mins. East.
> Ascending steep rocky side
> 4.00 Top of slide and enter grassy opening
> 18.00 Ridge bears N. W. & S. E.
> 19.00 Enter brush
> 26.00 timber.
> 40.00 Mark leaning Madrona 10 in., dia. for ¼ sec. cor. from which a madrona 8 ins, dia., bears N. 18. degs. W., 46 lks. dist. a tan oak 8 ins., dia., bears S. 30 degs., W. 37 lks. dist.
> 64.40 Stream in deep gulch 10 links wide course South."

It will be observed that to mark the southwest corner of the township he sets his post not at, but east of, the corner, and this, for a reason sufficiently obvious. Set at the line of ordinary high tide it would have been exposed to the wash of every spring tide, and with its mound of stones would have been obliterated by the first storm. Set east of the corner it exactly indicated the point of intersection of the shore and township lines—the true southwest corner of the township. Having thus established this corner he proceeded to lay out the township line to the eastward. If he understood his duty and a public officer is presumed not only to know, but to perform, his duty), he commenced his measurement at the true shore line, which is, indeed, the proper construction of his notes; for that corner of the fractional section 31 coincides with the southwest corner of the township. Wherever one is, the other necessarily is, and the notes clearly show that he ran east from the corner and not from the post which he set on the line east of the corner. But if it were conceded that he commenced at the post and not at the corner it would only be so much the worse for Mr. Chapman's deductions. Instead of bringing the true shore line nearer to the summit of the ridge it would put it farther away, by just the distance between the corner and the post. From whichever point he measured he found that it was 21.80 chains to the common corner of sections 31 and 32 and at least four chains farther, on any construction of his field notes, to the summit of the ridge, where Chapman takes the liberty of locating the ocean shore, and where he found some scattered stones which he concludes are the remains of the mound erected by Perrin to mark the southwest corner of the township. Enough has been said, I think, to demonstrate how absurdly fallacious were the means resorted to by Chapman for locating the shore line of the ocean—a natural monument that locates itself—how gratuitous his assumption that the meander line was traced along the top and sides of a lofty ridge more than a quarter of a mile from the beach, and how inconsequential that fact would have been if it had been a fact.

Having no guide for the location of that part of the township line except the field notes of Perrin and Foreman, which exactly agreed as to such conspicuous natural monuments as Whale Gulch, the summit of a high ridge and the ocean shore, he discards all these in his search for a starting point, in favor of a stake pointed out by an old settler, more than a quarter of a mile from the place indicated by the natural monuments and not otherwise identified, than by a line of "old blazes on trees"—a kind of mark not mentioned in any surveyor's field notes, and not explained or given any significance by his own testimony, or that of any other witness. The genesis of this old settler corner will be shown when we come to consider the York survey, evidence of which was introduced for the purpose of corroborating Chapman, and it will appear to be an extremely frail foundation for the structure that has been reared upon it. At this point it is sufficient to say that Chapman, by adoping it as the basis of his survey, has made a location of plaintiff's land which utterly falsifies every important feature of the official survey which it was his duty to follow. An instance of its discrepancies not before mentioned is the distance on his line, according to his estimate (he did not take the trouble to measure it), between Whale Gulch and the seashore. He testifies that it was not more than 5 chains from his post on the ridge down to the ocean, and only 10 chains in the opposite direction to Whale Gulch, making the total distance only 15 chains. Foreman's field notes and the approved plat show the true distance to be 86.20 chains. If his estimate of the distance is even approximately correct, his line must have been run within a quarter of a mile of the mouth of Whale Gulch—three-quarters of a mile south of the true line as platted on the township map. It is probable, however, that he greatly underestimated the distance from the summit of the ridge to the ocean, for the shorter the distance the less the absurdity of making the summit the ocean shore. And all plaintiff's other witnesses on this point exceeded his estimate, one placing the distance at 1,200 feet or over. If this witness was correct, Chapman's survey locates plaintiff's land a quarter of a mile away from the ocean, which, by the official survey, is its western boundary; if Chapman was correct his township line was located much too far south.

I have thus far discussed Chapman's survey with sole reference to the field notes (Perrin's and Foreman's) by which he professes to have been guided. He had, it is true, the field notes of another surveyor (Glover), but since his survey was altogether east of section 33, they did not touch section 31 or section 32, and could not possibly have aided Chapman at this stage of the proceedings. But after he had completed his survey of plaintiff's land by measuring it off and setting boundary posts at the corners and along the sides, he made a survey for another party to locate the southeast quarter of section 34, and in that connection ran some lines and made some measurements from one of Glover's corners which are supposed to corroborate the survey he made for plaintiff.

For the purpose of considering this part of plaintiff's case, it is necessary to give a brief outline of the proceedings of three official surveyors employed at different times in the survey of township 5 south, range 2 east, Humboldt meridian, and two adjoining townships. The history of these surveys is plainly written upon the face of the township plats and in the field notes from which they were compiled, copies of which were introduced in evidence by the plaintiff. Bearing in mind that in laying off townships to the east of the Humboldt base and meridian, those in range 1 east were naturally marked out before those in range 2, and that the meridian line bounding range 1 on the east became necessarily the western boundary of range 2, it appears that this common boundary was established by the official survey of S. W. Foreman in 1874. By his survey, it was found that the length of the township line from the northeast corner of township 5 south, range 1 east, to the Pacific ocean was 385 chains, or, in other words, 95 chains short of six miles, and the plat shows that the established common cornet of the two townships on the shore line (the southeast corner of 1 and southwest corner of 2) was just 65 chains south of the southeast corner of section 24 of township 5 south, range 1 east, Humboldt meridian.

In 1876, another surveyor (George H. Perrin) was employed to complete the subdivisional survey of township 24 north, range 19 west, Mt. Diablo base and meridian. The north boundary of this tier of townships in the Mt. Diablo system did not quite coincide with the south boundary of township 5 south of the Humboldt system. It seems that there was a space between them, and that Perrin was instructed to locate the south line of township 5 south, range 2 east of the Humboldt system in order to close his survey of township 24 north, range 19 west of the Mt. Diablo system upon that line. The method adopted by him for locating the southern boundary of township 5 south, range 2 east, was to start from the southern extremity of its western boundary at its intersection with the shore line of the ocean, and meander that line to a point 95 chains south of his starting point. This was a perfectly correct method, and, since his measurements seem to have been carefully made, would have yielded a correct result if, unfortunately, he had not mistaken his proper starting point. He commenced his meander line a little more than 20 chains south and a little less than 40 chains east from the right point, and in consequence placed the township line a quarter of a mile too far to the south, and added a half mile to the west border of the township. The subdivisional survey subsequently made shows this. By reference to the map it will be seen that the western tier of sections (18, 19, 30, etc.) are 38 and a fraction chains over a mile in width from east to west, and the common corner of sections 19 and 30 in 2 east, instead of coinciding with the common corner of sections 24 and 25 in 1 east, are 20.60 chains south of it. This mistake of Perrin's seems to have been the occasion of much of the confusion which has since arisen. He, however, unconscious of his error, proceeded to lay off the township line from the southern extremity of his meander line as far east as the quarter-section corner of section 34, and it is the field notes of this survey to which reference has heretofore been made.

About a year after the completion of Perrin's survey of the township line, as far as the quarter-section corner in section 34, another surveyor (J. R. Glover) seems to have been employed to continue that survey and establish the township line as far as the southwest corner of township 5 south, range 5 east. At all events, that is what he assumes to have done, as appears by a copy of his field notes certified by the Surveyor General. But there is no evidence that any subdivisional survey was ever based on his survey of the township line. It was in 1883, six years after Glover's survey, that Foreman was employed to make the subdivisional survey of this township and to resurvey its east and south boundaries. This he did, and his survey was adopted and approved, and the land sold by reference to a plat compiled from his field notes, a circumstance which puts Glover's survey and notes completely out of the case. They either conform to Foreman's notes or they do not. In the former case they are superfluous, in the latter incompetent, and only serve the purpose of further confusing an inquiry which is sufficiently confused without them. It is to Foreman's field notes, and the official plat, that we must look for guidance in relocating the lost corners of the subdivisional survey, and whatever Glover did, not only may, but must, be left out of the consideration, if it conflicts with what Foreman did. His survey was superseded by the resurvey. It could, at most, have the effect of corroborating the latter in some collateral way, but cannot be allowed to contradict it. The question is not where Glover put the township line, but where Foreman finally established it, and the only evidence we have of that is his field notes, and the official plats of township 5 south, range 2 east, Humboldt meridian, and township 24 north, range 19 west, Mt. Diablo meridian, of which that township line is the common boundary. These show a perfect correspondence with Perrin's field notes as to the western portion of the line—noting at the same distances the seashore, Whale Gulch, section and quarter-section corners, and witness trees.

To return now to the survey made by Chapman of the southeast quarter of section 34, and the measurements based upon that by which he claims to have confirmed the correctness of his location of plaintiff's land: His testimony shows that he selected as the starting point of that survey a corner described in Glover's field notes. In other words, he prefers a corner established by a superseded survey to all the conspicuous landmarks noted in the later official survey, and the only conclusion is that, if he surveyed correctly from the point so selected, there is no correspondence between Glover's survey and Foreman's survey—a very probable supposition on other grounds; for Glover's method of locating the east end of Perrin's line, as described in his (Glover's) field notes and the testimony of the witness Riley, was not such as to inspire much confidence in the result of his labors.

The first survey made for the purpose of locating plaintiff's land after the approval of Foreman's official survey, was made in 1894 by Richard York, county surveyor of Mendocino county, for Stewart, the original patentee and plaintiff's grantor. Evidence of York's location of the land was introduced for the purpose of corroborating Chapman's survey. York, himself, was not called as a witness, and his field notes—which should have been on file in the county surveyor's office—were not produced; but Breeden and Howard, who, as chairmen, assisted in making the survey, testified from recollection as to the manner in which it was made, and that the location of plaintiff's land by York was practically identical with Chapman's location. But their testimony also showed that this survey corresponded with Chapman's only because, like Chapman's, it was based exclusively upon an erroneous location of the quarter-section corner of section 32. York's method of locating that corner was to start from the southeast corner of the township at a distance of 4½ miles to the east, and chain that distance on a course which the witnesses are unable to state. As to whether it was due west or only approximating that course, there is no competent evidence; and there is likewise no competent evidence that he started from the southeast corner of the township. Neither Breeden nor Howard pretends to be a surveyor, or to know, of his own knowledge, that the point from which they commenced their chain measurement was the true southeast corner of the township. Howard says: "We started on the east line of 36; they [meaning, I suppose, York] called it the township line; I don't know; we found a post at the corner of 36, from that course we ran west clear to the ocean—the bluff," etc. Breeden's testimony upon this point is the same in effect as Howard's, except that he does not expressly state that he did not know of his own knowledge that the post from which York started was on the township line. Fairly construed, however, all the testimony as to this essential fact was pure hearsay. But, passing this objection, and allowing that the measurement was made from the true southeast corner of the township, the mode of locating the corner at or near the end of the measured course was contrary to law. There is nothing better settled by authority or statute than the rule that courses and distances are controlled, in the fixing of boundaries, by visible monuments, unless there are other sufficient circumstances to corroborate the former. See section 2077, Code Civ. Proc., and Miller v. Grunsky, 141 Cal. 450, 66 Pac. 858, 75 Pac. 48. And this is especially true when the boundaries themselves are permanent and visible, such as the bank of a navigable river or the shore of an ocean. As to the mode of locating this quarter-section corner of section 32, Breeden, who admits that he cannot remember the exact distances they ran except where they set or found corners, says that when they got to section 32 "we found a part of a stake or some object there, I don't know what it was; we found a stake having the appearance of a corner," etc. Howard says: "They found a stub there that they thought would prove to be a stake; the stake had been burned years before. It was so rotten you could not tell—we set a stake there, then we went on west to 31 and 32, and then we located Mr. Stewart's claim." This tells the whole story. Neither Breeden nor Howard knows whether York had any field notes to guide him. If he had any, they were probably Glover's, as may be inferred from the fact that his survey co-ordinates itself with Chapman's survey from a Glover corner. Certainly, if he had Foreman's notes—identical with Perrin's—and the only notes he was at liberty to follow, he entirely disregarded them. They, if they had been consulted, would have told him that the quarter-section corner of section 32 was marked, not by a stake, but by a leaning madrona tree, ten inches in diameter, and by the distance and bearing of two witness trees—a madrona and oak; that instead of being nearly a quarter of a mile east of Whale Gulch, it was more than a quarter of a mile west of it, and that instead of being nearly 100 chains from the ocean shore it was only 61.60 chains from that imposing landmark. Here, then, was a corner located by course and distance alone, and absurdly out of relation to a fixed and unmistakable natural boundary, and to every monument and landmark called for in the field notes of the official survey. A location of lost corners by a survey from a corner so established is utterly worthless; it is a survey made contrary to law. Code Civ. Proc. § 2077. York's survey, therefore, instead of corroborating Chapman's, merely serves to explain Chapman's mistake. It furnishes, as above intimated, the genesis of the "old settler" corner. For Howard testifies that they replaced the rotten fragment of a stake with a new stake; and that no doubt soon acquired among the neighboring settlers the reputation of being what it purported to be—the proper mark of that quarter-section corner. As such it was pointed out to Chapman, who made it the basis of his survey without regard to mountain, stream or ocean.

Plaintiff also called as a witness a Mr. Champagne, who had acted as a chainman for one Sandow in making a survey of plaintiff's land about two years before the trial. His survey assumed to start from the quarter-section corner between sections 20 and 21, and resulted practically in the same location as Chapman's. If Champagne knew of his own knowledge where the quarter-section corner between sections 20 and 21 was, his testimony would lend some faint support to plaintiff's case, but he does not say that he knew the corner—he saw a corner marked by a stake and a tree, but does not explain how it was identified as the corner which Sandow took it to be; and Sandow, himself, did not testify, having, as it is stated, left the country. Champagne's testimony, standing by itself, would leave it very uncertain whether Sandow really started from the quarter-section corner between 20 and 21, while the fact that his survey coincides with those of York and Chapman tends strongly to prove that he must have started from another York corner established by him in surveying from a Glover corner, or from his erroneous location of the quarter-section corner of section 32. But whether this surmise is correct, or not, it is certain that the Sandow survey cannot impart vitality to one so fatally at variance with natural boundaries and monuments as Chapman's is.

The southwest corner of section 31 is the southwest corner of the township, and that is marked by the intersection of the township line with the shore of the ocean. To locate subdivisions of that section the survey should start from that corner, and if a survey from that corner locates them in one place, with their west boundary at the shore line, a survey starting from an interior quarter-section corner, nearly two miles distant from the nearest corner of section 31, which locates the same subdivisions in a different place and entirely away from the ocean shore, cannot be said to raise a substantial conflict. For, in the first place, a township corner is a monument of higher grade than any interior corner, and, in the next place, natural monuments—such as the shore of the ocean—which are incapable of being moved or mistaken, are always preferred to artificial monuments, and especially to artificial monuments at remoter distances.

In this review of the evidence, I have not forgotten the witness Burg, and I have not forgotten Perrin. Burg merely acted as axeman for Chapman in making the survey from the Glover corner, which, as explained above, counts for nothing. Perrin was taken on the ground after the completion of Chapman's survey for the purpose of seeing whether he had correctly located the township line. He went on the ground 25 years after this survey, without his field notes, and, looking at Chapman's stake at the summit of the ridge, concluded, from his recollection of the topography, that it was placed at or very near—practically at the same point—where he had set a post to mark the end of his meander line and the southwest corner of the township. This evidence, given on his direct examination, it is needless to say was flatly contradicted by his own field notes, as above quoted, and on his cross-examination he admitted over and over again that where his testimony differed from his field notes his recollection was at fault. So that if, as he testified from recollection, he set his post at the end of his meander line to mark the southwest corner of the township that line must have ended at least 25.80 chains west of the ridge, instead of directly on top of it, where Chapman's post was set, and must have been run, as I have assumed it was run, along or near the beach. The evidence of Perrin, so far from supporting Chapman, is directly against him, for at last he swears by his field notes, and nothing confutes Chapman more completely than they do, corroborated as they are in every particular by Foreman's notes.

An important topographical feature, to which frequent reference has been made, is Whale Gulch. Its distance from the ocean, and its relation to section and quarter-section corners have been extensively commented upon in the foregoing discussion of the evidence, and it would not be proper to omit all reference to the iterated and reiterated assertion of counsel for respondent, based apparently on Mr. Chapman's testimony, that neither Perrin nor Foreman mention or refer to Whale Gulch in their field notes. It is somewhat surprising that counsel should have been so easily misled in so simple a matter, for the only basis of Chapman's claim that the notes do not mention Whale Gulch is that they do not mention it by name. They both mention it—Perrin, as a stream in a deep gulch, 10 links wide, course south; Foreman, as a small creek in a gulch running east. All the evidence in the case, including Chapman's own testimony, shows that this small stream, or creek, was Whale Gulch, and nothing else. The official map of the adjoining township on the south shows it at the same distance from the ocean on the township line that Foreman places it in township 5 south, range 2 east, Humboldt meridian, and also shows its course from that point to its mouth in the ocean. The photographs also put in evidence by plaintiff, and taken from a point near the mouth of Whale Gulch, corroborate the map. They show the relation of the gulch to the ridge, and to Chapman's stake. It was not necessary to give a name to the gulch in the field notes, even if it had acquired a name at the dates of the surveys, which does not appear.

The fact has been mentioned that Perrin located the township line a fraction over 20 chains too far south. It is not to be understood that it can now be correctly relocated. For it appears that Foreman, in his resurvey, adopted Perrin's line and based his subdivisional survey upon it. He must have discovered at an early stage of the subdivisional survey the fact that the township line was too far south, and to satisfy himself as to the source of the error, he carefully retraced the meander line of the ocean, and discovered, as his field notes show, the error of Perrin in starting from the point "a" instead of the point "A," when he undertook to locate a point on the seashore 95 chains south of "A," which marks the southeast corner of township 5 south, range 1 east, Humboldt meridian. He, however, resumed his subdivisional survey on the line upon which he had started—Perrin's line—and completed it by closing on the eastern line of the adjoining township, adding, as the map shows, nearly a half mile to the western boundary of that which he was surveying. His field notes of the survey of section 31—which correspond exactly with the official plat—show that he commenced at the common corner of sections 31 and 32 on the township line 21.80 chains east of the seashore, that he ran north 40 chains, between sections 31 and 32 along a southwest slope, and there set a marked post and stone witnessed by two trees—at 60 chains he entered dense chapparal, at 80 chains he set a post to mark the common corner of sections 29, 30, 31, and 32, properly marked, and witnessed by four trees—giving distances and bearings. He describes the land along this course as mountainous, soil third grade, first half mile in open prairie, balance dense chapparal. Scattering oak and madrona. His notes as to the next course running west to the ocean read as follows:

> "As this line ends in the ocean in less than a mile I run
> W. on true line bet. secs. 30-31
> Var. 17 degs. 42 min. E.
> Steep descent
> 40. Set a post 4 ft. long 4 ins., sq., 24 ins., in the ground with mkd stone for ¼ sec. Cor. in stone mound 4x2 ft. mkd. ¼ S. on N. face.
> No tree in limits.
> 50.35 Intersect the Pacific ocean on station No. 3 of meanders in sec. 30 and set a post 4 ft. long 4 ins, sq., 24 ins, in the ground for cor., to fractional secs., 30, 31 mkd., T. 5 S., R. 2 E. on E. S. 30 on N. and S. 31 on S. faces; raises a mound of stones around post.
> No trees in limits.
> land steep W. slope
> Soil 3rd rate
> partly open grass land and partly dense chapparal."

These notes clearly show that the whole of the section was surveyed on the west slope of the ridge, that on its south boundary the section line was 21.80 chains and on its north boundary 50.35 chains from the ocean. Plaintiff's east line is 20 chains west of the east line of the section, and the south half of his west line is the seashore. In relocating the corners of this section these notes, and their calls for natural monuments, are not to be disregarded in favor of a quarter section post in Whale Gulch, placed as it appears by county surveyor York in utter disregard of every call in the official survey—and upon no better evidence as to its proper location than a chain measurement of a course 4½ miles in length from a point assumed to be the southeast corner of the township by witnesses who do not pretend to be surveyors, and whose testimony upon that point is essentially hearsay.

It is urged by counsel for respondent that even conceding an error in Chapman's survey, and that plaintiff's land is west of his location, the verdict ought not to be disturbed, because there is evidence in the record that defendant peeled the trees on the western slope of the ridge. There is such evidence, but it also appears that while the growth of tan oak east of the ridge is very abundant, there are but few trees scattered along certain ravines on the west slope, and the verdict for $5,000 was based upon proof of a large quantity of bark stripped from the trees in Whale Gulch. The verdict, therefore, is not supported by the evidence as to the comparatively trifling amount cut on the west slope.

The principal errors of the court in ruling upon objections to evidence consisted in admitting the testimony of Breeden, Howard, and Champagne, as to the York and Sandow surveys, without sufficient preliminary evidence that they were made from correctly located starting points. Minor errors need not be noticed in detail. In view of the foregoing discussion they are not likely to be repeated on a retrial of the issues.

The order denying a new trial is reversed, and the cause remanded.

We concur: HENSHAW, J.; HARRISON, J.; LORIGAN, J.

SHAW, J. I dissent. I think there is sufficient evidence to sustain the verdict, under the rules applicable in this court.

NOTE.—McFARLAND, J., being unable to act, HARRISON, J., one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

NOTE.—The following is the opinion of SHAW, J., in departmemt, referred to:

The plaintiff sued the defendant to recover damages for an alleged trespass upon real estate belonging to the plaintiff. The trespass complained of consisted of stripping tan bark from a large number of oak trees growing upon the premises.

The land described in the complaint consisted of four government subdivisions contiguous to each other, and constituting a tract one mile in length from north to south, and one-fourth of a mile in width except at the southernmost part thereof where the Pacific ocean cut off one corner thereof. The three southernmost tracts lay in section 31, township 5 south, range 2 east, Humboldt meridian, and were described as lots 1, 3, and 4 of said section, being the lots corresponding to the west half of the northeast quarter, and the fractional northwest quarter of the southeast quarter thereof. The northerly tract constituted the southwest quarter of the southeast quarter of section 30. The principal contention upon the trial arose over the location of the land with reference to the government survey, and a large part of the evidence relates to the location of the monuments placed at the corners by the government surveyors and the topography described in the field notes of the official survey. The appeal is from the order denying the defendant's motion for a new trial. Many objections and exceptions were taken to the rulings of the lower court upon the admission or rejection of evidence, and these are alleged as errors which require a reversal of the order.

The plaintiff derived title under a patent from the United States issued to John L. Stewart. The patent describes the subdivisions above mentioned, and refers to the official plat of the survey of said land returned to the General Land Office by the Surveyor General. A certified copy of this official plat was introduced in evidence. It shows that the official survey of the township in question consisted of separate surveys of different parts of the township, made by different surveyors, at different times. The west boundary was surveyed by S. W. Foreman under contract of June 24, 1874; part of the south boundary was surveyed by G. H. Perrin under contract of January 26, 1876; the remaining part of the south boundary was surveyed by J. R. Glover under contract of November 13, 1876, and the whole of the south boundary was resurveyed and the lines of the sections and minor subdivisions of the township were surveyed by Foreman under contract of January 13, 1883. It appears from the evidence that the survey by Perrin of a part of the south boundary was done under a contract for a survey of the township immediately south, being township 24 north, range 19 west, Mount Diablo meridian, and many of the so-called corners established by Perrin referred to in the evidence are what are called "closing corners" made by him in joining the survey in township 24 to that in township 5. A survey of plaintiff's land was made by Mr. Chapman and the plaintiff's case depends on the accuracy of his location of the southeast corner of section 31 and other corners on the south township line from which the location of the boundaries of plaintiff's land was determined. The defendant claims that Chapman placed the boundaries about one-fourth of a mile from their true location. One of the principal questions in the case was whether or not Foreman's survey of the south township line was identical with Perrin's and whether or not Chapman found the true location according to the intendment of the patent. Chapman, in his survey, attempted to follow the lines as shown by the field notes of the Foreman survey rather than those of the Perrin survey. The time of the issuing of the patent is not given in the record, or, at least, our attention is not called to it, but it is manifest from the evidence that it was issued after the making of all these surveys and the acceptance thereof as shown on the official plat.

The objection to the introduction of the field notes of surveyor Foreman, showing the resurvey of the southern boundary of the township, was properly overruled. These field notes were certified by the Surveyor General as a copy of the field notes of Foreman on file in his office, and the official plats sufficiently identify them as the field notes on which the patent was issued. They therefore became, in legal effect, a part of the patent (if no pre-emption or homestead rights have intervened, and none appear here) which constituted the plaintiff's title, and, were properly admitted in evidence. Chapman v. Polack, 70 Cal. 487, 11 Pac. 764. It was not necessary to show any reason for the making of the resurvey. Prior to the issuing of the patent the government could make any number of surveys, as its officers might direct, and the last-accepted survey is presumed to be the one on which the patent was issued, unless the contrary appears.

The various objections made to the admission in evidence of the field notes of the Glover survey and of the action of the court in allowing references to be made to the field notes of Foreman are disposed of by the remarks already made concerning the authenticity of these surveys. They each constituted a part of the survey of the township in which the land was situated, and, for the purpose of locating the land, it is proper to refer to either or both of them so far as they would aid in fixing the landmarks and boundaries.

Two witnesses, Breeden and Howard, testified that they were present and assisted one Richard York, county surveyor, in making a survey of the land in question, some eight years before the trial. Objection was made to these references to the survey of York upon the ground that there was no competent evidence that any such survey was made, nor that, if made, it was accurate or correct. If these witnesses had been called to prove the survey of York, this perhaps would have been an error, but it is manifest from their whole testimony that this was not the purpose. They were asked to testify with relation to certain landmarks which were found in the course of the survey and which they were as competent to observe and describe as any other person, and the point of this part of their testimony, so far as it was material, consisted in the fact that these landmarks to some extent corresponded with those mentioned in the survey of the plaintiff's land made by Chapman, which last-mentioned survey was introduced in evidence. Their testimony as to the existence of the landmarks some eight years before the trial was some corroboration of the later survey by Chapman. It was also admissible to show that they were familiar with the lines of the land in question according to the theory of the plaintiff, that is, with their location, as fixed by the survey of Chapman. This familiarity was necessary as a foundation for further testimony by Howard concerning the damage done to plaintiff's land by the stripping of the bark from the timber thereon.

The defendant was called as a witness by the plaintiff to testify to the fact that if the south boundary of the township was extended west from the established corner between sections 34 and 35, it would pass near to the stake established by Mr. Chapman, the plaintiff's surveyor, as the southeast corner of section 31, in which the plaintiff's land is situated, and to the additional fact that the quarter-section corner between sections 20 and 21 in the same township was a well-known corner and marked by well-known, visible monuments. Upon cross-examination by the defendant's counsel he was asked a number of questions which called for facts, or for his opinion concerning facts, affecting the respective merits of the two surveys, that alleged to have been made by Mr. Perrin of the south boundary of the township on the one hand, and claimed by the defendant to be conclusive as to the location of the land, and that made by Mr. Chapman for the plaintiff on the other hand, and which, according to the plaintiff's claim, established the corners so as to cover the land upon which the defendant committed the trespasses. These questions were objected to as not proper cross-examination and were excluded by the court. There was no error in this. While some of the preliminary questions put to the defendant on examination in chief referred to these surveys, it was plainly not the object or purpose of the testimony elicited from him by the plaintiff to prove any facts except the two above mentioned—the location of a line extended west from the corner of section 34 with respect to the Chapman stake, and the well-known character of the quarter-section corner between sections 20 and 21. The defendant had not the right, upon the cross-examination concerning these facts, to go into an extended cross-examination with reference to the details of the respective surveys. Two of the questions objected to called for a description of the place where the stake of Chapman was set as the southeast corner of section 31 and of the objects which were visible from that point. If there had been any dispute concerning the location of this stake, this evidence might have been properly admitted, but, as matter of fact, there never was any question or doubt concerning it. The dispute was not as to the actual location of this stake on the ground, but as to the place where it should have been located according to the official government survey. The exclusion of this testimony, even if erroneous, could have caused no substantial injury.

Complaint is made of the action of the court in allowing a witness to testify concerning a survey made by one Sandow. The objection was that there was no competent evidence of any such survey, and that it was not proper to prove its accuracy or its existence by the testimony of those who assisted in making it. The testimony, however, was competent for the purpose for which it was introduced. The witness assisted Mr. Sandow in making the survey, and saw and observed the landmarks located by Mr. Sandow. Some of these were mentioned also in the original government survey. He subsequently assisted the plaintiff's surveyor, Mr. Chapman, in making a resurvey and relocation of the land, and upon that occasion saw many of the same landmarks. The corner from which Sandow started in making his survey was the quarter-section corner between sections 20 and 21, which was the same corner which the plaintiff himself testified was a well-known and well-marked corner. The witness testified to the courses and distances, run from thence, under his own observation, by Sandow, to the land in dispute, and his testimony tended to show that the correct measurement and course from that corner, according to the government survey, would locate the land in substantially the same place as that established by Chapman's survey, and consequently it would tend to corroborate the accuracy of Chapman's survey, and to show that it corresponded with the quarter-section corner which the defendant testified was well established. He testified to what he saw and not to statements made by Sandow. It was therefore competent and relevant testimony.

The testimony of the witness Burg was properly admitted for the purpose of identifying the land subsequently testified to by Pryor. Pryor was called to testify concerning the commission of the trespasses complained of, and he stated in a preliminary way that the particular land concerning which he testified was pointed out to him by Burg as the land belonging to the plaintiff, according to the survey made by Chapman. It was proper, therefore, to prove by Burg that he correctly pointed out the land to the witness Pryor. As the witness Pryor did not pretend to know anything about the accuracy of the surveys, the question put to him concerning the same was correctly excluded. A good deal is said in argument concerning a remark made by the court after questions to Pryor had been repeated several times by defendant's attorney. The defendant's attorney, in answer to some statements by the court, said: "I have a right to cross-examine the witness." To which the court said: "You have no right to impeach him." This is the remark complained of. We do not think the action of the court was so serious as to require a reversal of the case. It is true that counsel was not endeavoring at that time to impeach the witness, and the remark of the court, if it was properly taken down, appears to have been irrelevant. We cannot perceive how it could have done substantial harm to the defendant's cause.

The complaint made concerning the refusal of the court to permit the extended cross-examination of the plaintiff Kimball with respect to the details of a survey made by Chapman which he witnessed is without foundation. In his examination in chief the plaintiff had merely testified that he saw Mr. Chapman set the corners of his land, and that he afterwards pointed out the same corners to one George Howard, who subsequently testified concerning the trespasses complained of. The cross-examination was properly excluded for the reason given in regard to the cross-examination of the witness Burg, namely, that the witness had not, in his testimony in chief, claimed any knowledge of the accuracy of the Chapman survey, and that he was not called for the purpose of proving its accuracy.

There was no error in the instructions given by the court at the request of the plaintiff. The instructions complained of were as follows: "(1) I charge you that the government of the United States can make a new survey and change and correct an older or erroneous survey while the land affected thereby remains government land; and after the acceptance by the land department of the correcting survey, the latter becomes the authorized and official one." "(3) I charge you that any corner or monument established by Perrin in his survey of 1876 was, so far as the land situated in township 5 south, range 2 east, Humboldt meridian, is concerned, superseded by the corresponding corner or monument established or used by Foreman in his survey of 1883, if the latter survey disagrees with the former in relation thereto." "(4) I charge you that while it is true that the United States government can change or correct the surveys of its lands as it may see fit while the same remain government lands, after they are disposed of to settlers or purchasers the last surveys made for, and accepted by, the land department before the disposal or purchase, is final and unchangeable; and any surveyor, who for private parties thereafter undertakes to re-establish or relocate lines or corners, should endeavor as nearly as possible to follow in the footsteps of the surveyor who made the last-accepted government survey and place the corners and lines where they were placed by him." "(5) If you should find from all the evidence in the case, that Foreman, in his survey in 1883, did not use the same line or the same location of corners run and established by Perrin in 1876, yet as to all the lines and corners which were not run or established by Perrin at all, but by Foreman only, the survey of Foreman must govern without regard to the question whether or not he used the same line on the south boundary of the township, which was used by Perrin." "(7) If you find from all the evidence in the case that the township surveyed by Perrin and that surveyed by Foreman were so surveyed by them respectively that the lines thereof overlapped, yet the survey of Foreman must be followed in the township surveyed by him." "(11) I charge you that if you find from the evidence that Chapman, the surveyor, fixed the lines of plaintiff's lands substantially in accordance with the Foreman survey of 1883, it is your duty to bring in a verdict in favor of the plaintiff, J. A. Kimball, and fix the amount of damages in accordance with instructions heretofore given."

The official plat which was introduced in evidence was not in any way impeached or contradicted. It established the fact beyond controversy that the original survey of part of the south boundary of township 5 by Perrin was resurveyed by Foreman in 1883, and this being the case, the survey by Foreman would control in all disputes concerning the identity of the land included in the government patent subsequently issued. There was no evidence that any settler or purchaser had acquired any rights in the land in question between the time of the two surveys. It is propable from the evidence that the survey of township 24 made by Perrin in 1876 overlapped to some extent the survey of township 5 made by Foreman in 1883. But this fact cannot avail the defendant in his defense to this action. He does not claim any land in township 24 under the Perrin survey or any other survey. His defense consisted entirely in an attempt to show that the land upon which he stripped the timber of its bark was not the land patented to the plaintiff's predecessor Stewart. From the evidence there can be no controversy over the fact that the subdivisions patented to Stewart were the subdivisions as surveyed and located by Foreman by the survey of 1883. That survey is, therefore, the one which must control the location of the land in question. Wherever that survey conflicts in any respect with the previous survey made by Perrin of the township to the south thereof, the Foreman survey must be considered as having superseded all previous surveys with respect to the land in township 5. The land of the plaintiff did not at any point touch the southern boundary of the township in which it was situated. Its location was controlled entirely by the corners and lines of the interior subdivisions as established by the Foreman survey. The only purpose which the Perrin survey could serve in establishing the location of the land was that of a check to the survey made by Foreman, and to aid in ascertaining the true location of the latter. The true location of the Foreman lines, however, when ascertained, establishes the location of the interior subdivisions of the township, regardless of any discrepancy that may exist between said lines and the south boundary of the township as established by Perrin, even if we should admit that the resurvey of that boundary by Foreman was not controlling. We do not think that the instructions complained of assume the existence of any fact which is not conclusively established by uncontradicted evidence, or by the law regarding official surveys of he United States government. Some complaint is made that the instructions given at the request of the defendant are inconsistent with those given by the plaintiff. Upon examining them, however, we do not think that the inconsistency exists.

Objections were sustained to a number of questions put by the defendant in cross-examination of plaintiff's witnesses and in the examination of his own witnesses upon the ground that they were not in proper form. Many of these questions called for the conclusions of the witnesses, who were not experts, concerning the accuracy of the surveys and the situation or location of the land with respect thereto, and were incompetent for those reasons. Others were argumentative in form, and were properly rejected for that reason. It is not necessary to prolong this opinion to discuss errors of this character. The principle that questions of such form are improper is well established.

The last point made by the defendant is that the evidence is insufficient to justify the verdict. We have examined it and are satisfied that there was abundant evidence in support of the plaintiff's case. The question is squarely presented whether the survey of Chapman, made by the plaintiff, indicated the correct location of the land in controversy. There was evidence sufficient to show that it did, and the contradictory evidence, such as it was, would have scarcely been sufficient, if taken alone, to justify a contrary conclusion.

The order is affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

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149 Cal. 464

PEOPLE v. FELD. (Cr. 1270.)

(Supreme Court of California. July 13, 1906.)

1. CRIMINAL LAW — APPEAL — DENYING MOTION IN ARREST.

An order denying a motion in arrest of judgment in a criminal case is not appealable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2591.]

2. SAME—REVIEW ON APPEAL FROM JUDGMENT.

The action of the court in denying a motion in arrest of judgment in a criminal case is reviewable on appeal from the judgment.

3. HOMICIDE — MURDER IN THE FIRST DEGREE — EVIDENCE — SUFFICIENCY.

Evidence on a trial for homicide examined and *held* to support a conviction of murder in the first degree.

4. CRIMINAL LAW — APPEAL — VERDICT — CONCLUSIVENESS.

The court on appeal must assume that the evidence in support of the prosecution is true, and the verdict cannot be disturbed on the ground of the insufficiency of the evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3074–3083.]

5. SAME—ERRORS IN ADMISSION OF EVIDENCE —PREJUDICIAL ERROR.

Where, on a trial for homicide, the evidence admitted without objection showed the alarm of the inmates of the house where the homicide occurred on learning that accused was outside seeking to gain admission, the error in permitting the son of decedent to testify that when he started from the kitchen to the front door, the son handed decedent a bread knife, and told him to take it and protect himself, was not prejudicial.

6. SAME—MISCONDUCT OF PROSECUTING ATTORNEY.

On the trial of accused for the murder of his father-in-law, the district attorney, to show the intent of accused in going to the home of decedent on the night of the homicide and his feelings toward the inmates of that home, offered to show that accused had mistreated his wife both before and after the killing. Objections to the testimony were sustained. Before closing his case, the district attorney recalled witnesses, and was allowed by the court to state that he desired to show by them that accused prior to the homicide made threats against his wife, and had mistreated her immediately after the killing. The court sustained an objection to the offer. *Held*, that as the question as to the admissibility of the evidence was a debatable one, the district attorney was not guilty of misconduct constituting reversible error.

7. SAME—TRIAL—INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse instructions requested by accused which are covered by instructions given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

8. HOMICIDE — INSTRUCTIONS — SELF-DEFENSE—REFUSAL.

Where, on the trial of accused for the murder of his father-in-law, the evidence showed that accused and his wife had been living apart prior to the killing, and the court charged that where a husband and wife were living apart, neither had the superior right to the custody of a child, and that if accused called at the house of his father-in-law to see his child, and was attacked by decedent under such circumstances as to make it apparent to him as a reasonable man that it was necessary to shoot decedent to save his own life, and, so in good faith believing, shot decedent, he must be acquitted, the refusal to charge that accused had as much right to the custody of his child and as much right to enjoy his society as had the wife, and that he had a right at all reasonable times to visit the child wherever the child might be, was not erroneous.

9. CRIMINAL LAW—INSTRUCTIONS.

Where the court charged that a verdict must be the unbiased verdict of each member of the jury based on his individual judgment and uninfluenced by any considerations except the evidence and the law, and there was no necessity of a special admonition, the refusal to warn the jury against being influenced by public sentiment was not erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2005.]

10. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

To justify the granting of a new trial on the ground of newly discovered evidence, the evidence newly discovered must be such as to render a different result probable in the event of a new trial.

[Ed. Note—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2336.]

11. SAME—DISCRETION OF COURT.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, and its action will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2134, 2306–2336; vol. 15, Cent. Dig. Criminal Law, §§ 3067, 3069.]

12. HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

On the trial of accused for the murder of his father-in-law, the son of decedent testified that, at the time accused was heard outside the house of decedent, he put a bread knife, 10 or 12 inches long, into the hand of decedent, and accused testified that at the commencement of the difficulty decedent advanced on him with a knife, and that, after the shot, decedent pursued him with the knife still in his hand. The knife disappeared immediately after the homicide, and though search was made it was not found until discovered under decedent's house where apparently it had been concealed about a month after the trial. *Held*, that proof of the discovery of the knife did not warrant a new trial on the ground of newly discovered evidence.

13. SAME.

On the trial of accused for the murder of his father-in-law, the evidence showed that when accused appeared at the front door of the house of decedent he had an iron bar with which he attempted to force open the door, and with which he inflicted a blow on decedent. Accused testified that he did not have any such weapon, and that the wife of decedent had it in her hand, and, in endeavoring to strike him, struck decedent, and that defendant took it away from her and threw it down. A bar was identified as the one used. Deponents in support of a motion for a new trial on the ground of newly discovered evidence stated that over a year prior to the homicide the bar, or one precisely like it, belonged to decedent. *Held*, that the motion for new trial was properly denied.

14. CRIMINAL LAW — NEW TRIAL — MISCONDUCT OF JURY — PROOF.

One convicted of crime who moves for a new trial on the ground of the misconduct of the jury in reading newspaper articles commenting adversely on accused must show that the articles came to the knowledge of the jurors, for unless they did, prejudice could not result.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2252.]

15. SAME—PRESUMPTIONS.

Proof of the publication of articles in newspapers during a criminal trial containing statements adverse to accused raises no presumption that the articles came to the knowledge of the jurors, it being their duty to abstain from reading articles relative to the case.

16. SAME—EVIDENCE.

Affidavits in support of an allegation of misconduct of the jury in a criminal case made solely on information and belief of deponents are valueless as evidence, and no evidence in reply is necessary.

17. SAME—AFFIDAVITS OF JURORS AS EVIDENCE OF MISCONDUCT.

Where the charges of misconduct of the jury in a criminal case were not so supported as to require answer, the affidavits of the jurors presented in reply to the motion for a new trial on the ground of misconduct cannot be deemed proof of misconduct except so far as the averments therein affirmatively show misconduct.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2394.]

18. SAME.

On a motion for a new trial on the ground of the misconduct of the jury in reading a newspaper article relating to the trial, it appeared that accused was a police officer and the article commented on the fact that one of the jurors had formerly been a police officer, and that the judge had expressed surprise at the fact that neither side had challenged or excused him, etc. *Held* that, as to the jurors not named in the article, there was nothing therein from which it could be concluded that any juror would be unduly influenced thereby.

19. SAME.

The juror referred to in the article filed an affidavit averring that some one had called his attention to the article and that he merely replied that it did not hurt him. *Held*, that though the affidavit of the juror be deemed sufficient to show knowledge of the article during the progress of the trial, there was nothing to show that he was influenced thereby.

20. SAME—QUESTION OF FACT—CONCLUSIVENESS.

The determination of the trial court on an issue of fact raised on a motion for a new trial on the ground of the misconduct of the jury is conclusive on appeal.

21. HOMICIDE — MOTIVE — EVIDENCE — ADMISSIBILITY.

Where, on the trial of accused for the murder of his father-in-law, the evidence showed that accused and his wife had been living apart prior to the killing, and that accused went to the house of decedent and killed him, evidence of a conversation between accused and his wife in the presence of a witness, subsequent to the homicide, in which accused made a threat against his wife relative to what he would do before he would give her money, was admissible as showing the motive with which he visited the house of decedent at the time of the homicide.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Joseph Feld was convicted of murder in the first degree, and he appeals. Affirmed.

J. A. Spinnetti and W. H. Alford (Theo. J. Roche, of counsel), for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of the crime of murder in the first degree, for the killing of one Fritz Dirking, and adjudged to suffer death. He appeals from the judgment and from orders denying his motions for a new trial and in arrest of judgment.

1. The law gives no appeal from an order denying a motion in arrest of judgment. Any error in the action of the trial court in that regard is reviewable upon appeal from the judgment. It is not claimed, however, that there was any error in denying the motion in this case.

2. It is claimed that the evidence was insufficient to justify the verdict. A brief review of some of the evidence will suffice to show that the record will not support this claim. The defendant who, at the time of the homicide, November 2, 1903, was a police officer of the city and county of San Francisco, was a son-in-law of the deceased, having married his daughter some 3 years before. There was one child by this marriage, a little girl then about 2 years old. The defendant and his wife had been living separate and apart for nearly 2 months immediately preceding the homicide, the wife with the child residing at her father's home during this period. She had commenced divorce proceedings which were then pending. There had been a previous separation some few months before, and previous divorce proceedings. There was some evidence tending to show that defendant entertained feelings of bitterness toward both his wife and her family, and that on one or two occasions he had expressed such feelings when it was suggested that he should contribute to her support, one

witness testifying that a few months before the homicide he told his wife he would not give her a cent, and when she suggested he might be compelled to, he said: "No—I will fix you and your whole family first." During the afternoon of the day of the homicide he was served by his wife's attorney, Mr. Hayes, with a copy of an order requiring him to pay his wife counsel fees and alimony. Hayes testified that the defendant then said to him: "I am going out to see that child. I want to see it to-night and if I don't see it there will be a rough-house, and if that ——— ——— mother of hers says a word I will give her a clout in the jaw too." The defendant, that evening, went to the home of deceased, arriving there in the neighborhood of 7 o'clock. Defendant testified that the sole object of his visit was to see his child, whom he had not seen for a month; that he had for several days been endeavoring to obtain, through his own attorney, the consent of his wife that he should so do, and that he had finally, on that day, communicated with her by telephone and told her that he was coming out after supper to see the child, and she had said it was all right. Other evidence was such, however, as to warrant the jury in concluding that no consent to his visit had been given, and that he went to the house not on the peaceable mission of merely seeing his child, but in an ugly frame of mind, inflamed by the service on him of the order for alimony and counsel fees, and bent on making a "rough-house" of it, as suggested in the statement testified to by Hayes. If he did telephone to his wife before going out, as the evidence indicates, it is not believable that the message was of the nature testified to by him, or that she consented to his coming, for his arrival on the premises apparently greatly alarmed the occupants of the house.

The home of deceased was the lower flat of a two-story house. In the kitchen thereof, which opened on the back yard, were the deceased, his wife, defendant's wife and her brother. Defendant came into the back yard along a driveway which ran therefrom to the street, along the north side of the house. Mrs. Feld, crying, "Here he comes," ran to the kitchen door and locked it. The defendant, after trying to open this door, went around to the front door of the house, whither the two women, carrying the child, also ran through the hallway of the house, their object, as testified to, being to go out through that door, and thence to the upper flat. There was evidence tending to show that when that door was opened, the defendant appeared, having come from the rear, and that when it was attempted by those inside to close the door, he prevented them from so doing by means of an iron bar which he had. There was also evidence tending to show that defendant attempted to gain admission to the house by force, and that the deceased, who had also come to the door, and was attempting to prevent his entrance, was, during the attempt of defendant to enter, struck on the head by the bar held by defendant, and that when he told the defendant he had better go away from the house, the defendant stepped back a few feet, drew his revolver and fired the fatal shot, the bullet entering the left breast of deceased, and causing his death the next morning. There was in this sufficient warrant for the conclusion of the jury that the defendant had gone to the home of deceased, harboring feelings of bitterness against his wife and her relatives, and with a deliberate intent to obtain entry by force and violence, if necessary, and that when he found his progress in that direction impeded by deceased, he, for that reason alone, deliberately and premeditatedly, fired the fatal shot, with the intent to kill him. Under such circumstances, he would, undoubtedly, be guilty of murder in the first degree. There was, it is true, evidence at variance with that sustaining the theory above stated, but the utmost effect thereof was to produce a mere conflict of evidence, and it is certainly unnecessar here to cite authorities to sustain the proposition repeatedly enunciated by this court, to the effect that the appellate court is powerless to interfere with the verdict of the jury under such circumstances. Assuming the evidence given in support of the theory of the prosecution to be true, as we must assume in view of the verdict and the order denying a new trial, the verdict cannot be disturbed on the ground of insufficiency of evidence to support it.

3. The son of the deceased testified that when his father started from the kitchen to the front door, he handed him a bread knife "and told him to take it to protect himself." Defendant moved that the quoted portion be stricken out, and his motion was denied. The claim is that it was incompetent, being no part of the res gestæ and being a statement not made in the presence of the defendant. If it be admitted that this evidence was incompetent, we cannot see that it added in the slightest degree to the effect of the other evidence of the witness, which had already been received without objection, relative to the apparent alarm of the inmates of the house upon learning that defendant was outside, seeking to gain admission. The error, if any, was therefore, without prejudice.

4. The district attorney, for the purpose of showing the intention of defendant in going to the home of deceased on the night of the homicide, and his then feelings toward the inmates thereof, endeavored to show that he had brutally mistreated his wife both before that time and also immediately after the shooting, when he gained admission to the house. Objections to this line of testimony were sustained, after the district attorney had quite fully stated, in the presence of the jury, the nature of the proposed testimony. Before closing his case, the district attorney recalled certain witnesses and was allowed by the court, over the objection of defendant,

to state that he desired to show by them that defendant, prior to the homicide, made threats against his wife, and had mistreated her immediately after the homicide, upon gaining admission to the house. The court sustained an objection to this offer, but it is urged that the conduct of the district attorney in making such offer was misconduct prejudicial to the rights of defendant. It is unnecessary here to discuss the claim made by the Attorney General to the effect that the proposed testimony was admissible. If we assume that it was not admissible, we cannot hold that the mere offer thereof was prejudicial, in view of the fact that it was already practically before the jury so far as an offer to prove certain matters places those matters before a jury. The second offer was the same in effect as the first, and if the jury sworn to try the case on the admitted evidence alone would allow itself to be influenced by statements of attorneys not supported by evidence actually admitted by the court, the prejudice to defendant was fully created by the first offer, and could not have been enhanced by the second. The question as to the admissibility of such evidence was, at least, a debatable one, there being strong ground for holding it admissible, and it cannot reasonably be pretended that there was any misconduct on the part of the district attorney in originally seeking to introduce the proposed evidence. Nor would we be warranted in assuming from the record in this case that the jury, in disregard of their oaths, may have been influenced to the prejudice of defendant by either offer. They were specially instructed by the court to consider only the admitted evidence, and to disregard and discard every impression or idea otherwise suggested, including questions asked by counsel to which objections were sustained, and statements by counsel.

5. The trial court did not err in the matter of instructions to the jury. The instructions requested by defendant upon the subject of accidental homicide were fully covered by another instruction given by the court. The requested instruction to the effect that the defendant had as much right to the custody of his minor child, and as much right to enjoy the society and company of such minor child, as had his wife, and that he had "a perfect right, at all reasonable times, to visit said minor child wherever such minor child may have been," was properly refused. The quoted portion of the instruction might be understood by the jury, under the evidence in this case, as implying that defendant had the right, for the purpose of visiting his child, to use such force as was necessary to effect an entrance to the house of deceased, even to the extent of deliberately taking life, which, of course, is not the law, and hence the instruction might have been misleading. The defendant undoubtedly had the legal right to see his child at all reasonable times, but if he was denied this right by others, his remedy was to be found in an application to the courts, and in no event could he take the law into his own hands, and resort to force and violence, much less to the taking of human life. See People v. Harris, 125 Cal. 96, 57 Pac. 780. There was no question in the case as to the legal right of the father to visit his child. The court instructed the jury that where husband and wife were living apart, neither had a superior right to the custody of the children of the marriage, and also, that if the defendant called at the house for the purpose of seeing his child, and, as he was about to enter, was attacked by deceased under such circumstances as to make it apparent to him as a reasonable man that it was necessary to shoot deceased in order to save his own life or prevent great bodily injury, and so in good faith believing, shot the deceased, he must be acquitted; and also, that if, at such time, the fatal shot was accidentally fired in a scuffle, he must be acquitted. There was no pretense that a visit by defendant to the house where his child was, for the sole purpose of peaceably entering and seeing the child, was not a lawful mission, and the instructions given clearly indicated to the jury that such a visit would have been entirely lawful. There was no error in refusing to give the long and argumentative requested instruction, warning the jury against being influenced by public sentiment. We find no necessity evidenced by the record for any such special admonition, and the jury were elsewhere told that any verdict rendered must be the unbiased and independent verdict of each member of the jury, based solely upon his individual judgment, and uninfluenced by any considerations whatever, except the evidence received, the law declared, and the arguments thereon.

6. The defendant moved for a new trial upon various grounds, including newly discovered evidence, and misconduct of jurors.

It is well settled that, to justify the granting of a new trial upon the ground of newly discovered evidence, the evidence newly discovered must be such as to render a different result probable in the event of a new trial. This we understand to be conceded by counsel for appellant. New trials should be granted on this ground only for the purpose of doing substantial justice, and not simply for the purpose of enabling the defendant to introduce evidence which is of such a nature and character, that there is no reason to believe that the verdict would have been different, had such evidence been before the jury. It is also settled that such motions are addressed to the sound discretion of the trial court, and that its action will not be disturbed unless the record shows an abuse of this discretion, the presumption being that the discretion was properly exercised. The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial judge, who, in the light of the knowledge afforded by presiding at the trial, is especially qualified to determine as to the probable effect of such evidence. People v. Sing Yow, 145 Cal. 1, 4, 78 Pac. 235; People v. Buckley, 143 Cal. 375, 392, 77 Pac. 169. Bearing in mind these well-settled propositions, a brief statement as to the showing made by the affidavits produced, will suffice to indicate that the action of the trial court, so far as this ground is concerned, cannot be disturbed. Certain affidavits presented were to the effect that, nearly a month after the trial, a knife was found under the house of deceased by a man who was there engaged in doing some work. This knife was identified by defendant as a knife which belonged to deceased, and was used by his family, and as a knife which he claimed deceased had in his hand at the time of the homicide. The son of deceased had testified on the trial that, at the time defendant was heard outside the house, he put a bread knife, 10 or 11 inches long and pointed at the end, into the hand of deceased, and defendant had testified that at the commencement of the difficulty, deceased advanced upon him with a knife, and that after the shot, deceased pursued him with the knife still in his hand. The knife disappeared immediately after the homicide, and although search and inquiry had been made regarding the same, was not found until discovered under the Dirking house, where it had apparently been concealed, but by whom does not appear.

We cannot see that the discovery of this knife under the house of deceased warranted a new trial. Certainly a new trial should not be granted merely for the purpose of enabling the knife, claimed to have been in the hand of deceased at the time of the homicide, to be introduced in evidence. It had been sufficiently described at the trial for all the purposes of the defense, and its mere production and identification as the very weapon claimed to have been in the hand of deceased, could not add, in the slightest degree, to the effect of the evidence tending to show that deceased had a knife in his hand. Nor was the mere fact that it was found, apparently concealed, under the Dirking house, at all material to the issues involved in the case. The fact might possibly warrant the inference that some member of the family, for some reason thinking that the production of the weapon would in some degree tend to assist defendant's cause, had concealed it for the purpose of suppressing evidence favorable to defendant, and thus be evidence sufficient to discredit the person who had concealed it, if he or she could be ascertained and was a witness against the defendant, but it could have no other effect. It was not legitimate evidence to show that deceased had the weapon in his hand at the time of the affray. And as long as it could not be shown by whom it was concealed, it could not serve to constitute evidence impeaching any particular witness.

On the trial, there was evidence tending to show that when defendant appeared at the front door of the Dirking house, he had an iron bar, with which he attempted to force open the door, and with which he inflicted a blow on the head of deceased. Defendant testified that he did not have any such weapon when he came to the door, and that Mrs. Dirking had it in her hand, and in deavoring to strike him with it, struck her husband, and he (defendant) took it away from her, and threw it down. A bar was identified as the one used on this occasion. The record does not show that there was anything in the appearance of this bar to distinguish it from any other iron bar about the same size. In support of the motion for a new trial, two affidavits were presented, one deponent stating that as late as January, 1902, a year and 10 months prior to the homicide, he was acquainted with the tools of deceased, kept in the rear of his premises, having occasionally used some of them, and that either this bar, or one precisely like it, was among those tools, and the other testifying to a similar condition existing as late as June, 1902, a year and 5 months prior to the homicide. The contents of these affidavits were such that we cannot say that the judge of the trial court was not fully warranted in concluding that the evidence of the new witnesses would not operate to change the result in the event of a new trial. In this connection, it may also be suggested that even if the iron bar was one of the tools of deceased, kept in the rear of his premises, the defendant, when in the back yard before going to the front door, could have taken it from that place. What has been said in regard to the affidavits relative to the iron bar is also true as to the only other affidavits presented. There is no reason to believe that the verdict would have been different if this evidence had been before the jury. We are of the opinion that it cannot be held that the trial court erred in concluding that the showing as to newly discovered evidence was not such as to warrant the granting of a new trial.

The alleged misconduct of jurors charged was the alleged reading by all the jurors of certain newspapers articles. The newspaper articles were two in number, and were published in the San Francisco Examiner during the progress of the trial, and the day before the case was submitted to the jury. One was an editorial headed: "It is time to stop the wanton slaughter of innocent women," which commented unfavorably upon juries in certain cases, where persons charged with killing or assaulting women had, in the opinion of the writer, been too leniently dealt with. The other was a news article, headed: "Ex-Policeman a Juror for Feld. Sergeant

Wright, Retired, is among the 12 accepted to try young patrolman who killed his father-in-law. Counsel indicate that prisoner whose life is in the balance will depend on a plea of self-defense for acquittal." This article, in addition to giving what was apparently a fair account of the previous day's proceedings of the trial, and a statement as to the probability that the defense would be self-defense, in a subdivision headed: "Comment about Juror," stated that there had been some comment on the fact that C. P. Wright, a former member of the police department, had been accepted as one of the jurors to try defendant, who was on the police force at the time of the shooting. It quoted the trial judge as saying in an interview, that he was rather surprised that neither side had challenged or excused him, but that he had found on inquiry that Mr. Wright had served on other juries in other departments and had given excellent satisfaction; that the fact that a man had served on the police force did not disqualify him for jury service, and that police training ought to make a good juror; that if the defendant had been charged with murder for a killing done in the performance of police duty, it might be expected that the sympathies of any juror who had been a member of the police force would naturally be with him, but that there was no sentiment of that kind involved in this case; that the questions asked of Mr. Wright showed that he did not know the defendant and had never had any dealings with him; and that in any event the prosecution accepted the juror, and the court should not interfere. The district attorney was also reported as saying that he regarded Sergeant Wright as an excellent juror.

We have not considered it necessary to state the contents of the editorial, for there is no evidence that any juror read it, or heard of it, until after the rendition of the verdict. It has been declared that newspaper articles may be of such a nature that the reading thereof by jurors during the progress of a trial will require the granting of a new trial. People v. McCoy, 71 Cal. 395, 397, 12 Pac. 272; People v. Stokes, 103 Cal. 193, 199, 37 Pac. 207, 42 Am. St. Rep. 102; People v. Chin Non, 146 Cal. 561, 80 Pac. 681. It, however, devolves upon the party moving for a new trial on this ground to show that such articles have come to the knowledge of the jurors, for, unless they have, prejudice could not possibly have resulted to the defendant by reason of the publication, and the burden is on him to show any substantial cause that may exist for the granting of a new trial. It cannot be held that evidence showing the publication of articles in newspapers during a trial raises any presumption that such articles have come to the knowledge of the jurors. It is their duty to abstain from reading any articles relative to the case they are trying, and from talking to any one or allowing any one to talk to them concerning the case, and to refrain from allowing themselves to receive any information or impression concerning the case from any source other than the evidence, arguments and instructions given in open court, and the presumption is that they have fully performed their duty. See Sheehan v. Hammond (Cal. App.) 84 Pac. 340. The only allegations as to this contained in the affidavits presented by defendant were made solely on the information and belief of the deponents. For this reason they were utterly valueless, and constituted no evidence whatever that any juror had ever read or heard of either article. People v. Findley, 132 Cal. 301, 64 Pac. 472; Gay v. Torrance, 145 Cal. 144, 151, 78 Pac. 540. They were simply charges without proof to sustain them, no denial or evidence in reply was, under the law, required, and a failure to deny them would in no degree tend to establish their truth. It is contended that an affidavit of the 12 jurors, which was presented by the district attorney in reply to defendant's motion, was of such a nature as to establish the fact that the jurors had read the editorial. In this connection, defendant relies on the rule declared in People v. Chin Non, supra, to the effect that the rule against allowing a juror to impeach his own verdict is not applicable where the district attorney introduces the juror's affidavit, and that in such event he, on behalf of the people, waives the benefit of the rule excluding such evidence. In the Chin Non Case, the jurors expressly stated in the affidavits presented by the district attorney that they had read the newspaper articles there involved, and it was sought to show by the further statements in the affidavits, that such articles had not influenced them in arriving at a verdict. In this case, while there was in the joint affidavit of the jurors no express denial of the information and belief allegation that they had read the editorial, there was no express acknowledgment thereof, as in the Chin Non Case, nor was there any statement therein which would warrant the inference that the editorial had come to the knowledge of any of them until after the verdict. Every statement therein contained is entirely consistent with a conclusion that the editorial had not come to their knowledge until after verdict. The conclusion of defendant's counsel to the contrary is based entirely on the fact that while, by this affidavit, certain allegations of defendant's affidavits were denied, nothing was said therein concerning or in reply to the allegation as to the reading of the editorial by the jurors. It is contended that in the presence of this opportunity on the part of the district attorney and the jurors to deny such allegation if the facts were such as to enable a denial to be made, the failure to do so is, in effect, an express admission on the part of the district attorney that the undenied allegation was true.

When it is borne in mind that the charges of misconduct were not so supported as to require answer of any kind, that there was no evidence of misconduct therein, and that the jurors' affidavits alone must be looked to for evidence of misconduct, it must be apparent that the only misconduct shown is such as is shown by the affirmative allegations of such affidavit, or such as must be necessarily inferred from such allegations, and the district attorney, by introducing such affidavit, admitted no more, at most than what is so affirmatively alleged, or necessarily inferable from such allegations. We are of the opinion that the exception declared in the Chin Non Case to the general rule prohibiting the impeachment of his own verdict by a juror, should not be extended so as to allow such impeachment to be accomplished solely by the mere failure of the juror to deny certain information and belief allegations of misconduct, even though such failure be accompanied by an express denial on his part of other information and belief allegations of misconduct. So far, therefore, as the editorial was concerned, there was no showing warranting the granting of a new trial. We have assumed in what we have thus far said that the article was of such a nature that it might have influenced jurymen in this case. The article contained no reference to this case, but was a general article relative to failures of justice in cases of crime against women. Whether, by reason of the special circumstances of this case, the trial court would have been warranted in holding that it was of such a nature that the mere reading thereof may have influenced this jury, is, indeed, very doubtful, but, in view of what has already been said, it is unnecessary to decide this question. The showing as to the knowledge by the jurors, before verdict, of the other newspaper article, the news article, is precisely the same as the showing in regard to the editorial, except in the single case of the juror, Wright, who is discussed therein. As to the other 11 jurors, therefore, the showing did not warrant a new trial, for the reasons already stated. As to this article, it must also be held that, so far as the jurors not named therein are concerned, there is absolutely nothing therein from which it could be reasonably concluded that any juror might have been influenced thereby. The article was in no degree partisan, and was, in addition to the comments on juror Wright, apparently only an exceedingly fair report of the previous day's proceedings. Of course, as already stated, jurors should not read any article concerning the case they are trying, but no prejudice could possibly have been suffered by defendant from a reading by such jurors of this article.

An affidavit of Juror Wright was filed by the district attorney, in which Wright stated that some one had called his attention to the fact that an article had been published about him, and he merely replied: "Oh, that does not hurt me, the judge gave me a good send-off." This is the only legal evidence serving as a basis for the conclusion that he had knowledge of the article or any portion thereof. It may be assumed that this was sufficient to show such knowledge. We, however, are unable to see anything in the comments on Wright contained in the article, or in the remarks attributed by the article to the trial judge and the district attorney concerning him, that would warrant a conclusion that he might have been influenced thereby in the discharge of his duties as a juror. An affidavit as to Juror Wright, made by Clarence Gray, was filed on the part of the defendant. The allegations contained in this affidavit were specifically denied in the affidavit of Wright. The issues of fact thus made were for the trial court to determine, and such determination is conclusive here. It cannot be held that the court erred in concluding that there was no sufficient showing of misconduct of jurors to warrant a new trial.

Upon the motion for a new trial, the affidavit of defendant's attorneys was presented, charging misconduct on the part of the district attorney in making alleged unwarrantable statements in his closing argument. Misconduct of the district attorney is not one of the grounds specified in section 1181 of the Penal Code as a cause for granting a new trial, and that section in terms provides that a new trial may be granted only in the cases therein specified. Such ground, therefore, is available only upon the appeal from the judgment, and, to be available there, the facts upon which the alleged misconduct is based must appear in the bill of exceptions settled by the judge, and not be left to be determined by the appellate court upon affidavits. In this case, the allegations contained in such affidavits are in no way certified by the trial judge as true, without which certification we cannot legally consider them. That the affidavits are contained in a bill of exceptions is, of course, no finding by the trial judge as to the truth of the allegations contained therein. The affidavits presented on this ground had no proper place on the hearing of a motion for a new trial, the action of the trial judge in denying the motion cannot be accepted as a finding upon the matters therein set forth, and the affidavits have no proper place in the record on appeal. We have, however, examined them, and, taking into consideration the reply affidavit filed by the district attorney, cannot say that there is any such showing of misconduct in the closing argument as would warrant a reversal, were the question properly before us.

We have, in a previous portion of this opinion, discussed the efforts of the district attorney to prove mistreatment of his wife by the defendant, both before and immediately after the killing of deceased, and his second offer in regard thereto, and have held that there was no misconduct in the first offer and no prejudical misconduct in the second. Nor can it be held that there was any misconduct in asking Mrs. Quarles in her examination in rebuttal as to a conversation between defendant and his wife in her presence, about two months before the homicide, in which he made a threat against his wife relative to what he would do before he would give her any money. Under the circumstances of the case, we think the evidence was admissible as tending to show the motive with which he visited the house of deceased on the evening of the homicide, and this was apparently the view of the trial court, for an objection to the question was overruled. There is no other specification of misconduct on the part of the district attorney requiring notice. We have now considered all the points made for a reversal, and find no legal ground upon which the judgment of the trial court may be set aside, or a new trial granted.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; HALL, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

NOTE.—Justice McFARLAND being unable to act, Justice HALL, one of the justices of the district court of appeal for the first appellate district, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

Petition for Rehearing.

(Aug. 9, 1906.)

PER CURIAM. What was said in the opinion relative to whether the question of misconduct of the district attorney can, in view of our statute, be considered by the trial court on motion for a new trial, and afford sufficient ground for the granting of such motion, was not necessary to the decision, in view of the fact that the showing of misconduct made was not sufficient to warrant a reversal, even if the question had been properly before us. This particular question was not argued by counsel. It has been brought to our attention since the filing of the opinion that the decisions of this court upon this question are conflicting, and that in several cases the right of a trial court to grant a new trial upon this ground has been recognized. We have concluded that it would be proper to defer final decision of this important question of practice until it has been more fully argued and considered.

The opinion heretofore filed is, therefore, modified by striking out in the part of the opinin numbered "7" that portion thereof commencing with the words "Misconduct of the district attorney is not one of the grounds," and ending with the words, "and the affidavits have no proper place in the record on appeal," and also by striking out of the sentence next following the word "however," and the words, "were the question properly before us."

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149 Cal. 552

In re RATTO'S ESTATE. (Sac. 1,483.)

(Supreme Court of California. Aug. 16, 1906.)

1. WILLS—LEGACIES—PAYMENT—FUNDS.

Testator bequeathed to his four daughters and to his grandson each the sum of $200, and also by a later clause bequeathed to his five sons the remaining one-half of all his real estate acquired after his marriage to his present wife, and all the remainder of his personal property of which he should die possessed, after the payment of legacies provided for in the second clause of the will. *Held*, that the legacies given in the second clause of the will were general, and were not charged on the personal property alone.

2. SAME—SPECIFIC DEVISES.

A will devising to testator's five sons the remaining one-half of all his real estate acquired after marriage to his present wife, and all the residue of his personal property after payment of legacies, etc., constituted a general and not a specific devise.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1938.]

3. SAME.

Testator by the second clause of his will bequeathed certain general legacies, and by the fifth clause gave one-half of all the real property acquired after his marriage with his present wife, and all the residue of his personal property after the payment of the legacies provided for in the second clause of his will, to certain devisees. *Held*, that the words "after payment of the legacies provided for in the second clause of the will," should be construed as qualifying both the preceding clauses, and to entitle the residuary legatees to whatever residue there should be of both the "remaining one-half of the real property acquired" and of the personal property after satisfaction of the legacies.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1279.]

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Application by Giambatista Ratto as guardian of Antonio Ratto, a minor, for an order for the sale of real estate of Guisseppi Ratto, deceased, to pay a legacy bequeathed to such minor. From an order denying the application, applicant appeals. Reversed.

C. W. Miller, for petitioner. Buck & Middlecoff, for opponents. A. V. Scanlan, for certain minors.

McFARLAND, J. This is an appeal by Giambatista Ratto, guardian of Antonio Ratto, a minor, from an order of the superior court refusing to make an order directing the sale of real property of the estate of said deceased to pay a legacy to said minor.

Guisseppi Ratto died, leaving a will. By the first paragraph of the will the testator directs the payment of his funeral expenses, etc.; by the second paragraph he gives to his four daughters, naming them, and to his grandson, said Antonio Ratto, "each the sum of $200"; by the third paragraph he gives to his five sons, naming them, a certain described piece of land containing about 17 acres, which he owned at the time of his marriage, and was therefore his separate property; by the fourth paragraph he gives to his wife, Angela Ratto, "one-half of all the remaining real property now held by me, which said real property was acquired and possessed by me after my marriage with my present wife, said Angela Ratto, and to which one-half she is legally entitled to under the laws of the state of California." And the fifth paragraph, which is the one mostly discussed by counsel, is as follows:

"Fifthly. I give and bequeath to my five sons, John Batista Ratto, Joseph Ratto, Benedicto Ratto, Antonio Ratto and Peter Ratto, share and share alike, the remaining one-half of all the real property acquired and possessed by me after my marriage to my present wife Angela Ratto, and all the rest, residue and remainder of the personal property of which I may die possessed, after the payment of the legacies provided for in clause above marked 'Secondly' of this will."

It appears that all the personal property of the estate has been exhausted by the payment of expenses of administration, family allowance, etc., and that there is no personal property out of which the said legacy to Antonio Ratto can be satisfied; and respondents contend, and the court below held, that the legacy must fail because, under the will, it was to be a charge on the personal property alone. We see no such provision in the will. Certainly the second clause, in which the legacy is given, does not provide that some particular property or fund must be resorted to for its payment; it is general and unconditioned. Nor does the fifth clause direct that it should be a charge only upon the personal property, and there is no other provision in the will on the subject. Therefore, leaving out of view for the present any intent of the testator as expressed in the will, the general rule on the subject would prevail, which is, as stated in section 1360 of the Civil Code, that the property of a testator must be resorted to for the payment of legacies in the following order: "(1) Property which is expressly appropriated by the will for the payment of legacies; (2) Property not disposed of by the will; (3) Property which is devised or bequeathed to a residuary legatee; (4) Property which is specifically devised or bequeathed." In the Estate of Neistrath, 66 Cal. 330, 5 Pac. 507, the court leaves it somewhat doubtful whether by said section 1360 the Legislature intended to subject specific devises to the payment of general legacies; but we need not consider that question here, for the only specific devise to appellants is of the 17-acre tract mentioned in the third paragraph of the will. The clause in the fifth paragraph in the testator's will "the remaining one-half of all the real property acquired and possessed by me after my marriage" contains no description of the property devised, and is clearly general and not specific. Moreover, taking the whole will together, the clear intent of the testator was that the very first gift which he makes, in the second paragraph, to his daughters and grandson of $200 each, should not be chargeable upon any particular fund or property; and in view of this clear intent the words in paragraph fifth, "after the payment of the legacies provided for in clause marked 'Secondly' of this will" should be construed as qualifying both the preceding clauses, and is easily susceptible of that construction. And therefore appellants are entitled to whatever residue there shall be of both the "remaining one-half of the real property acquired," etc., and of the personal property, after the satisfaction of the legacies.

We do not consider the fact incidentally appearing in the transcript that some of the real property was set apart to the widow and minor children as a homestead; for the transcript contains an express stipulation "that the only question involved in this proceeding is the question as to whether or not, under the terms of the will of decedent, any of the real property in this estate is chargeable with the payment of the legacy herein involved."

The order appealed from is reversed, with directions to the court below to order sold so much of the real property of the estate devised to appellants, other than the 17-acre tract, as may be necessary to satisfy the legacy of $200 to Antonio Ratto.

We concur: HENSHAW, J.; LORIGAN, J.

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3 Cal. App. 741

KAUFFMAN et al. v. FOSTER.

(Court of Appeal, Second District, California. June 20, 1906.)

1. ADMINISTRATORS—CLAIMS—PRESENTATION—NECESSITY.

Where a court having jurisdiction construed a testamentary trust, and intestate in obedience to the decree segregated the trust fund from his other property in acceptance of the trust, the decree became binding on all the parties then before the court as the law of the estate, so that it was unnecessary that the claim for such trust fund should have been presented by the parties entitled thereto as against intestate's estate to entitle them to maintain an action to recover the fund.

2. TRUSTS—FOLLOWING TRUST FUNDS—IDENTIFICATION OF PROPERTY.

Where, after a trust created by the will of intestate's wife had been sustained, intestate segregated the fund from his other property and invested the same in certain securities, the investment was sufficiently earmarked to entitle the persons entitled to the fund to trace the same.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 553.]

3. CHARITIES—CHARITABLE ASSOCIATIONS.

Where a Masonic association was formed for certain purposes of charity and held its funds in trust for such purposes, and none other, it was a charitable association capable of taking funds bequeathed to it for charitable purposes.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 17.]

4. JUDGMENTS—EFFECT—PRESUMPTIONS.

Where a court of competent jurisdiction has distributed a trust fund to an association on a use and trust specified in the decree, it would be presumed in support thereof that the society had power to accept the bequest and was a person competent to act as trustee.

5. CHARITIES—BEQUEST TO AN ASSOCIATION—EQUITABLE CONTROL.

Where a trust fund was bequeathed to a masonic association in trust for charitable purposes, the association was so far under the control of a court of equity that it could be compelled to execute the trust and be properly dealt with for breach thereof.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, §§ 83–90.]

6. TRUSTS—INVESTMENT OF TRUST FUNDS—FOLLOWNG TRUST FUNDS.

A trustee invested the trust funds in proper securities as directed by a decree, and tendered the same to the distributee specified in the will, exacting, however, certain conditions inconsistent with the decree of distribution. Investments of such character were shown on his death to have come into the hands of his administrator. *Held* that, as such investment once proved to exist would be presumed to continue as long as usual with things of that nature, as provided by Code Civ. Proc. § 1963, subd. 32, there were sufficient remarks to authorize a finding that the trust securities had come into the hands of the administrator.

7. SAME—DEATH OF TRUSTEE—EFFECT.

Where a trust in personalty devolved on intestate in his life by the decree of a court of competent jurisdiction, and he accepted the trust, it devolved on his personal representatives on his death.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 221.]

Appeal from Superior Court, Ventura County; J. W. Taggart, Judge.

Action by Parke W. Kauffman and others against E. P. Foster, as administrator of the estate of Jacob K. Gries, deceased. From an order denying defendant's motion for a new trial, he appeals. Affirmed.

Barnes & Selby and Edward M. Selby, for appellant. Toland & Andrews, N. Blackstock, and M. J. Rogers, for respondents.

ALLEN, J. A judgment in favor of plaintiffs against defendant, as administrator of the estate of Jacob K. Gries, decreeing that said administrator should invest $1,000 in his hands and transfer the security to San Buena Ventura Lodge, Free and Accepted Masons, under a contract that of the income of such $1,000 so much as necessary should be used in the maintenance of a burial lot in which is interred the remains of Mrs. Mary S. Gries. From an order denying a new trial, defendant appeals, upon a bill of exceptions.

The case is this: Ventura Lodge, Free and Accepted Masons, is an unincorporated association, found by the court to have been organized for charitable purposes, and since its organization has been collecting and disbursing large sums by way of charity, and no money received by it can be properly expended otherwise than for expenses of the association and for charitable purposes. This association contains about 85 members. Mrs. Gries, by her last will, devised to her husband, Jacob K. Gries, certain real estate and requested him that, out of the rents, issues, and profits thereof, to invest $1,000 in some satisfactory security and transfer the same to the association above named, under a contract that so much of the income or principal as may be necessary shall be used by said association for the care, repair, and maintenance of the burial lot in Springville cemetery, in which the remains of testator should be interred. That after the death of Mrs. Gries, and in due course of the administration of her estate by the decree of distribution regularly entered, after notice, on January 5, 1897, there was distributed by the court to this association $1,000, to be paid out of the rents, issues, and profits of the life estate of said Jacob K. Gries, and to be by him invested in a satisfactory security, to be transferred to said association upon the trusts and uses in said will provided. Thereupon said association appointed plaintiff's trustees to take and receive such transfer of security for said association. That at all times, after the 1st of January, 1898, and until his death, the said Jacob K. Gries kept segregated and in his hands, out of the proper funds, said sum of $1,000. That in 1903 said Jacob K. Gries died, so having such funds separated from his other estate, and after his death said funds in due course came into the hands of Foster, as administrator, and the same has at all times remained in his hands. That a claim was presented, more than 10 months after the publication of notice to creditors, to defendant as administrator of the estate of Jacob K. Gries, by plaintiffs in their own behalf, and in behalf of the other members of the association, which claim was rejected. Plaintiffs bring this action thereon, by way of an amended and supplemental complaint; the original action having been brought against Jacob K. Gries in his lifetime, and in which action not only the amount here involved was sought to be recovered, but certain specified real property.

The first contention of appellant is that the presentation of the claim to defendant within the time required by law was a condition precedent to the right to maintain this action. We are of opinion that, under the facts of this case, the presentation of a claim was unnecessary. Whatever may have been the rights of Jacob K. Gries under the will, the decree of distribution became the law of the estate. The court having jurisdiction construed the trust created by the will, and that judgment and decree is final and conclusive upon all parties then before the court. Toland v. Earl, 129 Cal. 152, 61 Pac. 914, 79 Am. St. Rep. 100. Gries, in obedience to such decree, segregated the sum ordered to be invested, and held the same in that manner, presumably in obedience to the decree, and presumably with the intent to transfer the funds whenever other questions which he was litigating were eliminated. These acts signified with reasonable certainty Gries' acceptance of the trust which was imposed upon him by the decree to invest and transfer. Civ. Code, § 2222. The fund having been by him segregated, the investment was sufficiently earmarked so as to be identified, and proven to have been turned over with the assets of the estate to the administrator. Elizalde v. Elizalde, 137 Cal. 638, 66 Pac. 369, 70 Pac. 861. It is only where payment of a claim is sought out of the assets of decedent's estate that such presentation is necessary. Elizalde v. Elizalde, 137 Cal. 642, 66 Pac. 369, 70 Pac. 861.

The sufficiency of the evidence to support the findings of the court as to the charitable character of the association is next challenged. Competent evidence appears in the record to show that the association was formed for certain purposes of charity and society and holds its funds in trust for these purposes, and none other; that the lodge funds are sacred to the purposes of charity and shall not be used for any other purpose. This evidence is sufficient to support the finding last referred to.

The competency of the lodge to receive this bequest is next challenged. We have nothing to do upon this appeal with the bequest, its nature or purpose. We are dealing only with the judgment of a court of competent jurisdiction, which has distributed to the association certain personal property, upon the use and trust in such decree of distribution specified. It will be presumed in support of such judgment that the distributee has power to accept and was a person competent to act as trustee. Were the rule otherwise, bodies such as this association before the court have been held so far under the control of a court of equity that they may be compelled to execute the duties of the trust, and can be dealt with for a breach thereof. Estate of Winchester, 133 Cal. 274, 65 Pac. 475. There being then before the court a distributee, and decree of distribution having become final, we may not now by indirection inquire into the validity of such judgment or decree, or the evidence offered and received in its support. There is evidence in the record to support a finding that Jacob K. Gries had this money in his possession, segregated and ready for payment. There is evidence that at one time before his death, to wit, in the early part of 1898, he had the same invested in proper securities, as by the decree directed, and tendered the same to the association, exacting, however, certain conditions before the transfer not consistent with the decree of distribution. This investment once proven to exist will be presumed to continue as long as usual with things of that nature. Code Civ. Proc. § 1963, subd. 32. The nature of the investment ordered was permanent, and investments of this character are shown to have come into the hands of the administrator after the decease of Gries. All of this tends to establish the findings of the court as to Gries' acceptance of the trust, the partial performance thereof, and the receipt by the administrator of a trust fund earmarked so as to be identified, and proven to have been turned over with the assets of the estate to the defendant, as administrator. A trust having devolved upon Gries in his lifetime by the decree, and his acceptance thereof established by acts performed by him, upon his death the trust devolved upon his personal representatives. Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

We are of opinion that the judgment and decree of the court in this case, directing the transfer of the securities to the association as distributee under the decree of distribution, was warranted.

There being no error apparent in the record, the order is affirmed.

I concur: GRAY, P. J.

SMITH, J. (concurring). I concur in the judgment of affirmance. The appeal before us is from an order denying the defendant's motion for a new trial, and the questions to be considered are those only relating to appeals of this kind, which, in the present case, are confined to the alleged insufficiency of the evidence, and the point that the decision is against law. The findings attacked for insufficiency of the evidence to support them are, in effect: (1) That the Ventura Lodge is a charitable institution and its funds devoted exclusively to charity; (2) that the lodge is competent under the laws of the state of California to receive bequests of real and personal property; (3) that a thousand dollars was "segregated" by Gries for the purpose of complying with the provisions of the will out of the rents and profits of the lands devised to him, and that this sum has come into the hands of his administrator; and (4) that the claim of the lodge was presented to the administrator of the estate of Gries in the manner required by the provisions of section 1502 of the Code of Civil Procedure. Of these findings, the first is clearly not supported by the evidence; for it appears, without contradiction, that the funds of the lodge are for the exclusive uses of a definite number of members, and that the lodge does not dispense charity to outsiders. The association, therefore, in this regard, differs in no essential respect from an ordinary partnership, or other mutual benefit society; and hence it cannot be regarded as a charitable institution or institution existing for charitable purposes, in the technical sense of the term. 2 Story's Eq. Jur. 1156 et seq.; 2 Pomeroy's Eq. Jur. §§ 1019, 1022; People v. Cogswell, 113 Cal. 129, 136, 137, 45 Pac. 270, 35 L. R. A. 269; Gorman v. Russell, 14 Cal. 535; 1 Bacon's Benefit Societies, § 44. The second of the findings attacked is a mere conclusion of law, and will be correct or otherwise accordingly as we construe it. If it be construed as meaning that an unincorporated institution, such as the Ventura Lodge, can take property in trust or otherwise, as a corporation or quasi corporation distinct from its membership, or hold it as the representative of its fluctuating membership, the proposition cannot be admitted. Blakeslee v. Hall, 94 Cal. 159, 29 Pac. 623. But if it be construed as meaning no more than that the existing members of the association can take under the common name, it cannot be disputed. Grand Grove v. Garibaldi Grove, 130 Cal. 119, 62 Pac. 486, 80 Am. St. Rep. 80. In the present case, as will be seen, the proposition is asserted in the latter sense, and no objection can be urged to it. As to the finding of the segregation of a thousand dollars by Gries, there is no evidence in the record to support it. But the finding is obviously immaterial, unless in connection with the fourth of the findings objected to, which is in effect that the claim of the Ventura Lodge was duly presented to the administrator of Gries' estate; nor in connection with this do we think it is of any materiality. The specific point of objection to the last finding is that the claim was not presented within the statutory time after the publicaton of notice to creditors required by section 1493 of the Code of Civil Procedure, and, as this point is not disposed of by the findings, it may be assumed that the court intended to hold that, under the provisions of section 1502 of the Code of Civil Procedure, all that was required was that the claim should be presented before a recovery could be had. But assuming, for the purposes of the decision only, that the court was wrong in this view, the error is in this case quite immaterial, for here the claim of the lodge is to a definite fund created by the terms of the will and the decree of distribution, and charged upon the real estate allotted to the defendant Gries, which must be regarded in a court of equity as an interest in, or lien upon, specific property. Code Civ. Proc. §§ 1505, 1686. It is therefore not a claim against the estate in the sense of the term as used in section 1493.

There remains to be considered, therefore, only the objection that the decision of the court is against law, which will require a consideration of the effect of the provisions of the will and of the decree of distribution. With regard to the former, were the subject before us an original question, I would perhaps have no difficulty in allowing the contentions of the appellants, which are (1) That it was the intention of the testatrix that the transfer of the thousand-dollar fund provided for to the Ventura Lodge should be upon the trust that it should be maintained by it as a permanent fund and the income used for the care of the grave of the testatrix, with resulting trust to the successor of the testatrix of so much of the fund as should not be required for this purpose (Civ. Code, § 866; 2 Story's Eq. Jur. 1196, 1196a; 2 Spence's Eq. Jur. 22, 223-4); (2) that it was not intended to confer any interest, beneficial or fiduciary, upon the several members of the lodge, but that the transfer was to be made to the lodge as quasi corporation; and (3) that the trust thus created was void for the double reason: First, that it was in contravention of section 9, art. 20, of the Constitution relating to perpetuities (Estate of Gay, 138 Cal. 553, 71 Pac. 707, 94 Am. St. Rep. 70; 2 Story's Eq. Jur. 1156 et seq.; 2 Pomeroy's Eq. Jur. §§ 1019, 1022; People v. Cogswell, 113 Cal. 129, 136-7, 45 Pac. 270, 35 L. R. A. 269; 1 Bacon's Benefit Societies, § 44) and of sections 847 and 857, subd. 3, of the Civil Code, relating to uses and trusts; and, secondly, because the lodge was not a person competent to take as trustee (Estate of Winchester, 133 Cal. 275, 65 Pac. 475; Estate of Upham, 127 Cal. 95, 59 Pac. 315; Blakeslee v. Hall, 94 Cal. 159, 29 Pac. 623). But here the will has been, as it were, merged in the decree of distribution, which is to be taken as conclusive of the rights of all parties entitled, legally or equitably, to a share of the estate (Code Civ. Proc. §§ 1665-6), and the case must therefore turn upon the construction and effect of this decree. As to this, it may be, and in effect is, contended by the appellant that the person or supposed person named in the decree as distributee, i. e., the Ventura Lodge, is not a person competent to take as trustee, or otherwise, and that this is equally fatal to the validity of the decree as to that of the bequest. But this contention is based upon the assumption that it was the intention of the decree to direct the transfer to be made to the Ventura Lodge as a quasi corporation, and that it was not its intention that the individual members of the lodge should take any interest. But we find nothing in the terms of the decree to justify this assumption. All that is said is that the thousand-dollar fund shall be transferred to the lodge upon the execution of the contract specified, and to give effect to the decree we must suppose that the term "lodge" is used simply as the common name of the members; so that, in effect, the order is that the transfer be made under the common name to the members of the lodge jointly. Grand Grove v. Garibaldi Grove, 130 Cal. 119, 62 Pac. 486, 80 Am. St. Rep. 80; Gorman v. Russell, 14 Cal. 535. Upon any other construction, the decree would be defective in failing to designate any person or persons entitled to share in the estate, which it was essential to the jurisdiction of the court and to the validity of the decree should appear. For under the express provisions of the statute, the jurisdiction of the superior court in distributing the estates of deceased persons extends only to the determination of the persons entitled to distribution, and to give effect to any provision of the decree the designation of such person is essential. In the present case, the lands in question was allotted by the decree to Gries, and, upon the hypothesis we are now considering, without the designation of any other person or persons competent to take as entitled to an interest therein, and upon this hypothesis the directions to Gries as to the disposition of the rents and profits of his lands would be clearly nugatory. We have no alternative, therefore, other than to construe the decree as requiring the transfer of the fund to the members of the lodge jointly under the common name.

Whether it was the intention of the decree that the fund when thus transferred was to be held by the donees in trust for the purpose named in the will, either wholly or in part, is not expressly determined by the decree; but the contrary, we think, is to be inferred. For otherwise the effect of the decree would be to create a perpetuity in contravention of the constitutional provision, which it is not to be presumed was the intention of the court. The decree must therefore be construed as directing an absolute transfer of the fund to the lodge, or rather, under its name, to the members of the lodge, thus leaving in Gries, the owner of the land, no right in the fund, or in its disposition, but merely a right of action for any breach of the contract that might occur. The judgment in the case before us conforms precisely to the decree of distribution as thus construed, and must be construed in the same way, i. e., as directing the fund to be transferred absolutely to the San Buena Ventura Lodge, etc., upon the execution of the contract called for. This is to be understood as directing a conveyance under the common name to the associated members as existing at the date of the decree, and it must be assumed in support of the judgment, either that these were the same members as those existing at the date of the death of the testatrix and at the date of the decree of distribution, or that under the constitution and by-laws of the lodge the present had succeeded to the rights of the former members. Grand Grove v. Garibaldi Grove, supra. Thus far, the judgment conforms to the decree of distribution, and the decision is therefore not against law. The judgment, indeed, might have gone further and placed some conditions or restrictions upon the lodge with reference to the use and disposition of the fund. But, as there is no appeal from the judgment, the questions thus suggested cannot be considered.

I am of the opinion, therefore, for the reasons given, that the order appealed from should be affirmed.

Ex parte PAGE. (Court of Appeal, Second District. California. May 15, 1906.) In the matter of the application of Sherman Page for writ of habeas corpus. Writ denied. Walter J. Trask, Ansel Smith, and Roger S. Page, for petitioner. Rowan Irwin, for respondent.

PER CURIAM. Application for writ of habeas corpus. In this case the justices of the court being unable to concur in a judgment, it is ordered that the writ be denied, and the defendant remanded to the custody of the sheriff.

We concur: GRAY, P. J.; SMITH, J.; ALLEN, J.

SIERRA VALLEYS RY. CO. v. BOCA & L. R. CO. (Court of Appeal, Third District. California. May 22, 1906.) Appeal from the Superior Court, Plumas County; C. E. McLaughlin, Judge. Action by the Sierra Valleys Railway Company against the Boca & Loyalton Railroad Company. From an order modifying an order of injunction, plaintiff appeals. Dismissed. Goodwin & Borden and E. R. Dodge, for appellant. Geo. E. Bates, L. N. Peter, and E. De Los Magee, for respondent.

BUCKLES, J. This is an appeal from an order of the Superior Court of Plumas county modifying an order of injunction. The questions involved in this appeal were determined in the opinion rendered by this court in the case of Boca and Loyalton R. R. Co. v. Sierra Valley Railway Co. et al. (Cal. App.) 84 Pac. 298, and the parties having no further interest in this appeal and upon motion of respondent, this appeal is hereby dismissed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

CALIFORNIA REPORTER

87 PACIFIC REPORTER

149 Cal. 543

ARROYO DITCH & WATER CO. v. BEQUETTE. L. A. 1,634.

(Supreme Court of California. Aug. 13, 1906. Rehearing Denied Sept. 12, 1906.)

1. WATERS AND WATER COURSES—IRRIGATION DITCHES—REPAIR—LIABILITY OF OWNERS—STATUTES.

Where land owners constructed an irrigation ditch, and by custom, prior to the formation of a corporation to operate the ditch, contributed to the cost of maintenance above, but not below their point of diversion, a corporation thereafter organized could not compel a co-owner of the ditch, not a member of the corporation, to contribute to the improvement of the ditch below his point of diversion either at common law or under St. 1889, p. 202, c. 168, declaring that where two or more persons construct a common irrigation ditch, each shall be liable to the other for the reasonable expense of maintaining and repairing it, in proportion to his share in the use of the water, etc.

2. SAME—ISSUES AND PROOF.

Where plaintiff sought to recover defendant's alleged proportionate share of the cost of all improvements on an irrigation ditch, and introduced no evidence of the amount of defendant's share of the cost of the improvements made above defendant's point of diversion for which alone defendant was liable, the court was justified in giving judgment for defendant.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Arroyo Ditch & Water Company against L. L. Bequette. From a judgment for defendant, plaintiff appeals. Affirmed.

Kendrick & Knott and J. H. Ardis, for appellant. John S. Chapman, J. L. Fleming, and Goodrich & McCutchen, for respondent.

SHAW, J. This is an action to recover $364.52, alleged to be due plaintiff as the defendant's proportion of the cost of certain improvements and repairs made by plaintiff to a ditch owned in common by plaintiff, defendant and others. About the year 1869 certain persons, each being the owner in severalty of a tract of land susceptible of irrigation by water to be diverted from the stream now known as the "Old Sam Gabriel River," constructed a dam in the stream for the diversion of the necessary water, and made a common ditch leading from the dam to, or adjacent to, their respective tracts of land, by means whereof they thereafter diverted water from the stream and each used a due proportion thereof on his land for its irrigation and for domestic use. From time to time thereafter other owners of land were admitted to share in the water and in the use of the ditch until the water became appurtenant to an aggregate area of 3,950 acres of land, owned in small tracts, in severalty, by a large number of persons. The main ditch, which became known as the "Arroyo Ditch," was several miles in length from the dam on the river to the lowest tract reached thereby. Some tracts did not abut upon the main ditch, and were supplied through branch ditches, each constructed from the main ditch by the particular persons owning the tracts situate along such lateral. By a common custom, or understanding, among the respective persons interested, each contributed to, or assisted in, the maintenance and repair of the main ditch from the dam down to the point where it passed the lower line of his land, if the land abutted thereon, or down to the point of departure of his particular branch ditch, if his land did not abut upon the main ditch, but did not contribute to, or assist in, such maintenance or repair, below his land or ditch, as the case might be; and each landowner along each branch contributed in like manner to maintain and repair his part of the particular branch ditch upon which he was situated, but did not so contribute to the other branch ditches. By many years' use in this manner, and apparently without any specific or express common agreement, oral or written, except such as would be inferred and implied from their conduct, each owner, respectively, acquired a right to the water, and to the common use of the ditch to convey the water to his land, and a corresponding estate in common in the ditch and in the water diverted from the river thereby; the interest of each being such proportion of the whole as the acreage of his irrigated land bore to the entire acreage irrigated, or considered as entitled to irrigation, by the diverted water. In the course of this process common rights of way for the main ditch were acquired, from time to time, by the users of the water, either by conveyances or prescription, and a compromise was effected with other claimants of water from the river, whereby the parties herein concerned acquired the right, as against the others, to divert for their use a specific proportion of the water of the river. The defendant purchased from the original owner one of these tracts of land, containing 40 acres entitled to the water, and thereby became the owner of an interest in the water and ditch; his interest being such proportion of the whole as 40 is to 3,950.

For convenience of management, the owners of all the irrigated lands, except 622 acres, organized the plaintiff corporation, each taking stock therein proportioned to the number of acres of his irrigated land, and each transferring to the corporation his interest in the water and ditch; the corporation undertaking the obligation to distribute and deliver to its stockholders' land the water to which such land was entitled, and to perform the aggregate obligations of all of its stockholders to maintain and repair the ditch and its branches. The cost of the maintenance and repairs thereafter done by the corporation was raised by assessments upon the stock, from time to time, which were levied uniformly upon all the stockholders alike. The respective owners of the 622 acres, usually known as "outsiders," among whom was the defendant, did not become members or stockholders of the corporation, but each thereafter continued to use his respective share of the water from the ditches, and to contribute to the maintenance and repair of the ditches down to but not below, his own land, in the same manner as before. The defendant's land was situated on a branch ditch known as the "Sand Ridge Ditch" near its junction with the main ditch. This was the first branch ditch leading off from the main ditch. The ditches were ordinary open ditches, constructed in the earth, such as were in ordinary use for the distribution of water. The soil was dry and, in some places, light and sandy, in consequence whereof a considerable part of the water was lost by seepage and absorption in transmission to the lands. Defendant's land was near the head of the ditch and his loss from this cause was comparatively small, but the loss to the more remote lands was very great, so much, in fact, that at times, according to the evidence, the entire flow would be lost in that way before it would reach lands situated at the lower end of the ditch. This loss was not due to the bad condition or lack of repair of the ditch and its branches, but to the nature of the soil, and, at the time of the improvements made by the plaintiff, was not greater than it had been usually ever since the ditch was first constructed. To prevent this loss and save the water for the users, particularly those situated toward the lower end of the ditch, the plaintiff corporation built a wooden flume over 5,000 feet long, above the defendant's land, connecting it with the main ditch at each end, and also cemented the sides and bottom of parts of the main ditch and its branches, including a part of the Sand Ridge ditch; the aggregate length of such cement work in all the ditches amounting to several miles. Since this work was done the water has been carried through this flume and through the ditches thus cemented, and has been received by the interested parties in the same proportions as before.

The entire cost of these improvements made by the plaintiff was $35,997.24, and the defendant's proportion thereof, computed according to his interest in the water diverted in common from the river, that is, as 40 to 3,950, would be $364.52. The length of the cement work above and across defendant's land is less than half a mile, while its length below his land is more than three miles. The court does not find the distances more exactly. The defendant derives no benefit from the cement work below. The cost of the entire cement work was $31,880.99. One-seventh of this, or $4,550.14, together with the cost of the flume, $4,146.25, aggregating $8,696.39, comprise all the expense for work on and above the defendant's land. This assumes that the expense of the cement work was uniform throughout the course of the ditches, and nothing appears to the contrary. The defendant's pro rata share of the above sum of $8,696.39 would be only $88.06. The plaintiff sues for $364.52, being, as stated, his share of the whole cost of the work both above and below his land. The water has never been distributed among the respective owners by giving to each a continuous flow of a small stream, proportionate to his undivided interest in the stream diverted from the river. The division has always been effected by the method of delivering to each owner in his turn, beginning with those nearest the dam, a stream of water designated as a "head," for a certain number of hours; the time being regulated in proportion to the amount of his interest, until all were served in turn, and by repeating the process throughout the irrigating season. When the water was low the stream constituted but a single head. If the flow was sufficient, it was divided into from two to three heads, according to the volume of water available, and each head was delivered to a different owner. The defendant was the third person entitled, in order, at the beginning of a turn. Although it is not expressly stated, it is nevertheless plain from the facts found, that this method of division, if it was not originally specially agreed upon, has been continued so long that it has become part of the right of each owner of an interest in the water. Since the cementing of the ditch and the building of the flume, the defendant has received, and claimed the right to receive, his "head" of water for the same number of hours in each "turn" as before, although the effect of the flume and cement has been such that he has thereby received a substantially larger quantity of water than before; the amount of the increase being indeterminable from the evidence. The defendant did not consent to the making of the improvements. He was not asked to assist in the work, but was previously informed by the plaintiff that it proposed to make the improvements, and was asked to pay his share of the expenses. His situation is such that he cannot obtain the water at all except through the improved ditch.

The contention of the plaintiff is that, although plaintiff was under no compulsion, as a common owner, to make the improvements for the preservation of the common property; that is, of the portion previously lost by absorption in dirt ditches, and had no legal right to compel contribution in advance thereto by the defendant, or to force him to increase the amount of his water supply by those means, and although the defendant has the undoubted right to continue to demand and receive his full supply of water through the improved ditches, without contributing at all to the cost of the improvement, he is thus compelled to use for that purpose, nevertheless, if he knowingly claims and receives the additional amount of water which the improved ditch carries to his land; that is to say, that portion of his share of the water diverted at the dam which would have been lost by absorption before reaching his land if the improvements had not been made, he thereby assents to and ratifies the action of the plaintiff in the construction of the improvements and becomes bound to pay his proportionate share of the cost thereof. In support of this proposition the plaintiff cites the case of Stockwell v. Mutual L. I. Co., 140 Cal. 201, 74 Pac. 21, 98 Am. St. Rep. 25, in which case it was held that if one of several beneficiaries in a life insurance policy, who desires to preserve the policy from forfeiture, is compelled to pay the whole of the premium in order to do so, and the policy thereafter becomes due, the other beneficiaries cannot share in the proceeds thereof without paying to him their proper share of the premiums paid to prevent forfeiture.

No exception can be taken to the just and equitable rule laid down in that case. If the plaintiff's conduct and cause of action came within its terms its case would be impregnable. There are, however, vital differences. The court finds that a large proportion of the saving of water occurs in the branch ditches not used by the defendant, and in the main ditches below the defendant's land, and that the defendant had water sufficient for his land without the saving caused by the improvements. The defendant, of course, cannot share in or receive any benefit from the saving made after the stream passes his land, unless he takes it out below and uses it elsewhere. It is not shown that he does so, nor that he desires to do so, nor that he claims any such right. On the contrary, his claim is limited to the flow of the usual "head" for the usual number of hours in regular order, and the court finds that his acceptance of the benefits of the increase in the flow produced by the improvements, "has been because of his inability to obtain any water otherwise" than through this ditch. Thus, although the defendant has participated only in the saving made above his land, the demand of the plaintiff is not limited to a due proportion of the cost of the improvements made upon that portion of the ditch, the improvements which caused the saving in which alone he shares, but extends to and includes his regular pro rata share, according to his relative acreage, of the entire expenses of the whole improvement, at least three-fourths of which expense was for cementing ditches below his land, in which saving he has no interest, and from which he neither receives nor claims any benefit. This demand does not come within the principle invoked by the plaintiff. The principle is founded upon natural justice and equity—the proposition that he who claims a share in a benefit produced by the act of another, should pay a like share of the expense by which the benefit was secured. It would not justify a charge for a proportion of the whole expense of a work in a case where only a small part of the work was of use to the party charged, and where he neither received nor claimed the benefit accruing from the remainder. The same equitable principle which would impose the charge in a proper case, so far as the work was beneficial, would deny the validity of a charge as to that part of the work which was for the exclusive benefit of others. There was no evidence by which to correctly apportion the amount of the charge to the benefit actually claimed and received by the defendant. The estimates above made were based on the assumption that both the saving and the expense were uniform throughout the course of the ditch. Upon this point there was no evidence and the court makes no finding. The case was not tried upon the theory that there might be a partial recovery of the amount claimed, but upon the proposition that, as the defendant was a part owner in the whole, he was, consequently, chargeable with his proportion of the whole expense if he claimed and received the benefit of any part of the work, and regardless of the fact that a large part of the expense was for work which he did not use and was made to save water in which he did not share and the previous loss of which did not injure him. Hence, the proof was not directed to the proposition of a charge to the defendant limited to his proportion of the expense of that specific part of the work which was shown to be of benefit to him. Conceding, therefore, that the facts and law would justify some recovery by the plaintiff, it would be necessary for it, in order to maintain its case, to produce evidence from which the court could ascertain the amount for which the defendant would be liable. Having failed to do this, the court was justified in giving judgment for the defendant.

In view of the specific facts found, showing that the defendant neither has nor claims any beneficial use whatever of the part of the ditch or its branches situated below his land, the general preliminary statement that he is the owner of the stated interest as tenant in common in the "ditch and its branches, known as the 'Arroyo Ditch,'" cannot be taken according to its full meaning. He may have some sort of a title to that part of the ditch, but if so it is not derived from the prescriptive use by which the right to the ditch and water was originally acquired, and its origin must be ascribed to the inaccurate phraseology of a subsequent judgment between the interested parties, introduced in evidence, whereby the undivided interest of each party in the Arroyo ditch was determined, or perhaps to a misapprehension of the legal effect of that judgment. At all events, the specific facts found and amply supported by the uncontradicted evidence, conclusively show that if the defendant has any title to the ditches and water below his land, it can be nothing more than a barren legal title, without any beneficial use or right whatever, a title which, of itself, would raise no implied promise to pay for improvement made thereto without his consent. It is further asserted that the defendant is liable under the provisions of the act of 1889 relating to tenancies in common in waters. St. 1889, p. 202, c. 168. In substance that act provides that where two or more persons construct a common ditch and use the same for the irrigation of their lands, each shall be liable to the other for the reasonable expense of maintaining and repairing the same in proportion to his share in the use of the water, and that if either neglects, after demand in writing, to pay his proportion of such expenses, he shall be liable therefor in an action by the party who has paid the sum with 2 per cent. interest from the time such demand was made. To this claim what we have heretofore said is a sufficient answer. Conceding, for the purposes of argument only, that the fluming and cementing done could, under the circumstances, be classed as "maintaining and repairing," the plaintiff has no case; for it asks contribution to the cost of work done chiefly on a part of the ditch of which defendant has no beneficial use, and by which he is not benefited, and the evidence furnishes no means of ascertaining separately the cost for which, if any, the defendant might be held liable under that statute.

It is claimed that some of the other findings are conflicting with each other, and that others are contrary to the evidence. We do not think it necessary to discuss these points at length. We have examined the findings and have read the evidence with some care, and we are satisfied that the findings can be easily reconciled with each other and that there is sufficient evidence to support all the material facts in issue.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

149 Cal. 487

In re DEAN'S ESTATE, (Sac. 1,423.)

(Supreme Court of California. July 26, 1906. Rehearing Denied August 23, 1906.)

1. DISMISSAL AND NONSUIT—APPEARANCE—NOTICE.

A court should not dismiss an action as authorized by Code Civ. Proc. § 581, subd. 3, for plaintiff's failure to appear on the trial except on proof of the service of five days' notice of trial required by Code Civ. Proc. § 594.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 150-152.]

2. Appeal—Prejudice—Presumptions.

Where, on direct appeal from a judgment of dismissal, it affirmatively appears that the dismissal was made without any showing to the court of notice to plaintiffs of the time of trial or waiver of such notice, prejudice would be presumed, and the judgment of dismissal reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4038, 4045, 4046.]

3. Trial—Notice.

Trial of a will contest was fixed for November 14, 1904, at which time a motion for continuance was granted on payment of costs, and an order made continuing the case for trial to February 7, 1905. On January 13, 1905, defendants gave notice of an application to be made on January 23d, for an order for additional security for costs, which order was granted on January 24th, and stayed all proceedings until the undertaking was filed, and directed the filing thereof within 10 days. No order was thereafter made resetting the case for trial, and no notice was given as to the time of trial, which was moved by defendants on February 7th. *Held*, that the order for additional security for costs vacated the order setting the case for trial on February 7th, so far as to require that the matter be again set for trial, or the giving of a new notice of trial.

4. Costs—Security—Time to File.

Where, after a will contest had been set for trial, contestants were ordered to give additional security for costs, a provision of the order requiring such security to be furnished within 10 days was ineffectual for any purpose, contestants being entitled by Code Civ. Proc. §§ 1036, 1037, to 30 days, after the making of the order within which to comply therewith.

5. Trial—Notice.

Where contestants in a will contest were directed to give additional security for costs, and all proceedings including the trial were stayed contestants complied with the order, which they were entitled to do within 30 days, the giving of the undertaking by their coplaintiff before the expiration of such time, and on the day the case had been previously set for trial, did not justify a trial and dismissal of the proceedings on that day for contestant's failure to appear, without a further notice of trial.

6. Appeal—Judgment—Record—Affidavits.

An affidavit of one of defendant's attorneys, used on the hearing of a motion to set aside a judgment of dismissal, constitutes no part of the record on appeal from the judgment, and cannot be considered thereon, though properly authenticated.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2394-2396, 2408.]

7. Dismissal and Nonsuit — Validity — Subsequent Acts.

Where a will contest was erroneously tried and dismissed in contestant's absence and without proper notice of trial being given contestants, it was immaterial that after submission of the motion to dismiss, and prior to the actual dismissal, the judge asked one of contestant's attorneys whether he had notice of the motion to dismiss, and desired to take any steps thereunder prior to the ruling, and that the attorney replied that he would not do anything in the matter at present.

8. New Trial—Motion—Scope of Remedy.

Where a will contest was dismissed for contestant's failure to appear, and no trial of the issues of fact was ever had, the case was not one for a motion for a new trial.

9. Appeal — Exceptions, Bill of — Affidavits—Incorporation.

In order to make a record of a showing by affidavits sufficient to establish error in the decision of a motion on which affidavits were or could have been used, the affidavits used and the evidence taken on the hearing, must be authenticated by being incorporated in a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2416.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Contest of the will of Thomas Claiborn Dean, deceased. From an order or judgment of dismissal, and from an order refusing to vacate such order and grant a new trial, contestants prosecute separate appeals. Reversed.

James T. Boyd, A. N. Salisbury, E. D. McCabe, B. F. Fowler, and J. W. Knox, for appellants. F. W. Henderson, for respondent.

ANGELLOTTI, J. These are two separate appeals on one transcript; the first taken April 11, 1905, from an order or judgment of dismissal (made February 11, 1905) of certain proceedings instituted for the revocation of the probate of a document purporting to be the last will of deceased, and the second, taken June 6, 1905, from an order refusing to vacate said order or judgment and grant a new trial (made May 29, 1905). The dismissal was granted on motion of the defendants upon the ground that the plaintiffs failed to appear on the trial. The appellants are all of the 23 contestants, except one, Nathan Morrison, who, at the time the matter was called for trial, was represented by separate attorney, appeared at the time set for the trial, and there practically abandoned his contest. Originally there were two groups of contestants, one of 21, including Morrison, represented by one set of attorneys, and the other of two, represented by another set of attorneys. Whether or not the lower court erred in giving judgment of dismissal must be determined solely in the light of the facts shown by such papers in the transcript as may properly be held to constitute a part of the judgment roll and the settled bill of exceptions. Certain affidavits contained in the transcript, purporting to have been subsequently filed and used on the motion to set aside the judgment and grant a new trial, which affidavits are not contained in any bill of exceptions, cannot, of course, be considered in the determination of such question.

Most of the plaintiffs were nonresidents of the state of California. By the bill of exceptions settled for use on appeal from the judgment, the following facts appear: Prior to answers filed, a demand that plaintiffs give security for the costs and charges that might be awarded against them, as provided by section 1036 of the Code of Civil Procedure, was regularly served and filed, and plaintiffs subsequently regularly complied with this demand. Issues of fact having been joined, a demand for a trial by jury was regularly made by defendants, and November 14, 1904, was fixed for the trial of the contests. At the last-named time, a motion of plaintiffs for a continuance on the ground of absence of plaintiffs and witnesses was granted on payment of certain costs, and an order was made continuing the trial to February 7, 1905, at 10 o'clock a. m. On January 13, 1905, defendants gave notice of an application, to be made on January 23, 1905, for an order for an additional undertaking in the sum of $1,500, as security for costs, and for a stay of proceedings until the same should be given. This application having come regularly on for hearing, the court, on January 24, 1905, made an order: First, requiring plaintiffs to file such an additional undertaking in the sum of $300; second, staying all proceedings until such undertaking was filed; and, third, directing that said undertaking be filed within 10 days. The attorneys for plaintiffs notified the court that it would be necessary for them to have 30 days within which to file such undertaking, on account of the absence of their clients from the state, and claimed that they were entitled to such 30 days under the provisions of section 1037 of the Code of Civil Procedure. No order was made on January 24, 1905, or subsequent thereto, relative to the time of trial of said contest, and no notice was ever given to appellants at or subsequent to the proceedings of January 24, 1905, as to the time of trial. On February 6, 1905, one J. J. Griffin was regularly substituted as attorney for plaintiff Nathan Morrison, who had hitherto been represented by the attorneys for the group of 21 contestants, and who appears to have been a resident of California. On February 7, 1905, at 10 a. m., said plaintiff Morrison filed the necessary additional undertaking. This was filed without any notice to any of the other plaintiffs or their attorneys, and none of them knew anything about his intention to file the same or about the filing until after the submission of the motion to dismiss. At 10:10 a. m. on February 7, 1905, the proceeding was called for trial by the court. None of the plaintiffs or their attorneys were present, except Morrison and his attorney. When the matter was called, defendants answered "ready," as did plaintiff Morrison, who further stated that he had no evidence to offer. Defendants, having shown to the court that the additional undertaking had been filed that morning, moved that the proceeding be dismissed for failure on the part of the plaintiffs to appear at the time set for the trial of the cause. No proof whatever was made as to any notice given to appellants as to the filing of the undertaking by Morrison, or as to any intention on the part of defendants to ask for the trial of the contest at that time. The court thereupon ordered the matter submitted, and, subsequently, on February 11, 1905, made its order granting the motion, whereupon the clerk of the court noted said order on his register of actions.

Other facts, such as that the trial of another case was actually in progress before the court on February 7th, at the time this case was called for trial, and that, although a jury had been demanded, no jury had been summoned or was in attendance, and that no witnesses were in attendance, also appear; but these facts would probably be material only on a subsequent motion to relieve from the judgment on the ground of surprise, inadvertence, and excusable neglect. The facts already stated are the only matters shown by the record that are material in determining as to the correctness of the action of the lower court in giving judgment of dismissal. Section 594 of the Code of Civil Procedure provides: "Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial." A court should not dismiss an action under subdivision 3 of section 581 of the Code of Civil Procedure, for failure of the plaintiff to appear on the trial, except upon proof made in compliance with the above quoted proviso of section 594 of the Code of Civil Procedure, designed to prevent the manifest injustice of dismissing a party's action, or trying it in his absence, because of his failure to appear at a time at which he could not be held to have had notice that the trial would be had, or that any proceeding would be taken against him. When upon direct appeal from the judgment of dismissal, it affirmatively appears that such a dismissal has been had against a party, without any showing having been made to the court of notice had by such party of the time of trial, and waiver of such notice on his part is not shown, it seems clear that the judgment of dismissal is erroneous, and should be reversed. In the absence of a showing to the contrary, such an error must be deemed prejudicial.

We are not here concerned with the question as to what would constitute a sufficient notice, or sufficient proof of such notice, to authorize a court to proceed to a disposition of a cause in the absence of a party. Here there was no notice whatever other than that afforded on November 14, 1904, by the order continuing the trial, on motion of plaintiffs, to February 7, 1905, at 10 o'clock a. m.

If it were not for the subsequent proceedings had in January, 1905, this order, made on motion of plaintiffs, would undoubtedly be held effectual to dispense with further notice of the time therein designated. But we are satisfied that it must be held that the subsequent order of January 24, 1905, made on the motion of defendant, practically vacated the order fixing February 7th for trial, so far as the same could be held to operate as notice to appellants that the trial would then be had, and left the matter either to be again set for trial when the undertaking required was given, or triable at the original date only upon new notice showing that a trial would then be had or insisted on by the defendants, who had procured the stay of the proceedings. Under the provisions of sections 1036 and 1037, plaintiffs had 30 days from the making of the order of January 24, 1905, within which to give the additional undertaking thereby required, and the direction in such order that such undertaking be given within 10 days was ineffectual for any purpose whatever. Under said sections, a failure on the part of plaintiffs to give the additional undertaking within 30 days would warrant the dismissal of the proceedings, and this was the only penalty prescribed by law for a failure to give security. By the order made, in accord with the demand of defendants and in strict accord with the provisions of section 1036 of the Code of Civil Procedure, all proceedings including the trial, were directed to be stayed until plaintiffs should give such additional undertaking. Plaintiffs were thus notified by the express terms of the order of the court, that if compliance with said order for additional security was insisted on by defendants, which, in the absence of notice to the contrary, they had the right to assume would be the case, no trial could be had until they gave the additional undertaking, the giving of which might legally be deferred, and so far as appellants are concerned was deferred, until long after the time originally fixed for trial. Under such circumstances, it appears too clear for question that these appellants cannot be held to have had any notice that the trial would or could be had on February 7, 1905. Not having themselves given the required undertaking, having no notice that their seceding resident coplaintiff intended to pursue the most remarkable course of assuming the burden for them and giving such bond, in order that the stay directed might be avoided and judgment given against them, and having no notice that defendants would waive the benefit of the order they had themselves obtained staying proceedings until given security for costs, they had the right to rely on the order of January 24, 1905; and, so relying, to assume that the trial could not be had at the time originally appointed, and that no proceeding against them would be taken at that time in such matter, without notice. The mere giving of the undertaking by their co-plaintiff Morrison on February 7th was no more effectual in this regard than would have been a waiver at such time by defendants of the benefit of the order requiring additional security. Appellants were entitled to notice of any change in existing conditions which would render a trial of the issues possible. In view of the order of January 24, 1905, the trial court, before dismissing the proceedings for failure of appellants to appear, should have required proof that appellants had notice that the additional security would be waived and a trial insisted on by defendants at the time originally set, or notice that their coplaintiff had given such an undertaking as would make a trial possible under the terms of that order. The record on appeal from the judgment of dismissal shows that no such proof was made to the court, and also fails to show that appellants had any such notice in fact.

We are not unmindful of the fact that in an affidavit of one of defendants' attorneys, said to have been used on the hearing of the motion to set aside the judgment of dismissal, it is stated that appellants did have notice that defendants would, if such undertaking were not filed by February 7th, at 10 o'clock a. m., waive the additional security, and insist upon a trial, but this affidavit, as already stated, constitutes no part of the record on appeal from the judgment, and it cannot be considered thereon, even if it were properly authenticated. The statement in the bill of exceptions to the effect that within a day or two after the submission of the motion to dismiss, and prior to the actual dismissal, the judge of the trial court asked one of the attorneys for one group of contestants whether he had notice of the motion to dismiss, and whether he desired to take any steps therein prior to the ruling of the court thereon, and that the attorney replied that contestants would not at the present time do anything in the matter, but would simply let it stand as it was, is entirely immaterial. Whether or not the dismissal should be granted depended upon the facts existing and the showing made at the time of the making and submission of the motion, and plaintiffs were not required by this subsequent notice from the judge to take any proceedings in order to save their legal rights. If the motion made and submitted without notice, and in their absence, was erroneously decided, they could then take such proceedings as the law afforded them for a review of such decision. The statement of the attorney to the judge was nothing more, in effect, than a statement that appellants would stand on their legal rights.

In view of our conclusion that the judgment of dismissal must be reversed, it is unnecessary to consider the appeal from the subsequent order refusing to vacate the judgment and grant a new trial. Of course, in view of the fact that no trial at all had been had of the issues of fact, and the proceeding had been dismissed without any trial for failure of appellants to appear, the case was not one for a motion for a new trial, and so far as the motion made was one for a new trial, it was undoubtedly properly denied. It is possible, however, that the motion made be properly considered as having been partially for relief under section 473 of the Code of Civil Procedure, on the ground of excusable neglect, surprise, etc. Whether it could be so considered, and whether the showing made on the hearing of the motion was such as to require the lower court to grant the relief sought, are, as already said, immaterial, in view of our conclusion upon the appeal from the judgment. In respect to that showing, it is, however, proper to note that affidavits printed in the transcript and claimed to have been used on the hearing, are not incorporated in any bill of exceptions, and some of them are not even indorsed by the judge as having been used on the hearing. It has several times been pointed out by this court that, in order to make a record of a showing by affidavits sufficient to establish error on the part of the lower court in the decision of a motion upon which affidavits were or could have been used, in the face of the presumption of correctness and regularity which attaches as to the action of lower courts upon such motions, the affidavits used and evidence taken on the hearing below must be authenticated by being incorporated in a bill of exceptions. The indorsement of the judge on certain affidavits, to the effect that the same were used on the hearing is not sufficient, for it does not show or raise any presumption that such affidavits constituted all the affidavits used and evidence taken, and the presumption in favor of the order is that other affidavits and evidence were received on the hearing, sufficient to support the order made. The only way by which this presumption can be overcome is by a bill of exceptions purporting to show all the material evidence received, whether by affidavit or otherwise. Rule 29 of this court (78 Pac. xii), in terms, requires that "in all cases of appeal to this court from the orders of the superior courts, the papers and evidence used on the hearing of the motion must be authenticated by including the same in a bill of exceptions, except where another mode of authentication is provided by law." There is no other mode provided by law for the authentication of affidavits used on the hearing of such a motion, as was here made. See Skinner v. Horn 144 Cal. 278, 77 Pac. 904; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522. It devolved upon plaintiffs appealing from the order denying their motion, to have settled a bill of exceptions showing the evidence taken upon the hearing of such motion.

The judgment or order of dismissal appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

(149 Cal. 485)

In re DAVIS' ESTATE. (Sac. 1,475.)

(Supreme Court of California. July 26, 1906.)

1. ADMINISTRATORS—APPOINTMENT—CONCURRING JURISDICTION—ATTACHMENT.

Where a nonresident died, leaving property in two or more counties, the public administrator of the county first filing a petition in the superior court for administration of the estate is entitled to appointment, precluding a court of another county from taking jurisdiction.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 24, 132–140, 177.]

2. SAME—APPOINTMENT—RIGHT TO CONTEST.

Where the superior court of a county appointing a public administrator as administrator of the estate of a nonresident had no power to appoint him because proceedings had been previously instituted for the appointment of another in another county, the administrator so illegally appointed was not a party in interest entitled to oppose the appointment of an administrator in the county in which jurisdiction had attached.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 95.]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Contest between the public administrator of Tulare county and the public administrator of Fresno county to determine which of the two was entitled to administer on the estate of Jane Davis, a nonresident deceased person. From a judgment in favor of the public administrator of Tulare county, the administrator of Fresno county appeals. Affirmed.

Everts & Ewing, M. F. McCormick, Truman & Oliver, and Bishop, Wheeler & Hoefler, for appellant. Carter P. Pomeroy, Hannah & Miller, Herman O. Miller, and Frank H. Short, for respondent.

SLOSS, J. As stated by the appellant in his brief, "this action is a contest, simply, between the public administrator of Tulare county and the public administrator of Fresno county as to which one has the better right, under the existing circumstances, to administer the estate." The decedent was a resident of the state of New York, and left estate in various counties of this state. The appellant, Chittenden, the public administrator of Fresno county, appeals from an order of the superior court of Tulare county appointing the respondent, Dungan, the public administrator of Tulare county, administrator of the estate. The appellant had theretofore been appointed as administrator of the same estate by the superior court of Fresno county, although his petition for appointment was filed several days later than Dungan's petition in Tulare county. The appellant's main contention is that the superior court of Fresno county, having first heard and passed upon an application for letters of administration, had sole and exclusive jurisdiction of the estate, and that the superior court of Tulare county was without jurisdiction to make the order appealed from. The facts concerning the proceedings in the two courts appear more fully in the opinion of this court in Dungan v. Superior Court (Cal.) 84 Pac. 767, which was a controversy between the same parties, and raised the same point here involved. It was there held that "jurisdiction in such matters attaches upon the filing of the first petition, to the superior court in which the petition is filed, and continues during the pendency of the proceeding thus instituted, and that this jurisdiction is exclusive, precluding any other court from effectually acting in the matter." That ruling is conclusive against the appellant's argument as to jurisdiction.

If, then, the superior court of Fresno county had no power to appoint an administrator, pending the proceedings in Tulare, the appellant had no interest in opposing the appointment of another in Tulare county. He was not himself an applicant for letters in the latter county, but was merely opposing any action by the court. In view of the determination that the Tulare county court had the power to appoint, the appellant, who did not himself seek appointment, is not affected by the grant of letters to any one else. He was not a "person interested," and had no standing to oppose Dungan's appointment. Code Civ. Proc. § 1374. It is, therefore, unnecessary to consider the point urged that the court below was without power to appoint an administrator except upon probate of the will said to have been left by the decedent.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

149 Cal. 540

OLDHAM v. RAMSNER et al. (Sac. 1,412.)

(Supreme Court of California. Aug. 13, 1906.)

1. Quieting Title—Evidence—Admissibility.

In a suit to quiet title to certain numbered lots in M.'s addition to the city of S., lying without the city, a tax deed to lots so numbered in M.'s addition "* * * lying within the city," and showing the assessment to have been against such numbered lots in M.'s addition "lying within the city," was inadmissible, there being nothing on the face of the description tending to show any error in description, and the courts not being able to take judicial notice that there was no M.'s addition within the city.

2. Trial—Evidence—Offer of Proof—Purpose of Admission.

Where, in a suit to quiet title, defendant offered a tax deed, which, on its face, did not embrace the land in controversy, its exclusion was not error on the ground that it should have been admitted for the purpose of allowing him to show other facts to make certain the description, or by way of estoppel, where, in offering the deed, he did not state any such intention or offer any such additional evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 118.]

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Suit by Florence B. Oldham against John L. Ramsner and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant Alonzo Hewlett appeals. Affirmed.

Joshua B. Webster and Charles H. Fairall, for appellant. Buck, Miller & Clark and Miller & Clark, for respondent.

ANGELLOTTI, J. Plaintiff instituted this action to quiet her title to certain land, and obtained judgment, and defendant Hewlett appeals from such judgment, and from an order denying his motion for a new trial.

The land involved in this action is all of the land situated in San Joaquin county, state of California, particularly described as follows, to wit: All of lots numbered 9 and 10 in block C in McCloud's addition to the city of Stockton, according to the official map or plat of said McCloud's addition to the city of Stockton, on file in the office of the county recorder of the county of San Joaquin, state of California. It was admitted that this property was a part of the school district containing the city of Stockton, and was assessed by said city for school purposes for the year 1900, but that it was wholly outside of the corporate limits of said city of Stockton. Upon the trial, plaintiff showed ownership of this property in one Mary E. Baright, and then introduced in evidence a deed of conveyance thereof from said Mary E. Baright to her, executed and recorded prior to the commencement of the action. Appellant's sole claim was that he acquired the title of said Mary E. Baright to said property, under a tax sale thereof made by the city of Stockton based upon an assessment for school purposes for the year 1900. For the purpose of showing this he offered in evidence a tax deed from the tax collector of the city of Stockton to one John L. Ramsner, proposing to follow this with a deed from Ramsner to himself. The plaintiff's objection to the introduction of this deed was sustained, and the only question presented by this appeal is as to the correctness of this ruling.

Several points are made by plaintiff in support of this ruling, but it will be necessary to consider only one. According to the deed, the land sold by the tax collector at the tax sale and conveyed by said deed was described as follows, viz.: "Lying and being within the said city of Stockton, county of San Joaquin, state of California, described as follows, to wit: Lots nine (9) and ten (10), block C in McCloud's addition." Upon the face of the deed, it further appeared that the assessment upon which the deed is based was of land lying "within the city of Stockton," and that the only other description thereof in the assessment was: "Lots nine (9) and ten (10) block C in McCloud's addition." It is claimed by plaintiff, that this deed did not purport to convey the land described in the complaint and involved in this action, and we are of the opinion that this claim must be held good. It appears very clear that the deed did not, upon its face, refer to or purport to convey any of the land in controversy. That land lay wholly without the city of Stockton, while the deed was plain to the effect that the land assessed, sold and thereby conveyed was within said city. The remainder of the description is not such as to warrant the rejection of the words "lying and being within the said city of Stockton" as a superfluous recital, or the substitution of the word "without" for the word "within." There is absolutely nothing on the face of the description given in the deed from which it can be concluded that there is any error in such description, or that the same does not correctly describe property in the city of Stockton. It is entirely within the possibilities that there may be a "McCloud's addition to the city of Stockton" without the city, and a "McCloud's addition" within the city, and we cannot take judicial notice that this is not the case. Under the plain and explicit words of the deed, the only land assessed by the assessor, sold by the tax collector, and conveyed by the deed. was certain land lying within the city, and we are not at liberty, in plain disregard of these words, to construe the description as including only lands lying outside the city. To so do would be to include in the deed land not now affected thereby. It is, of course, not disputed that no right can be asserted under a tax deed, except as to such property as is described therein.

It is claimed that, admitting the description to have been insufficient, the deed should still have been admitted, for the purpose of allowing appellant to show other facts "to make certain the description of the land, or by way of estoppel," such as that the property in controversy was commonly known in the community in the way it was described in the deed; that there was only one McCloud's addition in the county; that the owner made the return to the assessor and is estopped; and that taxes of former years had been levied by the same description, and had been paid. In regard to this claim, it is sufficient to say that, if it be assumed that any such evidence would have been admissible, appellant did not offer the same, or even state to the court, in connection with his offer of the deed, his intention to so do, though one of the specific objections made to the deed was that it did not purport to convey any of the property described in the complaint, but only property within the city of Stockton. Appellant simply offered a deed which, upon its face, did not refer to any of the land in controversy, and which, therefore, was not admissible, in the absence of other evidence showing its relevancy to the issues. In view of what we have said, the trial court did not err in excluding from evidence the deed from the tax collector to Ramsner. There was, of course, no error in refusing to admit the deed from Ramsner to plaintiff, for the deed from the tax collector being refused admission, there was nothing to show any title in Ramsner.

The judgment and order are affirmed.

We concur: SLOSS, J.; SHAW, J.

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149 Cal. 556

ESTUDILLO et al. v. SECURITY LOAN & TRUST CO. OF SOUTHERN CALIFORNIA et al. (L. A. 1,434.)

(Supreme Court of California. Aug. 16, 1906.)

1. PLEADING — DEMURRER — AMENDMENT — ORDER.

Where a demurrer was amended, it superseded the original demurrer, so that an order subsequently entered providing that the demurrer be sustained and time given to amend the complaint related to the demurrer as amended.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 816–818.]

2. EVIDENCE—JUDICIAL NOTICE—FORMER ADJUDICATION.

On appeal from an order sustaining a demurrer to a complaint in a suit in equity to set aside a judgment, judicial notice could not be taken of the record on an appeal from an order denying a motion to set aside such judgment between the same parties.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 62–65.]

3. JUDGMENT — VACATION — FRAUD — REMEDIES —EQUITY SUIT—MOTION.

Where a foreclosure decree was taken against plaintiffs for an excessive amount, by means of a fraudulent and collusive agreement between plaintiffs' attorney and the attorney for the holder of the mortgage, plaintiffs were entitled to maintain a separate suit in equity to vacate such judgment, though they had notice of its entry and of fraud in its procurement in time to have moved to set the same aside on affidavits, as authorized by Code Civ. Proc. § 473.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 768–771.]

4. SAME—RES JUDICATA.

Where the plaintiffs moved to set aside a judgment against them on the ground of want of authority in their attorneys to stipulate for judgment, the overruling of such motion was no bar to a subsequent suit in equity to vacate the judgment as entered under a fraudulent and collusive agreement between plaintiffs' attorney and the attorneys for the holders of the mortgage.

5. SAME—LACHES.

The period of limitation for actions for relief on the ground of fraud being three years from the discovery of the fraud, a suit to vacate a judgment for fraud brought less than two years after its commission was not barred by laches.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 863–866.]

6. SAME—CONDITIONS—ABILITY TO REFUND.

The ability of certain mortgagors to pay the amount found due on an accounting was not a condition to their right to maintain a suit to vacate a foreclosure decree collusively and fraudulently entered for an amount largely in excess of that due.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 853.]

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Suit by Francisco Estudillo and another against the Security Loan & Trust Company of Southern California and another. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

J. F. Conroy, for appellants. R. H. F. Variel and John G. North, for respondents.

BEATTY, C. J. The plaintiffs, who are husband and wife, mortgaged certain lands to secure an indebtedness to the defendant loan and trust company, a corporation. Under a judgment of foreclosure, entered upon their default, the mortgaged premises were sold to the corporation by its codefendant, Keefe, acting as special commissioner under the decree. The object of the present action is to obtain a decree vacating the foreclosure sale, canceling the certificates and deeds executed and recorded in pursuance of the sale, requiring the corporation to account for moneys received by it from the plaintiffs and from others to their use, which should have been credited upon the mortgage indebtedness, and for general relief. The grounds upon which this relief is claimed are, first, that the foreclosure decree was fraudulently obtained for an excessive amount; and, second, that the sale of the mortgaged premises was unfairly and illegally conducted by the commissioner acting in collusion with the mortgagee, for the purpose, and with the effect, of discouraging competition of bidders, and thereby enabling the mortgagee to become the purchaser at a price much below the actual value of the lands. The complaint was filed in December, 1900. The defendants first filed a general demurrer for want of facts. Afterwards, but before any action upon that demurrer, they filed, as of course, an amended demurrer, specifying more particularly their objections to the complaint for want of facts, and adding the special objection that several separate and distinct causes of action had been united and combined in the complaint without a separate statement. An order was subsequently entered in the cause in these terms: "It is ordered that the demurrer be sustained and ten (10) days given to amend the complaint." Plaintiffs declined to amend, and judgment was entered dismissing the action. From the judgment so entered plaintiffs appeal.

The first point urged in support of the appeal is that the judgment was erroneously entered because it appears that the only demurrer in the case has never been disposed of. The appellants contend that the amended demurrer superseded the original, and that the order of the superior court is by its terms confined to the original, leaving the amended demurrer still standing as an obstacle to any final judgment. It is true the amended demurrer did supersede the original, and thereby completely disposed of it. The order of the court subsequently entered therefore had nothing to operate upon except the amended demurrer, and is to be construed as sustaining it. This is doing no violence to the terms of the order. A demurrer is none the less a demurrer because it has been amended, and the last amended demurrer in a case, being the only demurrer, is properly designated as "the demurrer." The entry of the judgment cannot be held to have been even irregular, so far as this objection is concerned.

The more serious objections to the judgment remain to be considered, and among these the first in order and importance is the claim that the allegations of the complaint, if true, were sufficient to entitle the plaintiffs to a decree vacating the foreclosure judgment upon the ground that it was procured by fraud. Assuming the truth of what is alleged, there can be no doubt that the decree of foreclosure was procured by a fraud practiced upon the court of a character entitling the plaintiffs to the relief which they are seeking in this action, and the only question is whether their complaint does not also show that they are debarred from any relief in equity by the fact that they had a complete remedy by motion in the foreclosure suit—a proceeding which they took and in which they litigated unsuccessfully the same matters which they are endeavoring to relitigate here. The facts alleged are that plaintiffs borrowed of the loan and trust company $12,675 in May, 1892, giving their note for that principal sum, and also separate interest notes, payable semiannually for a period of three years. To secure the notes they mortgaged a tract of land containing 950 acres, which had been surveyed and platted into lots and blocks as an addition to the town of San Jacinto, in Riverside county. They received in cash only $1,874.44; the balance of the loan being retained by the loan and trust company to satisfy alleged prior liens upon the land. They have never had any account of the application of the moneys so retained, and charge that they were more than sufficient to satisfy the liens. Between the date of the loan and the 25th of October, 1898, plaintiffs paid all the interest notes, and, besides, there had been paid by them and by others for their account various sums, amounting in the aggregate to $9,600, which the corporation has appropriated, and for which it has failed to account. The suit to foreclose was commenced October 22, 1898, and as shown by the default judgment subsequently entered the corporation alleged an indebtedness of nearly $16,000, with interest from May 1, 1898. The sum so claimed was, on any calculation, more than could have been due at that date, after deducting the payments alleged to have been made. These plaintiffs retained an attorney to defend the suit to foreclose, and communicated to him the facts constituting their defense. He interposed a demurrer to the complaint, which was subsequently overruled by his consent; time being allowed to answer. A week before the time to answer expired he signed and filed in the action the following stipulation: "The defendant Francisco Estudillo, and Felicitas Estudillo, his wife, named in said action, having appeared therein by their attorney, Wilford M. Peck, and demurred to the plaintiff's complaint, and said demurrer having been overruled by the above-entitled court on the 8th day of February, 1899, by an order duly entered in the minutes of said court: Now, therefore, it is stipulated and agreed by and between the plaintiff represented by its undersigned attorney, duly authorized thereto, and the said defendants Francisco Estudillo and Felicitas Estudillo, his wife, by their said attorney duly authorized thereto, that said defendants waive the service of notice of overruling of said demurrer, and further waive the right to and refuse to further appear or answer in said action, and that the plaintiff shall be entitled to take judgment in accordance with the prayer of its complaint, or as may otherwise be ordered by the court on the hearing of said cause. Dated February 21, 1899. R. H. F. Variel, Attorney for Plaintiff. Wilford M. Peck, Attorney for said Defendants." On the same day the cause was heard and judgment of foreclosure entered. The mortgage indebtedness according to the complaint and judgment amounted at that date to $18,464.98, to satisfy which and costs the lands were ordered sold. There was besides a personal judgment entered against these plaintiffs for $1,000 attorney's fee. According to the allegations of the complaint in this action, a much smaller sum remained unpaid on the mortgage debt than was found due by said judgment, and the mortgagee must be deemed to have known that it was taking judgment for an excessive amount upon the stipulation of an attorney who was sacrificing the interest of his clients in abandoning their valid defense to a large portion of the claim asserted against them. It is charged, and by the demurrer admitted, that the mortgagee knew prior to the date of the stipulation that said attorney had been instructed to file an answer for these plaintiffs, and that he had no authority to stipulate for a judgment by default. That the stipulation was collusive and fraudulent in fact and in intent is repeatedly charged, and is by the demurrer admitted. These facts so admitted constitute a fraud extrinsic and collateral to the issues in the cause which entitles the plaintiffs to relief in this action unless it shall be held that their sole remedy was by motion in the foreclosure suit to vacate the judgment on the ground of surprise and excusable neglect. Code Civ. Proc. § 473.

The facts relevant to this question are that plaintiffs first learned of the stipulation and subsequent proceedings on the 14th of April, 1899, and immediately discharged their said attorney, and on the 19th of the same month filed a motion to set aside their default and vacate the judgment. This motion was overruled by the superior court June 14th. An appeal from that order was taken to this court, and was still pending when the present action was commenced in December, 1900. The grounds upon which that motion was based are not stated in the complaint, but counsel in their briefs make frequent reference to the report of our decision on the appeal from the order (Security Loan & Trust Company v. Estudillo, 134 Cal. 166, 66 Pac. 257), from which it appears that the whole question mooted was that of the authority of the attorney to make the stipulation. It does not appear from that decision that any question of fraud on the part of the loan and trust company was litigated or involved in that proceeding unless it was necessarily involved in the question as to the authority of the attorney to stipulate. But we are clearly of the opinion that in this case we cannot take notice of the record on that appeal. We are here confined to the facts alleged in this complaint, which merely shows that the motion to vacate was made and overruled, and that an appeal from the order was pending when this action was commenced. It is alleged that the frauds and fraudulent conduct of the defendant corporation were discovered about the 10th of October, 1899, which was more than six months after the entry of the judgment. These alleged frauds consisted, in addition to what is above stated, in inducing the attorney to execute and deliver the stipulation for judgment, and to conceal his unauthorized proceedings in the action, in ignoring the proper description of the lands in the foreclosure judgment, and causing them to be described in the decree and order of sale as nine parcels or tracts, which could not be identified by reference to the recorded map of the premises, in naming the defendant Keefe as commissioner to make the sale, when he was clerk in the office of the corporation's attorney, and in causing him to do and to omit to do various things in connection with the sale in disregard of the rights of these plaintiffs, all with the intent and purpose of enabling the corporation to deprive plaintiffs of their lands.

If the right of plaintiffs to maintain this action depends upon their discovery of the frauds here alleged too late to make them the ground, or one of the grounds, of their motion to vacate the default judgment in the foreclosure suit, it must be held that their complaint does not state facts sufficient to constitute a cause of action. They allege it is true that the frauds of the corporation defendant were discovered about the 10th of October, 1899, but they also allege that they had notice of the judgment and the stipulation upon which it was entered in April, 1899. Necessarily they also knew before that date of their instructions to their attorney to make their defense in the action and of his betrayal of their cause. They knew that the judgment was for an excessive amount and that the corporation must have been aware of the fact when its complaint was filed. They knew how the land was described in the decree, and the manner in which it had been arbitrarily subdivided for the purposes of the sale. They knew that Keefe had been appointed commissioner to make the sale, and what his connection with the corporation's attorney and with the litigation was. In short, they knew all the facts which they now allege for the purpose of showing the fraud, except the fact that the corporation induced their attorney to enter into the stipulation, and to conceal his proceedings. That their attorney was induced by the corporation to consent to the default judgment was a fact necessarily to be inferred from the facts which they knew, and since they discovered his proceedings in time to make their motion, his attempted concealment, whether collusive or not, is a circumstance entirely immaterial here.

We must therefore treat this complaint as showing, not that the alleged frauds were first discovered in October, 1899, but as showing that they were known to plaintiffs at the time they gave notice of their motion to vacate the default judgment. So regarding it, the question presented for decision is whether a party against whom a judgment excessive in amount has been entered upon a fraudulent and collusive agreement between his attorney and the opposing party can maintain a separate suit in equity to vacate such judgment, or enjoin its enforcement when it appears that he had notice of its entry and the fraud in its procurement in ample time to have moved for relief under section 473 of the Code of Civil Procedure. Upon this question there seems to be a conflict of authority in other jurisdictions, and we have not been referred to any decision of this court in a case clearly calling for a determination of the precise point. The general principle that equity will not interfere to vacate or enjoin the execution of a judgment at law when the party aggrieved has a plain, speedy, and adequate remedy by motion to vacate the judgment or quash the execution, or by an appeal, is recognized and applied in many cases, but the question whether a summary motion to be supported by affidavits is an adequate remedy, and therefore exclusive, in a case such as this, has not been directly involved or decided in any of the cases that have come to this court, with the possible exception of California Beet Sugar Co. v. Porter, 68 Cal. 370, 9 Pac. 313. That was a case very much like this, in which the superior court sustained a demurrer to the complaint, and where, on the appeal, respondent contended that the action was not maintainable because the plaintiff had a plain, speedy, and adequate remedy by motion. In response to this objection the court said: "It has been held in Bibend v. Kreutz, 20 Cal. 109, Ketchum v. Crippen, 37 Cal. 223, and Ede v. Hazen, 61 Cal. 360, that so long as the statutory remedy by motion to set aside a judgment exists, the assistance of a court of equity cannot be invoked. But none of those cases involved the question of judgment fraudulently taken against an injured party and executed by a sale of his property." Further on the opinion says: "It is a general rule that if relief be obtainable against mistakes or errors of law or fact committed in a judicial proceeding the statutory remedies for relief must be resorted to in the proceeding itself. But, as the Supreme Court of the United States says in U. S. v. Throckmorton, 98 U. S. 65, 66, 25 L. Ed. 93, 'there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing.'" From all this it would seem that the judgment of reversal in that case was intended to be rested upon a distinction as to the remedy between cases of judgments obtained by fraud of the plaintiff, and judgments suffered by reason of surprise or excusable neglect on the part of the defendant. It is not, however, entirely clear from the report that the question was necessarily involved, though it may have been. But, even if what was said in that case should be regarded as obiter, it is still entitled to respect, and in the absence of direct authority upon the question ought to be followed if no good reason appears for laying down a different rule; and no such reason is suggested. On the contrary, it appears to me to be a salutary rule. The burden of proof rests upon no one more heavily than upon a plaintiff seeking relief upon the ground of fraud, and he ought not to be unduly hampered as to the means of making proof. In support of a motion he is limited to ex parte affidavits of voluntary witnesses unless the court in its discretion permits a wider latitude. In a separate suit he may bring unwilling witnesses into court by subpœna, and he may take their depositions. The remedy is ampler and more efficacious, and the case is one which demands the amplest and most efficacious remedy. My conclusion is that the plaintiffs had the right to maintain this suit, notwithstanding they knew of the frauds alleged in ample time to have moved upon that ground.

But it is objected that they did move, and that their right to have the judgment vacated is res judicata. It does not, however, appear from this complaint that they moved upon the ground of the fraud here alleged, and the report of our decision on the appeal from the order denying the motion shows that it was made upon the ground of want of authority in their attorney to stipulate. The allegations of this complaint do not show that the order denying the motion to vacate is a bar to this action. In Black on Judgments it is said (section 321): "In an action to set aside a judgment on the ground of fraud, neither the judgment thus sought to be vacated nor an order refusing to set aside a default and permit an answer in that case can be set up as a bar to the action." From which it would seem to follow that in such a case as this the correct practice would be to move promptly under section 473 of the Code of Civil Procedure, and, if defeated in that proceeding, to commence a separate action for relief upon the ground of the plaintiff's fraud—a practice to be commended as convenient and expeditious in case the motion should be granted, and as affording the injured party all the advantage of a regular trial of the issue of fraud if the more summary proceeding proved ineffectual. This is the course which plaintiffs have taken, and, if the practice is admissible, they cannot be charged with lack of diligence. They moved promptly for relief in the foreclosure suit, and before that motion was finally decided they commenced this action.

There has been no laches. The period of limitation for actions for relief on the ground of fraud is three years from the discovery of the fraud. This action was commenced less than two years after its commission. The cases cited by respondent in which the complaint has been held bad for failure to show how and when the fraud was discovered, and why it was not sooner discovered, were all cases in which the action was commenced more than the full period of limitation after the commission of the fraud. In such cases the doctrine of laches applies, but in a case like this the right to maintain the action is governed by the statute of limitations. Nor does the right to maintain the action depend upon the readiness and ability of the plaintiffs to pay the amount that may be found due on an accounting. They are entitled to a correct determination of the amount of their indebtedness and to have the mortgaged premises sold only under a proper decree. What has been said in the cases of rescission cited by the respondent as to the necessity of averring readiness and ability to restore what has been received under the contract has no application to such cases as this.

It follows from what has been said that the judgment of the superior court must be reversed, but in view of the further proceedings involved in this conclusion it is proper to add that if, upon a trial of the issues, it shall be found that the attorney who represented these plaintiffs in the foreclosure suit had authority from them and acted in good faith in stipulating for judgment according to the prayer of the complaint, and that no fraud was practiced by the defendant corporation in procuring the entry of the decree, the plaintiff will have no right to demand that the sale and other subsequent proceedings be vacated; for, if the decree was not in accordance with the prayer of the complaint, the defendants therein had a remedy by appeal, and that remedy was exclusive, and if it was in accordance with the prayer of the complaint they cannot now object to a sale made in the mode authorized by their formal consent. In other words, our conclusion is that, if there was in fact no fraud in the procurement of the judgment, the plaintiffs have no right of action.

The judgment appealed from is reversed, and the cause remanded, with instructions to the superior court to overrule the demurrer with leave to the defendants to answer.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J. (dissenting). I dissent, and adhere to the opinion delivered in department affirming the judgment. I think that the case clearly comes within the rule that equity cannot be invoked where there is a remedy at law. Appellants had an ample remedy for their alleged grievance by motion under section 473, Code Civ. Proc. They availed themselves of that remedy and were defeated; and they are now seeking to try all over again the matter there litigated. If their statements are true, they were the victims of the "surprise" which is made one of the grounds for relief in section 473; and it makes no difference that the surprise was the result of alleged fraud. Moreover, if the decision on the motion were no bar to the present action because of fraud involved, then in my opinion there is no sufficient averment in the complaint of facts constituting fraud. The mere averment that plaintiffs "procured" defendant's attorney to make the stipulation, etc., is insufficient.

The procurement may have been by proper and justifiable means.

Note.—The following is the opinion in department referred to in the dissenting opinion:

McFARLAND, J. A general demurrer to the complaint was sustained, and, plaintiffs not offering to amend within the time allowed, judgment was entered for defendants. Plaintiffs appeal from the judgment.

In appellants' points and authorities it is merely asserted that the complaint does state facts sufficient to constitute a cause of action, and in support of the assertion a general reference is made to 11 paragraphs of the complaint, which are designated by numbers. There is nothing more in the points that can be designated as argument, and no authorities are cited except section 694, Code Civ. Proc. The complaint, with exhibits attached, occupies 70 pages of the transcript. The gist of the complaint, when seen through the mass of the matter set forth, seems to be this: That in May, 1892, appellants executed to the defendant, the Security Loan & Trust Company, a mortgage on certain described lots of land to secure certain promissory notes made by appellants to said company; that on October 22, 1898, said company commenced an action to foreclose said mortgage, and that appellants employed an attorney, W. D. Peck, to defend the action; that the attorney filed a demurrer to the complaint, which was afterwards, by his consent, overruled; that on February 21, 1899, the said attorney made and filed a stipulation on the part of the appellants that appellants would make no further defense to the action; that their default be entered, and that judgment might be rendered for plaintiff in said action as prayed for in his complaint; that on said 21st day of February, 1899, a judgment of foreclosure was rendered and entered; that the defendant herein, Thomas F. Keefe, was appointed a commissioner to sell the mortgaged premises; that on the 22d day of January, 1899, said Keefe did sell said premises to the respondent herein, the said Security Company, and gave it certificates of sale, and on January 22, 1900, executed to respondent deeds for the land so sold. The main purpose of the action is to have the said judgment of foreclosure set aside, and the said sale of the mortgaged premises vacated.

It is averred that appellants' attorney in the foreclosure case was not authorized to make the stipulation above noticed, and that he did so by the procurement of the plaintiff in said action, etc. But it is also averred that within the time allowed by section 473, Code Civ. Proc., appellants moved the court in which the foreclosure judgment had been entered to set aside the default and vacate that judgment, that the court made an order denying said motion, and that appellants had appealed from that order. It appears from the records of this court that the appeal from the said order was afterwards heard and the order affirmed, although that fact is not important here, and perhaps cannot be considered. Security L. & T. Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257. At all events, the appellants by said motion to vacate the judgment had an ample remedy at law for their alleged grievance; and equity will not interfere where the remedy by law is ample.

It is averred that the commissioner sold the mortgaged premises in nine different parcels, whereas it should have been sold in different and more numerous parcels as demanded by appellants by written notice served on the commissioner, and that therefore the said sale was void. But, in the first place, there is no averment of facts showing that appellants were injured by the manner of sale; and, in the second place, it was decreed in the judgment that the sale should be made in nine named parcels, and the commissioner in making the sale followed the judgment, and, such being the case, the only remedy for the alleged grievance was an appeal from the judgment. In Ontario Land, etc., Co. v. Bedford, 90 Cal. 181, 27 Pac. 39, and Marston v. White, 91 Cal. 327, 27 Pac. 588, it is said that the provision of section 694, Code Civ. Proc.—that upon the sale under execution of land consisting of several well-known lots or parcels the parcels must be separately sold, and according to the direction of the judgment debtor if he be present at the sale—applies to a sale under a judgment of foreclosure only when the judgment is silent as to the method of sale; and while what is said in those cases may not be a direct adjudication on the subject still the rule must undoubtedly be as there stated. That part of the judgment in the foreclosure suit which directs how the mortgaged premises shall be sold is certainly not void; and, if it was erroneous, the only remedy was by appeal from the judgment.

The foregoing are the main points in the case, and we see nothing else necessary to be specially noticed. The complaint does not state facts sufficient to constitute a cause of action and the demurrer was properly sustained.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(149 Cal. 569)

FORSYTHE v. LOS ANGELES RY. CO. et al. (L. A. 1,733.)

(Supreme Court of California. Aug. 17, 1906. Rehearing Denied Sept. 13, 1906.)

1. CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE.

Where a passenger on a street car, free from contributory negligence, was injured in a collision between the car and a wagon of a third person, the negligence of the third person was no defense where the street railway company's negligence, in whole or in part, caused the injury, it owing to the passenger the highest care.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1211.]

2. Same.

In an action for the death of a passenger on a street car in a collision between the car and a wagon of a third person, the evidence showed that the motorman saw the wagon approaching the track but did not check the speed of the car till he was so close to the wagon that a collision was inevitable. *Held* that, though it might have been the duty of the driver of the wagon to have stopped until the car had passed, the motorman did not exercise the highest care toward the passenger because he failed to stop the car, though knowing that a collision would ensue.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1211.]

3. Appeal—Party Aggrieved.

In an action for the death of a passenger on a street car, in a collision between the car and a wagon of a third person, brought against the railway company and the third person, judgment was rendered against the company and in favor of the third person. *Held*, that the company was not a party aggrieved by the refusal to render judgment against the third person; there being no right of contribution between the codefendants.

4. Contribution — Torts — Joint Wrongdoers—Statutes.

Code Civ. Proc. § 709, providing that where property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the property of one of them, he may compel contribution from the others, etc., does not change the rule that there is no right of contribution between joint tort-feasors, but merely gives to a judgment debtor entitled to contribution the summary remedy of using the judgment itself to enforce contribution in the manner prescribed.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contribution, §§ 6–9.]

5. Appeal—Motion for New Trial—Review of Evidence.

Where, in an action for negligence, plaintiff does not move for a new trial, the court, on appeal, cannot consider the question of the sufficiency of the evidence to show negligence.

6. Trial—Findings — General and Special Findings—Consistency.

In an action for the death of a passenger on a street car, in a collision between the car and a wagon of a third person, brought against the street railway company and the third person, the court found that the death of the passenger was not caused by the negligence of the third person, but solely by the negligence of the company. The court further found that the driver of the wagon saw the car approaching when it was about 125 feet distant from the point of the accident and did not stop his team until too late. *Held* that, as the car was operated on a street, it could not be said that the driver of the wagon did not exercise reasonable judgment in determining that he could pass the crossing before the car would reach him, and a judgment in favor of the third person was authorized.

7. Same.

The finding of the ultimate fact prevails in support of the judgment, notwithstanding a finding of probative fact which tends to show that the ultimate fact is against the evidence.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sarah C. Forsythe, administratrix of J. W. Forsythe, deceased, against the Los Angeles Railway Company and another. There was a judgment for plaintiff against defendant Los Angeles Railway Company and in favor of defendant Los Angeles Hay Storage Company, and plaintiff and defendant Los Angeles Railway Company appeal. Affirmed.

Valentine & Newby and Bicknell, Gibson, Trask, Dunn & Crutcher, for appellant. E. W. Freeman, A. D. Laughlin, and Henry J. Stevens, for respondents.

McFARLAND, J. On the 16th day of March, 1903, J. W. Forsythe, since deceased, was a passenger on a street car of the defendant the Los Angeles Railway Company, which was running southerly on Main street in the city of Los Angeles. He was seated in the front part of the car on the easterly side, and in a seat provided by the railroad company for passengers. As the car was crossing Seventh street there was a collision between the car and a large, heavily loaded wagon of the other defendant, the Los Angeles Hay Storage Company, and driven by one of its employés; and by this collision the said Forsythe received injuries from which he afterwards died. This action was brought by his administratrix, who is also his widow, against both of said defendants to recover damages for his death, the plaintiff alleging that the death was caused by the negligence of both the said defendants. (For brevity, the said first-named defendant will be hereafter called the "Railway Company," and the other defendant the "Storage Company.") The case was tried without a jury, and the court found that the injuries were caused by the negligence of the said Railway Company, and that the other defendant, the Storage Company, was not guilty of any negligence in the premises. It found the amount of the damage to be $4,000, to which finding no exception is taken, and it rendered judgment for plaintiff against the Railroad Company for the aforesaid amount of money, but rendered judgment for costs against plaintiff in favor of the Storage Company. The defendant the Railroad Company, made a motion for a new trial, which having been denied, it appeals from the order denying said motion, and also from the judgment. The plaintiff, being dissatisfied because judgment was not given her also against the Storage Company, moved the court, under sections 663 and 663½ of the Code of Civil Procedure, to amend the conclusions of law so as to show that plaintiff was entitled to judgment against both defendants, and, this motion having been denied, the plaintiff appeals from the order denying it, and also from that part of the judgment which is in favor of the said Storage Company and against plaintiff, and which adjudged that the plaintiff take nothing against said defendant, and that the latter recover its costs against plaintiff. Plaintiff did not make any motion for a new trial.

1. Appeals of the Railway Company.

This appellant saved a few exceptions to rulings as to the advisability of evidence, but we do not think it necessary to notice these exceptions in detail, because they relate to trivial matters which could have had no effect upon the decision of the case. The main contention is that the evidence is not sufficient to support the finding that the collision was caused by any negligence of appellant, but this contention is not maintainable. No doubt the appellant makes a strong showing that the other defendant, the Storage Company, was guilty of negligence which contributed to the accident, and, in an action brought by the Storage Company to recover damages from the Railway Company for injury done to its team by the collision, the Railroad Company would perhaps have a good defense in the contributory negligence of the plaintiff in such an action. But the deceased was not guilty of any contributory negligence, and, if the negligence of the Railway Company was a cause of the damage, it has no defense to this present action in the fact that the negligence of the Storage Company also contributed to that damage. This appellant must show that it was not guilty of any negligence which, in whole or in part, caused the injury; and we do not think that it makes such showing. It must be remembered that the deceased was a passenger on appellant's car, and that it owed him the very highest care. Immediately before the accident the driver of the hay wagon going westerly along Seventh street was about 40 feet distant from the point of the accident when he was seen by the motorman of the car of the appellant, which was coming at the rate of about eight miles an hour southerly on Main street towards the place where the driver would cross Main street if he kept on his course. The motorman was about 125 feet from the point of the accident when he saw the driver of the wagon thus closely approaching the crossing. Neither the driver nor the motorman made any effort to avoid the collision until it was too late to accomplish that result. The court found, and the evidence supports the finding, "that said motorman, seeing said hay wagon, did not check the speed of said car until it reached Seventh street, when he threw off the current; that neither the said driver nor the said motorman made any attempt to stop his respective vehicle until the same was so close to the said point of accident that a collision was inevitable"; that the motorman did not apply his air brakes until he was nearly at the center of Seventh street, when he did apply the brakes and "stopped the car within 15 or 20 feet," and that "when the said motorman applied the air brakes both the said car and the said hay wagon were within a few feet of the point of collision." Appellant contends that it was the duty of the driver of the wagon to stop until the car had passed, and that therefore the motorman was not negligent in continuing at the usual speed; and there is a good deal of argument on the question whether or not the car had a right of way over the crossing superior to that of the wagon. These questions would be significant in an action brought by one of the two defendants against the other for damage to the plaintiff in such an action caused by the collision. But in the case at bar the railroad company should have exercised the highest care towards the deceased; and it certainly cannot be truly said that the motorman did exercise the highest degree of care to protect his passengers, when, seeing the team closely approaching the crossing, with no evidence of the driver's intention to stop, and, knowing that if he continued on his course a collision would be inevitable, he made no reasonable effort to avoid such collision. Whatever chances he might have taken as to liability for damages to the team and driver, he had no right to expose his passengers to the danger of a collision which seemed likely to occur and which he might have easily prevented.

This appellant further contends that even if the judgment against it could be considered as right, still the court erred in not also rendering judgment against the other defendant, the Storage Company, because, as is claimed, the evidence showed that the said other defendant was also guilty of negligence which contributed to the injury. But the appellant is not a party aggrieved by the refusal of the court to give judgment against the Storage Company, even if such refusal could be considered erroneous as against plaintiff. It is beyond doubt the well-established general rule that there is no right of contribution between joint tort-feasors. Appellant contends that this rule has been changed by section 709 of the Code of Civil Procedure; but we do not think so. That section does not pretend to deal with the matter of the right of contribution between tort-feasors. Its plain intent is to simply provide that, when there is a judgment against two or more defendants who are entitled to contributions from each other and one pays the whole or more than his proportion thereof, "the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days after his payment he files with the clerk," etc. It simply gives to a judgment debtor entitled to contribution the summary remedy of using the judgment itself to enforce the contribution, and relieves him of the necessity of pursuing some more tedious and inadequate proceeding for enforcing said contribution. It is only an amendment to the law of procedure; and the general rule is that an amendment to or provision in the law of procedure does not change the substantive law, unless the language used necessarily leads to that result. And it certainly cannot be said that the Legislature while enacting section 709 as a part of the law of procedure necessarily intended to change, or did change, the fundamental principle that there is no right of contribution between joint tort-feasors. Moreover, the section in terms relates only to cases where judgments had been rendered, and therefore it does not apply to the case at bar.

2. The appeals of the plaintiff.

On these appeals plaintiff contends that the court should have given her judgment against the Storage Comany as well as against the railroad company. As this appellant did not move for a new trial we cannot, on her appeal, consider the question of whether or not the evidence shows negligence on the part of the Storage Company; we can look only at the findings. Appellant contends that upon the findings judgment should have gone against the Storage Company. But the court found the ultimate fact that the collision and the injuries to the deceased "were not caused by the negligence of the defendant, Los Angeles Hay Storage Company, or by any of its agents, servants, or employés, but solely by the negligence of the agents," etc., of the railroad company. Appellant contends that this finding of the ultimate fact should be considered as overcome by certain findings of probative facts which are claimed to be inconsistent with the finding of the ultimate fact; but this contention cannot be maintained. The findings of the probative facts relied on are that the driver of the wagon saw the car approaching when it was about 125 feet distant from the point of the accident and did not stop his team, but did afterwards, when it was too late, attempt to stop, but "the wagon was loaded with three or four tons of hay and was of unwieldy bulk and weight, and was then so close to the track, and to the car of said defendant, the Los Angeles Railway Company, that before the wagon could be entirely stopped the end of its tongue struck said car and scraped along its side." In the first place, it does not clearly appear that these findings of the probative facts are inconsistent with the finding of the ultimate fact. The railroad operated by the railroad company was a street railroad, not a steam railroad running through the country at great speed and with heavy trains which cannot, like a street car, be stopped within a short distance; and, under the circumstances detailed by the findings, we could not well say that the driver of the wagon did not exercise reasonable judgment in determining that he could pass the crossing before the car would reach him, and in not trying to stop sooner that he did. But, in the second place, the general rule is that the finding of the ultimate fact prevails in support of the judgment notwithstanding a finding of a probative or evidentiary fact which tends to show that the ultimate fact was found against the evidence. And findings of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that these findings of probative facts dispose of all the facts involved in the pleadings, and that the facts found constitute all the facts in the case. Semple v. Cook, 50 Cal. 26; Smith v. Acker, 52 Cal. 219; Wood v. Pendola, 78 Cal. 287, 20 Pac. 678; Commercial Bank v. Redfield, 122 Cal. 407, 55 Pac. 160, and cases there cited. And such a condition is certainly not presented in the case at bar.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

3 Cal. App. 668

MADERA RY. CO. v. RAYMOND GRANITE CO. et al.

(Court of Appeal, Third District, California. May 29, 1906. Rehearing Denied by Supreme Court July 26, 1906.)

1. EMINENT DOMAIN—PROCEEDINGS—PUBLIC USE—BURDEN OF PROOF.

Under Code Civ. Proc. § 1238, providing that the right of eminent domain may be exercised in behalf of certain public uses, including railroads, and section 1241, declaring that before property can be taken it must appear that the use is authorized and the taking necessary therefor, in condemnation proceedings by a corporation organized under the general laws to operate a railroad, the burden is on the corporation to show a public use.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 530.]

2. SAME—WHAT CONSTITUTES PUBLIC USE.

The public use requisite to the exercise of the power of eminent domain need not be a use by the entire community, or any considerable portion of it; but it must be common.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 54.]

3. SAME—RAILROADS.

Neither the length of the railroad, nor the fact that it is a spur, bears any necessary relation to the question of public use.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 59, 66.]

4. RAILROADS — CONSTRUCTION—STATUTES — —LENGTH OF ROAD.

Civ. Code, § 468, requiring every railroad after commencing construction to complete, each year, five miles of road, failing in which the right to extend the road beyond the point then completed is forfeited, does not limit the right to construct a road to one not less than five miles in length.

5. SAME—RIGHT OF WAY—RIGHTS IN HIGHWAYS.

Under the express provisions of the statute, railroad corporations may construct their roads across or along highways.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 260–265.]

6. APPEAL—REVIEW—INVITED ERROR.

An appellant cannot complain of the admission of evidence introduced by him.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3597.]

7. Eminent Domain—Proceedings—Defenses.

In condemnation proceedings by a railroad, the good faith of the corporators in forming the corporation cannot be called in question.

8. Same.

A corporation not organized for railroad purposes was authorized by the supervisors of a county to build a railroad along a certain highway, but subsequently the building was enjoined. Thereafter a railroad company was incorporated and petitioned for a franchise to build along the highway; the petition being accompanied by a waiver of the franchise granted the other corporation. *Held*, in condemnation proceedings by the railroad to condemn a right of way along the highway, that the owner of the land could not object on the ground that the former corporation had not conveyed to the railroad its right of way, under Civ. Code, § 494, relating to sales of property by one railroad to another.

9. Same—Public Use—What Constitutes.

The fact that the advantage of a railroad inures to a particular individual or class of individuals does not render the use not public.

10. Same.

The fact that a railroad corporation has been formed to build a road to connect with another one, and be a branch thereof, does not render the use by such corporation not a public one.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 66.]

11. Same.

The fact that all the stockholders in a railroad company were stockholders in a corporation which would be primarily benefited by the construction of the road did not show the use not a public one.

12. Same.

The fact that a railroad company had not cars with which to operate its road, and intended to arrange with another road to operate the former one, did not show the use by the road in question not a public one.

13. Same—Proceedings—Evidence—Sufficiency.

In condemnation proceedings by a railroad, evidence considered, and *held* sufficient to show the use a public one.

14. Depositions—Objections—Right to Object.

Code Civ. Proc. § 2034, provides that, when a deposition has been taken, it may be read by either party, and is then deemed the evidence of the party reading it. *Held*, that where defendant took plaintiff's deposition, and called for a copy of records of plaintiff, which were incorporated into the deposition, and plaintiff offered the deposition in evidence, an objection that the copy was not the best evidence was untenable.

15. Same.

Code Civ. Proc. § 2032, provides that a deposition may be used by either party on the trial, subject to all legal objections except "to the form of an interrogatory." Defendant took plaintiff's deposition, but plaintiff offered it in evidence, and during the reading thereof objected to a question which called for the "deliberate judgment" of a witness as to a matter, and not as to the facts of the matter. *Held*, that plaintiff was not estopped to object to the question.

16. Eminent Domain—Proceedings—Damages—Evidence—Admissibility.

In proceedings by a railroad to condemn a right of way along a highway over defendant's lands, it was proper, on the question of defendant's damages, to exclude evidence as to the condition in which the highway was left by plaintiff's grading at points other than that along defendant's land.

17. Same.

In condemnation proceedings by a railroad to condemn a right of way along the highway over defendant's land, there was no prejudicial error in admitting on behalf of plaintiff the testimony of a witness on the question of damages when the condemnation for the highway was before the court, the court limiting the testimony to the value of the land, and on condition that it be shown that the value had not changed.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 542.]

Appeal from Superior Court, Madera County; L. W. Fulkerth, Judge.

Proceedings by the Madera Railway Company against the Raymond Granite Company and another for the condemnation of lands, and, from the judgment of condemnation, the granite company appeals. Affirmed.

Robert L. Hargrove, for appellant. C. H. Oatman and T. C. West, for respondent railway company. R. R. Fowler, Dist. Atty., for respondent county.

CHIPMAN, P. J. Condemnation of land for right of way. The complaint alleges the due incorporation of plaintiff under the laws of this state "for the purpose, among other things, of constructing, owning, maintaining and operating a single track railway of a standard gauge, to be operated by steam, for the carrying of passengers and freight thereon and thereover for hire, commencing at 'Curtis' Station' situated at the intersection of the branch of the Southern Pacific Railroad known as Knowles Spur at the crossing of the 'McLennan Road' in section No. 22, township 8 south, ranch 19 east M. D. B. & M.; thence in a southerly direction along said McLennan Road to 'McGowan Station,' situated about eight hundred feet south of Madera Granite Company's quarry in the southeast quarter of section 27," said township and range. The complaint describes with particularity the strip of land required, as shown on a map attached to the complaint and marked "Exhibit A," copy of which is attached to the transcript. The area of land sought to be condemned is .62 acres, and "the same does not include the whole, but is only a part of an entire tract of land" and is situated in Madera county. That defendant company "is the owner of an interest in said tract of land, hereinbefore particularly described, and also the larger tract of land of which it is a part." That the defendant county "is the owner of an easement over said tract of land, and the same is now used as a highway for vehicles and pedestrians to pass over. That the said tract of land herein sought to be taken consists of the west half of said highway and will not in any manner impede or interfere with the use of said highway." It is also averred that "the taking of said strip of land is for a more necessary public use than that to which it has already been appropriated," and that the "said railroad of plaintiff has been located in the manner which will be the most compatible with the greatest public good and the least private injury," and "that the taking of said strip of land is for a public use, to wit, the right of way of said railroad of plaintiff." Defendant county made no answer, and its default was duly entered. Defendant company answered, denying specifically that the plaintiff was incorporated for the purposes alleged, and also denied practically all the averments of the complaint; avers that plaintiff was incorporated "by the officers and agents of the Madera Granite Company for the convenience, use and benefit of said Madera Granite Company," a corporation operating a granite quarry near the terminus of plaintiff's said railroad; that said railroad commences "at a fictitious place called 'Curtis Station' and terminates on the private land of said Madera Granite Company less than one mile distant; that there are no such stations as 'Curtis' or 'McGowan' stations;" that said Madera Granite Company "is and has been for a long time extracting rock from its private land marked McGowan Station for market, and is and for a long time has been hauling the said rock by wagons and teams over said McLennan road to the said railroad of the Southern Pacific Company, and from there transports the same over said Southern Pacific's railroad to market"; that plaintiff was incorporated for the sole purpose of taking advantage of the law of eminent domain and of commencing this suit for the private benefit of the Madera Granite Company; that said railroad does not terminate or commence at public places; that its termini are on private grounds, and so situated as to be of no benefit to the public; that defendant company owns all the land about the place called Curtis Station, and the station called McGowan is upon lands of plaintiff, and no public roads lead to said station except said McLennan road, which terminates at that station; that "plaintiff has no passenger cars, locomotives, or cars at all, nor does it intend to operate any to carry any freight or passengers for the convenience of the public or otherwise"; that the purpose of building said railroad was to transport the rock of said quarry of the Madera Granite Company to the Southern Pacific's railroad; that plaintiff has made high fills and grades upon said strip of land in such manner as to prevent defendant from crossing said highway to and from its adjoining lands and to prevent the use of the west half of said highway for teams and wagons. The court made findings substantially as alleged in the complaint: That defendant company is the owner in fee of the land sought to be taken, subject to the easement thereover for the McLennan private road, which said easement is owned by defendant county, and the same is a public highway; that the interest of defendant company in said strip of land is of the value of $125,000, and the damage to the contiguous land of defendant company is the sum of $500. The court further found against defendant company on the specific facts alleged in defense. Thereupon the court made its preliminary order and judgment of condemnation, which was thereafter followed by its final judgment of condemnation. From this latter judgment, and from the order denying its motion for a new trial, defendant company appeals.

The transcript comprises about 500 pages, appellant's brief about 150 pages, and respondent's brief half the number. Obviously some way must be found to bring into reasonable compass the salient questions of law and fact before us. There are certain principles of law governing condemnation cases, discussed by the respective parties, which may as well be disposed of here as elsewhere.

1. "The right of eminent domain may be exercised in behalf of the following public uses: (4) * * * Steam * * * railroads. * * *" Code Civ. Proc. § 1238. Counsel for respondent contends that this declaration of the Legislature raises the presumption that the railroad in controversy must be presumed to be a public use, and that the burden of proving the contrary is upon the defendant. It was held in Napa Valley R. R. v. Napa County, 30 Cal. 435, that "railroads concern the public interest as matter of legal judgment; and however that conclusion be opposed to the fact in the case at bar makes no difference, the action of the Legislature on the question not being open to review by the judicial department of the government." So held, also. in S. & V. R. R. Co. v. City of Stockton, 41 Cal. 147. In both these cases, however, the railroads in question were authorized by special act of the Legislature, and it would have been an unwarranted interference with legislative discretion for the courts to inquire into the policy or wisdom of the Legislature, in declaring that the building of these particular roads concerned the public interest. The early case of Contra Costa R. Co. v. Moss, 23 Cal. 324, is of this class, also. Another class of cases is found in our reports, of which County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621, is an example. There the board of supervisors had determined the necessity of opening a public road by a certain route, and later found it necessary to bring the action to condemn a right of way over a portion of the land required for the road. "Roads" are among the public uses declared by the Code section above cited. And it was held that the court could not inquire into the necessity for the highway, its location, and extent, as these were matters of a political or legislative character. But in that case it was shown that the statute (Pol. Code, § 2681 et seq.) "has established a tribunal for determining these questions. * * * If this tribunal proceeds in accordance with the provisions of

these sections, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack. In a proceeding thereafter by the public to condemn a right of way for this public road, the court is not authorized to review the action of the board of supervisors in determining these questions"—citing Wulzen v. Board of Supervisors, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; County of Sisikiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; Lewis on Em. Domain, §§ 238, 239. See, also, Pool v. Simmons, 134 Cal. 621, 66 Pac. 872. Where, however, the public use is declared by general statute, enumerating the many objects that are thus designated, the courts are not precluded from determining from all the circumstances whether or not in the particular case the purpose is a public use. Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802. Consolidated Channel Co. v. C. P. R. R. Co., 51 Cal. 269, was such a case. Plaintiff sought by condemnation to procure certain lands to serve as a site for a bedrock flume to carry the dirt and gravel from its mining claims, and also as a place of deposit for the tailings of its mine. The statute (Code Civ. Proc. § 1238) gave the right of eminent domain in behalf of flumes among other declared public uses. A demurrer to the complaint was sustained. It was contended that the legislative declaration that flumes are public uses is conclusive upon the judicial department of the government. The court said: "Without doubt it is the general rule that, where any doubt exists whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the Legislature, and the courts will not undertake to disturb its judgment in this regard. This question was fully discussed and the doctrine established in the case of S. & V. R. R. Co. v. City of Stockton, 41 Cal. 147. But in the same case an exception to the general rule is recognized. It is said: 'A case might, indeed, be presented in which it might appear, beyond the possibility of question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public;' or, in the language of Chancellor Walworth (5 Paine, 159), 'where there was no foundation for a pretense that the public was to be benefited thereby'; and in such case it would be our duty to interfere and offer a relief." In discussing the general rule it was said in County of San Mateo v. Coburn, supra: "It is not to be held, however, that the mere declaration by the Legislature that the object for which private property may be taken is a public use will preclude the owner from contesting the right to deprive him of his property. If it is sought to condemn the property for a use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard the legislative declaration that such use is public. * * * If it can be shown by extrinsic evidence that the end sought to be accomplished is not of a public character, but is solely for private purposes, the condemnation will be denied as being in excess of the legislative power"—citing matter of Niagara Falls, etc., Ry. Co., 108 N. Y. 375, 15 N. E. 429. While it is true that, when the uses are in fact public, the necessity or expediency of taking private property for such uses, the extent to which the right may be delegated, and the instrumentalities to be used, are questions belonging to the political and legislative branches of the government, nevertheless the question whether the uses are in fact public, justifying the taking in invitum of private property therefor, is a judicial question to be determined by the courts. Lewis, Eminent Domain, § 158. Our statute would seem to set the question at rest. Section 1241, Code Civ. Proc., declares that: "Before property can be taken it must appear: (1) That the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary to such use." As the necessity for the taking of the particular property must be made to appear by proof, at least prima facie, the burden is upon the plaintiff to show "that the taking is necessary to such use." Lewis, Em. Domain, § 426. It was said in Lindsay I. Co. v. Mehrtens, supra: "Whoever, under the claim of an agency of the state, would deprive the owner of any of his property by virtue of the exercise of eminent domain, must show, not only that the use for which he seeks to appropriate it is a public use, but also that the Legislature has authorized the taking of property for that particular use, and in the mode in which he is seeking to appropriate it." Unquestionably the owner of the land sought to be condemned may show that the use and its purpose are private, and not public. The existence of the corporation plaintiff proves no more than would the existence of a natural person seeking to condemn under authority of the statute.

2. It was said in County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, approving the doctrine laid down in Sherman v. Buick, 32 Cal. 253, 91 Am. Dec. 577: "Whether a way be public or private does not depend on the number of people who use it, but upon the fact that every one may lawfully use it who has occasion." Mr. Lewis states the rule as follows: "It is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken." Lewis, Em. Dom. § 161. The public use required need not be of the whole state or any considerable portion of it, but the use and benefit must be in common, not to particular individuals. Every public use is in more or less degree local

and benefits a particular section more than others. This is true of railroads, as well as of ordinary highways. The cases are numerous sustaining this rule. See notes to Lewis, Em. Dom., supra. See, also, Lindsay I. Co. v. Mehrtens, supra.

3. Neither the length of the road nor the fact that it is a branch or spur bears any necessary relation to the question of public use or of the public interest to be subserved by it, except possibly as a circumstance bearing upon the alleged fact that the road is solely for the private use of plaintiff. Contra Costa Railroad v. Moss, supra. Short roads as connecting links between independent railroad systems, or as branches and feeders to established systems, are often necessary and fall within the general rules governing condemnation quite as completely as main lines of road. It is the public purpose that is to govern, and not the length of the road, whether it is a road connecting two established roads or a branch of an established road, or a branch connecting with another branch road. Appellant cites section 468 of the Civil Code and claims among its errors of law that the articles of incorporation of plaintiff were inadmissible because the above section provides that commercial railroads shall be at least five miles long, and in this case it was impossible to comply, as the road is less than one mile in length. This section requires every railroad corporation, every year after it has begun construction of its road, "to complete and put in full operation at least five miles of its road, until the same is fully completed," failing in which "the right to extend its road beyond the point then completed is forfeited." This section is not to be construed as limiting the right to construct a road to one not less than five miles in length. The most that could be claimed for the section is that, when the road is five miles long or more, the corporation must comply with the statute.

4. The meaning of that part of subdivision 3, § 1241, Code Civ. Proc., is called in question, reading: "If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." The point has reference to the McLennan road over which plaintiff seeks a right of way, and it is contended by appellant that only by direct and specific legislative enactment and authority can property be taken which is already applied to a public use; that the question whether or not the intended use is "a more necessary public use" is a question for the Legislature to decide, and not the courts. We are referred to a discussion of the question by Mr. Lewis, in his work on Eminent Domain (sections 262–276). Conceding the general doctrine to be as illustrated by Mr. Lewis, the Legislature of this state has specifically and directly authorized railroad corporations to "construct their roads across, along or upon * * * any * * * avenue or highway; * * * but the corporation shall restore the * * * road * * * highway * * * thus intersected, to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." Arcata v. Arcata & M. R. R. R. Co., 92 Cal. 639, 28 Pac. 676; S. P. R. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. 828, 16 L. R. A. 510. See, also, Montgomery v. Railway Company, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89. Mr. Lewis (section 270) cites Springfield v. Conn. River R. R. Co., 4 Cush. (Mass.) 63, to the effect that authority to construct a railroad between certain termini does not authorize the appropriation of a highway longitudinally. He adds, however, that "the Legislature may of course authorize the condemnation of additional easements in public highways, as for railroads, electric lines," etc. This latter authority is clearly given by our statute.

5. Some question arose in the case as to the right of the defendant company to inquire into the good faith of the promoters of plaintiff company in forming the corporation and to show that it was in fact not a bona fide corporation. So far as we can discover defendant company was permitted to introduce such evidence as it had which bore upon the question, and, if it was error to admit it, appellant cannot complain. Possibly it was admitted upon the theory that it bore somewhat upon the question that the use, as claimed by appellant, was in fact private. Appellant states distinctly, "we do not attack Madera Railroad Company's articles as a corporation," and we may accept this declaration as conclusive. We do not think, however, that the good faith of the corporators in forming the corporation can be called in question collaterally in this proceeding so as to in any wise affect the validity of the corporate existence. The dissolution of the corporation or the forfeiture of its franchise can only be accomplished by quo warranto proceedings, as was the case of People v. Pittsburgh R. R. Co., 53 Cal. 694; or under the provisions of Code Civ. Proc. § 803 et seq. (People v. Dashaway Association, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117). For a discussion of the right to collaterally attack the validity of the corporation charter, see Kansas Railway Company v. Coal Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717. Whether or not the franchise will be taken away or the exercise of corporate acts be enjoined, upon a given state of facts, are questions not necessarily determinative of the question here, namely, whether or not the corporation is in fact seeking only by means of the right of eminent domain to enjoy the property sought to be taken, purely as a private use, and not in the interest of the public. The corporation may have a valid existence and may successfully resist all efforts to revoke its franchise, and yet the court may inquire whether the particular use involved in the condemnation is public or private. If the use

be private, with which the public have no concern, and in which it has no interest, condemnation will be refused, regardless of the general right of the corporation to condemn by virtue of its corporate existence.

In view of the foregoing principles it remains to notice the facts developed by the evidence, and certain questions connected therewith and certain assignments of error. It appears that, by ordinance 74 of the supervisors of Madera county, the Madera Granite Company was authorized to build a railroad along the McLennan highway, and that company commenced the work of construction, but was enjoined from its further prosecution, or using this highway for railroad purposes. Subsequently, to wit, June 6, 1903, plaintiff company was duly incorporated, and thereafter it petitioned the board of supervisors for a franchise to construct and operate a railroad along the McLennan highway, which was accompanied by a waiver on the part of the Madera Granite Company of its franchise granted by ordinance 74, and on July 11, 1903, ordinance 86 was passed by said board of supervisors, granting the petition. It is now claimed that the Madera Granite Company did not convey to plaintiff its right of way granted it by ordinance 74 or any of its railroad property, and that the property under section 494, Civ. Code, still belongs to the Granite Company, and hence plaintiff has no standing in court. Section 494, Civ. Code, relates exclusively to sales and transfers of property of one railroad company to another railroad company. The Madera Granite Company was not organized as a railroad corporation, and had no authority by its charter to engage in railroad building, and probably for that reason the court enjoined its attempt to exercise the powers of a railroad corporation. However this may be, the section has no application to the facts, and hence we cannot see what cause defendant has for complaining that plaintiff is violating, if it is doing so, the private rights of the Granite Company.

Appellant contended at the trial for the right to introduce evidence showing that plaintiff, in constructing its road along McLennan highway, practically destroyed its usefulness to defendant company as an abutting owner and user of the highway. The trial court admitted the evidence offered in support of this defense, and in rebuttal thereof findings were made upon the issue favorable to plaintiff. The evidence was conflicting, with sufficient to support the findings.

There was considerable evidence tending to the point that the main object in building the road was to enable the owners of the Madera Granite Company to market its product. Circumstances may arise where it becomes of public benefit for branch railroads to be built primarily to reach some important industry about to be inaugurated or that is struggling along under difficulties for want of transportation facilities. The fact that the advantage of such road inures to a particular individual or a class of individuals will not render the use any the less public. And the fact that the stockholders of the Madera Granite Company were also stockholders of plaintiff company does not prove that the contemplated use is a private use. Lindsay I. Co. v. Mehrtens, supra. The doctrine, as we believe it to be, is well stated in Ulmer v. Lime Rock Railroad Company, 98 Me. 581, 57 Atl. 1001, 66 L. R. A. 387. That was a condemnation suit to condemn a right of way over certain land for a branch road to a lime quarry. The court said: "The mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right of the public to its use, and not to the extent to which that right is or may be exercised. If it is a public way in fact, it is not material that but few persons enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken, it may in fact be used only for the business of the plant to which it is constructed, because at that time no other business enterprise may exist in that vicinity to furnish freight for transportation; but in the future other enterprises may spring up, either upon the line or the extension thereof, so that a branch track which in the first instance is primarily constructed for the accommodation of one may become of equal accommodation, benefit, and use to others. The tests decisive of this question as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, but as of right, and if the track is subject to governmental control, under general laws as are the main lines of a railroad, then the use is a public one, and the Legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and, if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the Legislature may be exercised in that particular case. This is in accordance with the almost unbroken line of decisions of the appellate courts of the various states of this country, a brief quotation from a few of which may be advantageous." Citing many cases.

Our statute does not define what is meant by "steam railroads," nor does it make any distinction between main lines and branches. A corporation may be formed to build a particular road which is to connect with another road and become a branch thereof. Such a corporation would have the right to condemn land for its right of way. Mr. Lewis says: "There appears to be no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires." Lewis, Em. Dom. § 171. There was evidence that the Madera Granite Company was not the only person and its granite enterprise the only industry that might be served by this branch road. The defendant company employed a large number of men, as did the Madera Granite Company. There was evidence that a considerable business in marketing wood for fuel might be done by this road. There was evidence also that a grazing country surrounded this road and shipments of cattle might be made by this road; that the road passed through granite land which would with this branch road be profitable to work; that it would be an additional convenience to the neighborhood generally. It is made the duty by law for the railroad company to operate its cars "for the transportation of all such passengers and property as * * * offer or is offered for transportation," etc. (Civ. Code, § 481); and "in case of refusal * * * to take and transport any passenger or property or to deliver the same * * * must pay the party aggrieved all damages," etc. (Civ. Code, § 482). Failure to operate its road as provided by the act of April 15, 1880 (St. 1880, p. 43, c. 57), makes subject to forfeiture the right of the corporation or the individual owning the road to operate it. Section 17, art. 12, of the Constitution, provides, among other things: "Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars, without delay or discrimination." Organized, as plaintiff is, to do a general carrier business, it can be compelled to exercise its assumed powers and duties. Appellant contends that the Knowles switch or spur, with which the branch in question is to connect, is no part of the main line of the Southern Pacific Company; that it is a branch of the Raymond branch of the Southern Pacific Company, and is but a switch running to defendant company's quarry. There is evidence that the Knowles spur was built by the Southern Pacific Company; that the right of way was obtained by defendant company, and conveyed to the Southern Pacific Company for a consideration paid by that company in switching charges; that it was constructed in 1889 and has been in use ever since by the Southern Pacific Company. Witness Knowles testified: "The Knowles spur is their track. Q. Mr Knowles, is there a regular train service to Knowles' spur? A. No, sir; there is no train service; only freight service, that's all. They carry passengers to Knowles spur in freight or box cars or whatever they have to take passengers to and from our store at Knowles spur. Q. Do they run regular trains on that spur? A. Well, not regular; no, sir. Not every day. If they have freight to get or take they run there. Q. Do you always notify them when they come down there [meaning Knowles spur]? A. Not always, they come there [meaning Knowles spur] often without being notified. Q. But do they run regular trains? A. They are supposed to come there whenever we have anything to ship. If there is any one to go, they never come after them. * * * Knowles station on the Southern Pacific map is where the Knowles spur starts from the Southern Pacific line." In the answer of the defendant company this Knowles spur is referred to as "the railroad of the Southern Pacific Company," and the road in question is referred to as commencing "at the said Southern Pacific Raliroad," and that the sole purpose of said Madera Railroad is to carry the rock of the Madera Granite Company from McGowan station "to the said railroad of the Southern Pacific Company on cars prepared by the said Southern Pacific Company for that purpose." There was much evidence pro and con the question whether the use was private or public—sufficient, we think, to have supported a finding either way by the court. In such condition of the record we must uphold the view of the evidence taken by the court. That plaintiff company has now no cars with which to operate the road; that it may or intends to arrange with the Southern Pacific Company to operate the road with its cars; that at the present time little or no business will come to the road except from the Madera Granite Company; that the present or prospective volume of business for the road from all sources would not justify its construction; that the owners, agents, and attorneys of the Madera Granite Company were active participants in organizing plaintiff company—are facts having some bearing, perhaps, upon the question of the nature of the use, but are by no means conclusive. Legitimate railroad enterprises are often projected into regions of little present profit, and ultimately prove unfortunate investments by lack of anticipated business. But they were nevertheless public in their objects; and we have seen that a public use may be shown where only a single enterprise is primarily to be benefited, and that the fact that the corporators in another company which is the chief beneficiary are also corporators of the railroad company is not at all conclusive as to the character of the use.

The point is much urged that the Madera Granite Company and plaintiff were composed of the same persons, seeking thus not only to discredit the plaintiff company, but also the good faith and objects of its corporators. Sufficient to say, as was said in Kansas Railway v. Coal Co., supra: "There is nothing in the letter or spirit or policy of the law which prohibits the same persons from forming and conducting two different corporations; one a business, and the other a railroad, company. * * * The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus to do so if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be transportation of coal produced by the Kansas & Texas Coal Company does not destroy the character of the plaintiff as a railroad company, nor convert it into a private, and not a public, railroad; nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right of way, and therefore a public use." Upon the same general question, see Oregon Short Line v. Telegraph, 111 Fed. 842, 49 C. C. A. 663.

There are numerous errors of law assigned in the exclusion and admission of evidence. Many of them are inconsequential and need not be noticed. Others present rulings which, conceding error, were without prejudice to appellant. Still others are disposed of by the foregoing discussion.

Exception 2. Before the trial defendant company took the deposition of R. W. Campbell, secretary of plaintiff, and in the taking called for copies of certain records of the plaintiff company, which were produced and incorporated into the deposition. At the trial plaintiff offered this deposition in evidence, and, in reading it, objection was made to the admission of those record copies as not the best evidence, and defendant also demanded that the originals should be produced, citing section 1000, Code Civ. Proc. Having been introduced by defendant and made part of the deposition taken by it, the copies therein incorporated were as admissible as any other portions of the deposition. "When a deposition has been once taken, it may be read by either party at any stage of the same action or proceeding, * * * and is then deemed the evidence of the party reading it." Code Civ. Proc. § 2034. The demand made was substantially for all the books and papers and records of plaintiff, some few of which were specified, many of which were incorporated in the deposition, and all of which were at the office of the company in San Francisco, while the trial was going forward at Madera. There was no sufficient showing by affidavit or otherwise that these records and papers not appearing in the deposition were material to defendant's defense. As was said in Ex parte Clark, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176, the motion was "in effect a general omnibus order [motion] for the production of all of defendant's [plaintiff's] books, which has always been held to be unauthorized." Besides, the general purpose which the records were intended to establish appeared in many ways in the course of the trial.

Exception 3. During the reading of the deposition plaintiff objected to a question as immaterial and incompetent, which in fact it was, and the court sustained the objection. Section 2032 of the Code of Civil Procedure provides that "the deposition may be used by either party upon the trial * * * subject to all legal objections," unless the objection be "to the form of an interrogatory," which this was not. It is contended that "plaintiff, offering the deposition, was estopped from objecting to the same." The question called for the "deliberate judgment" of the witness as to a matter, and not the facts as to the matter, and was clearly immaterial and incompetent. The court did not err in its ruling.

Exception 12. Upon the question of defendant company's damage, defendant sought to show the condition in which the McLennan road was left by plaintiff's grading, at points other than along the land of defendant company, over which the right of way was being condemned, for the purpose of enhancing the damage to defendant company. The court sustained the objection to such evidence, and, we think, rightly.

Exception 13. Considering all the testimony brought out in connection with the ruling of the court complained of, we see no error, for defendant had the benefit of all the witness knew on the subject.

Exception 14. It was not error to admit at plaintiff's instance the testimony of the witness Knowles on the question of damage given in the condemnation suit when the McLennan private road was before the court. In admitting the testimony, the court limited it to the value of the land upon condition that it be shown that the value had not changed. Upon the question of damage the court held that a different element entered into the matter where the taking was for a railroad, and the damage might be different. Under the limitation made by the court the testimony worked no injury to defendant.

Exceptions were taken to certain rulings as violating the law as laid down in San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83. We cannot see that the court departed materially from the rules established by that case.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

3 Cal. App. 760

DENNIE v. CLARK et al.

(Court of Appeal, Second District, California. June 22, 1906. Rehearing Denied July 20, 1906. Denied by Supreme Court August 20, 1906.)

1. CONTRACTS—ACTIONS—PROOF OF ALTERATION—PLEADING.

Under the denial in the answer of execution of the contract sued on, defendants may prove that the contract contained material alterations made after it was signed.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1724–1726; vol. 2, Cent. Dig. Alteration of Instruments, §§ 227, 228.]

2. EVIDENCE — CONVERSATIONS IN THE ABSENCE OF A PARTY.

Proof of information conveyed by one defendant to another in the absence of plaintiff, relating to the subject-matter of a letter, written by the defendant to whom the information was given, after the receipt of the information, and claimed by plaintiff to be an admission, is competent, as tending to show the meaning and intent of the words employed in the letter.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1063–1067.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Frank B. Dennie against William A. Clark and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Will A. Strong and Works, Lee & Works, for respondents.

ALLEN, J. Action to recover the price and value of certain goods alleged to have been sold by plaintiff to the defendants under a written contract of sale and purchase. Trial to a jury. Verdict and judgment for defendants. Plaintiff moved for a new trial, which was denied, and appeals from the judgment and order.

Plaintiff by his complaint averred that the defendants, in writing, ordered from the plaintiff certain goods and merchandise to be shipped to Los Angeles, in which they agreed to pay the price and value thereof, less a discount of 20 per cent. and freight, one-third in three months, one-third in four months, and one-third in six months from date of shipment; that, pursuant to such order, plaintiff shipped the goods, and defendants received the same and paid the freight; that no part of the price and value had been paid to plaintiff by defendants. Defendants denied that they ever purchased the goods under a written contract, or otherwise; denied that they ever executed a contract in writing for the purchase of such goods; and by way of separate defense alleged that the only contract or agreement ever entered into between plaintiff and defendants was for the consignment by plaintiff to defendants of certain goods, to be by defendants sold on commission; that defendants were to advance the freight for plaintiff and to account to plaintiff for the amount of goods actually sold, less a commission of 20 per cent. thereon for handling; that the plaintiff was, by agent, to effect the sales, defray any expense, and report such sales to the defendants, who should fill orders for goods thus sold, and become responsible for the price and value of orders filled; that the only contract or agreement in writing ever entered into was that plaintiff should prepare upon a printed form a list of goods to be shipped under such agreement, and upon presentation by plaintiff of what purported to be such list defendants signed the same as evidence of willingness to receive such goods upon arrival at Los Angeles, and for no other purpose; and by way of counterclaim the defendants set up the contract, as in the separate defense averred, and averred that they advanced certain freight upon such goods and received the same in their warehouse, and plaintiff failed and refused to negotiate sales thereof, or to receive said goods from them, and they have been required to provide storeroom for them to their damage, for which they ask judgment.

Upon the trial plaintiff offered in evidence a written contract, in effect as claimed by plaintiff in the complaint. Defendants were permitted to introduce evidence that the written instrument so offered in evidence by plaintiff was never signed in the form presented; that many material alterations had been made therein; that it had been in plaintiff's possession continuously after signing, and that defendants had never had possession thereof. Further, that the only contract ever made was as set out in the special defense and counterclaim, and that the written agreement evidenced no contract ever entered into between plaintiff and the defendants. There was much conflict in the testimony, and many matters offered by plaintiff in the nature of admissions after the goods had been shipped, and testimony as to the acts of defendants connected with the paying of freight, and their control, not consistent with their claim as to the character of the instrument actually signed. It was the duty of the jury, however, to pass upon all of these questions of fact, and to determine the nature of the actual agreement; to determine whether the written agreement had been executed or not; and its finding, in effect, was that the agreement was as claimed by defendants, and that the written contract relied upon by plaintiff was never executed, and nothing appears in the record which would justify us in disturbing its verdict. None of the matters by way of admission, or acts performed by defendants in connection with the receipt of the goods and their custody over the same, amounted to an estoppel. There was no change of relation upon the faith thereof, and no prejudice resulted to plaintiff by reason of any reliance upon any acts or statement of defendant made or occurring after the delivery of the goods. Whatever force these admissions had was in connection with the main fact of the execution of the instrument. The evidence as to changes in the instrument after the same was signed was admissible under the issue raised by the denial of execution. The effect of this was not to introduce new matter, but to prove that the cause of action as alleged did not exist and had never existed. Landis v. Morrissey, 69 Cal. 86, 10 Pac. 258. That the making and delivery of the contract set out in the complaint was not the act of defendants. Hall v. Auburn Turnpike Co., 27 Cal. 257, 87 Am. Dec. 75. There was no admission that a cause of action once existed and a plea in avoidance, which would be a special defense, as in Michalitschke v. Wells Fargo & Co., 118 Cal. 688, 50 Pac. 847. Nor was any of the evidence offered by defendants received for the purpose of changing or varying a written contract, the execution of which was established, but was properly received to show that the contract actually agreed upon to be signed was different from the one offered in evidence by plaintiff, and as tending to show the alterations therein and their materiality, and particularly to show that the instrument offered in evidence by plaintiff was not an agreement ever entered into or contemplated by the parties, and in support of the special defense.

The evidence as to conversations between the defendants in the absence of plaintiff, or his agent, was admissible for the purpose of explaining certain written statements claimed by plaintiff to be admissions against his interests. The information conveyed to one of the defendants by the other relating to the subject-matter of such subsequent letter was competent as tending to show the meaning and intent of the words employed and the understanding of the writer of the letter as to the status of all parties.

We perceive no error in refusing charges 2 and 3 proffered by plaintiff. As to charge 2, it was inapplicable under the evidence, while charge 3 is open to the criticism of attempting to charge as to the weight and effect of the testimony before the jury. We find no error in the many other specifications not herein specially noticed.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

149 Cal. 505

LEWIS v. OGRAM. (L. A. 1,647.)

(Supreme Court of California. July 30, 1906. Rehearing Denied Aug. 27, 1906.)

BOUNDARIES — ESTABLISHMENTS — AGREEMENT BETWEEN OWNERS.

Where the government surveyor "flagged" the line between adjoining homesteads, and before the final survey the homesteaders executed an agreement reciting a "controversy as to the line" and that it was agreed that a fence erected should be the line and that one would not file on a certain part of his claim, and the fence was not within 10 chains of the flagged line, the agreement, being evidently intended to operate on title, was not within the rule as to the settlement of boundaries, the parties knowing that the true line was elsewhere, and hence was not binding.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 216.]

In Bank. Appeal from Superior Court, San Bernardino County; J. W. Taggart, Judge.

Action by Syra E. Lewis against Johnson Ogram. Judgment for defendant. Plaintiff appeals. Affirmed.

Wm. G. Griffith, for appellant. B. F. Thomas, for respondent.

SHAW, J. Lewis sued Ogram to recover damages for trespass on land alleged to be in his possession, described as the N. ½ of the N. W. ¼ of the N. W. ¼ of section 23, township 5, range 28. Ogram filed a cross-complaint in the usual form to quiet his alleged title against the claims of plaintiff. Issue was joined upon the averments of the complaint and cross-complaint, respectively, and after a trial the court gave judgment for the defendant. Plaintiff appeals.

The S. W. ¼ of section 14 lies north of and adjoins the N. W. ¼ of section 23. The official United States survey of the boundary line between the sections was not completed until February, 1900. In April, 1897, Lewis was residing upon the S. W. ¼ of section 14, and Ogram was residing upon the N. W. ¼ of section 23, each claiming the right, under the United States land laws, to file a homestead claim upon his particular tract when open for entry. The location of the division line between the two tracts was at that time uncertain, but both parties supposed it to be about 10 chains south of the true line as afterwards surveyed and established. Lewis was occupying all that part of the actual N. W. ¼ of section 23, lying between this supposed line and the true line, embracing substantially the N. ½ of said 40-acre tract, claiming and believing, until August, 1898, that it was a part of the S. W. ¼ of section 14, and that it was covered by his entry. In August, 1898, the government surveyor, at Ogram's request and with the knowledge of Lewis, "flagged" a line through between the two sections, on or near the true line, and set a post at the common section corner thus located at the west end line. The court finds that Lewis, thereafter, until this action was begun, continued in peaceful and exclusive possession of the 20 acres of section 23 in controversy, "but with full knowledge that the said portion of section 23 was not covered by his filing." The finding also states that the "exact location of the dividing line between said homestead of the plaintiff and the N. W. ¼ of the N. W. ¼ of section 23" was not known by either Lewis or Ogram until the official survey in February, 1900. In January, 1899, Lewis and Ogram orally agreed to establish a division line between their respective claims, and for that purpose measured 10 chains south from the aforesaid line "flagged" by the surveyor and, at that distance therefrom, built a fence at joint expense, as and for a division fence between their claims. On November 16, 1899, they executed the following agreement:

"Whereas there is a controversy between said parties hereto as to the boundary lines of their respective government claims including in part the northwest quarter of the northwest quarter of section 23, township 5 north, range 28 west S. B. M., and whereas they are desirous of settling said controversy. Now therefore said parties do mutually agree as follows, viz.: That the said Ogram will not include in his filing any part of the north half of said parcel of land, and Lewis hereby agrees that he will not include any part of the south half of said parcel of land. The said parties further agree that the fence now subsisting and dividing their respective claims of said parcel of land shall be and remain the division line of their said claims irrespective as to what may be the true line that would divide said parcel of land in two equal parts lying north and south of such true division line. In witness whereof we have hereunto set our hands this 6th day of November, 1899."

In February, 1900, the official survey was completed, showing that the 20 acres in dispute constituted the N. ½ of the N. W. ¼ of the N. W. ¼ of section 23, that it was not included in the homestead claim of Lewis, and that the line "flagged" through in August, 1898, was substantially correct. On April 5, 1900, Ogram filed his claim for a homestead upon the N. W. ¼ of section 23, including this 20 acres. In July, 1902, Lewis instituted in the United States land office a contest of the said entry of Ogram with respect to the 20 acres, setting forth as his ground for contest the same facts relied on by him in this action. A hearing of the contest was refused by the register and receiver, no appeal was taken from the ruling, and, on September 22, 1902, a patent was duly issued by the United States granting the land to the defendant Ogram.

The rule upon which Lewis, the plaintiff, relies is thus stated in the decisions of this court: "Where coterminous proprietors of land, in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them." Cooper v. Vierra, 59 Cal. 283; White v. Spreckels, 75 Cal. 616, 17 Pac. 715; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604; Dierssen v. Nelson, 138 Cal. 398, 71 Pac. 456. In other cases it is said that the occupancy in pursuance of the agreement need not continue for the period of the statute of limitations. This is obviously so where other conditions creating an estoppel exist. Cavanaugh v. Jackson, 91 Cal. 583, 27 Pac. 931; Helm v. Wilson, supra. This qualification, however, is not important in this case. Such an agreement, necessarily, is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary. If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is oral, it would be void, being an attempt to transfer land without writing. If it is in writing it would be ineffectual to pass title, for it would lack the apt words of conveyance that are necessary to accomplish a transfer of real property. The authorities are to the effect that these agreements, when deemed valid, are of such a nature that they do not operate upon the title at all. It is said that "one party does not purport or attempt to sell or convey to the other any land" (Sneed v. Osborn, 25 Cal. 630); that such agreement is "not a contract for the sale or conveyance of lands, and has no ingredients of such a contract" (Boyd v. Graves, 4 Wheat. [U. S.] 413, 4 L. Ed. 628); that "adjoining owners who adjust their partition line by parol, do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary line is fixed by consent they hold up to it by virtue of their title deeds and not by virtue of a parol transfer" (Hagey v. Detweiler, 35 Pa. 409); and that "agreements of this character * * * are not considered as extending the title. They do not operate as a conveyance so as to pass the title from one to the other, but proceed upon the theory that the true line of separation is in dispute, and to some extent unknown, and in such cases the agreement serves to fix the line to which the title extends." White v. Spreckels, supra.

The facts found clearly show that the agreement in question, although in terms purporting only to fix the division line, could have had no other object or purpose than to operate upon the title or right of possession of the parties to the land which they knew was not within the limits of Lewis' claim. There was, it is true, some uncertainty as to the "exact location" of the section line at the time the agreement was made, but it arose solely from the fact that the flagged line, although made by the government surveyor, had not then become official or final and was still subject to correction and change. The findings, properly construed, are not in conflict on this subject, as claimed by the appellant. There was no doubt or uncertainty over the fact that the so-called division line agreed upon was not the true line, nor anywhere within 10 chains of the true line, nor over the fact that the true line did not include in Lewis' claim any part of the 20 acres lying between the agreed line and the flagged line, the same 20 acres which Lewis now seeks to have transferred to him by virtue of the agreement. The agreement itself indicates this, for it does not recite that there was any uncertainty about the location of the line, but merely that there was a "controversy" about it, which, of course, may have arisen from some other cause. The findings place the absence of such doubt beyond question. Lewis knew that his claim extended only to the south line of section 14, and that it did not cover any of the 20 acres in question, which the agreed line would give him. He, therefore, must have known that the true line was not 10 chains south of the flagged line, but was either coincident with the flagged line, or somewhere to the north of it. The object and purpose of the agreement, therefore, could not have been to resolve or settle any existing doubts as to the exact location of the section line. This explains the finding that no consideration passed. If the agreement was made to settle a doubt about the division line, and in good faith to substitute an arbitrary line as the boundary, no other consideration than the mutual concessions of the parties would be necessary. The court below must, therefore, have believed that there was no such purpose and no such concession, and that, for the real object it was intended to accomplish, no consideration was given or received. The line agreed on, in view of the known facts, had no relation to the true line, and could not have been intended to represent the true line. There must have been some ulterior object. It may have been made for the purpose of allowing Lewis an opportunity to change his possession and, when the land was open for entry, file his claim to include this 20 acres, as he would have had the right to do. But he did not see fit to do this, and when the time within which he could have done so expired, Ogram, or any other qualified person, was at liberty to enter it.

Whatever the real purpose may have been, the agreement can have no present effect on the title. It does not, by its terms, purport to convey or transfer any land, or operate upon the title in any manner, and consequently does not effect an estoppel by covenant or agreement. And, being without consideration, it could not, in any event, operate to create such an estoppel. It had no relation whatever to the true line, nor to any doubt concerning the location of the boundary, and hence it does not come within the rule which makes an agreed line binding between the parties, not as a contract to convey, but as an attempt in good faith to make certain that which before was in doubt. We are, therefore, of the opinion that the court below was correct in its decision.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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149 Cal. 500

JENISON v. REDFIELD et al. (L. A. 1,685.)

(Supreme Court of California. July 30, 1906. Rehearing Denied Aug. 29, 1906.)

1. Waters and Water Courses—Irrigation Districts—Right to Use Water Outside of District.

Under St. 1887, p. 29, c. 34, and St. 1897, p. 254, c. 189, providing for the organization of irrigation districts, and authorizing a landowner to assign his water rights, the object of which legislation is to enable owners of lands susceptible of irrigation from a common source and by the same system of works, to form a district composed of such lands, which when formed is a public corporation, a landowner, even though part of his rights are as an assignee, has no right to water for use beyond the limits of the district.

2. SAME.

The fact that a landowner for five years had used water beyond the limits of the district under a claim of a right to do so, and with the knowledge of the district, gave him no right to continue such unwarranted use.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by J. E. Jenison against Henry Redfield and others. Judgment for defendants, and new trial denied. Plaintiff appeals. Affirmed.

Kendrick & Knott, for appellant. J. H. Ardis and Stephens & Stephens, for respondents.

ANGELLOTTI, J. This is an action for damages alleged to have been suffered by plaintiff, a landowner of Walnut Irrigation district, by reason of the failure and refusal of defendants, directors of said district, to distribute and apportion to him his proportion of the water of said district. Defendants had judgment, and plaintiff appeals from such judgment, and also from an order denying his motion for a new trial.

Walnut Irrigation district is a public corporation organized under what is known as the "Wright act" (St. 1887, p. 29, c. 34), and the acts supplementary thereto. See act of 1897, St. 1897, p. 254, c. 189. Plaintiff is the owner of 38 acres of land within the boundaries of said district, assessed on the last assessment of the property of the district at $4,100, and is also an assignee of the right to the water of one J. H. Burke, who owns 30 acres in said district, assessed at $3,000. The total assessed value of the property of the district was $94,450. Under the provision of the statute that "all waters distributed for irrigation purposes shall be apportioned ratably to each landowner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district, provided, that any landowner may assign the right to the whole or any portion of the waters so apportioned to him" (section 18 of act of 1897, St. 1897, p. 259, c. 189), plaintiff, as owner and assignee of Burke, was entitled to $^{7100}/_{94450}$ of the waters of the district distributed for irrigation purposes. It appears that plaintiff owned considerable land outside of said district, upon which he had planted alfalfa and walnuts, and the real question presented by this case is as to whether he was entitled to receive from defendants any portion of his share of water for use upon said land without the boundaries of the district. There is no pretense that he was ever denied water for use upon such of his land as was within the district, and unless he was entitled to have the water to the extent of his share for the sole purpose of carrying the same beyond the limits of the district and irrigating lands outside thereof, the defendants in no respect failed or refused to apportion and distribute to him any water to which he was entitled. All the damage alleged, viz., $900, was damage arising by reason of the failure to have the water on land lying outside of the district. The trial court found that the defendant had not failed or refused to deliver any water to which he was entitled, and refused to admit evidence as to damage to plaintiff's land lying outside of the district by reason of lack of water, and these rulings present for determination the question already stated.

It is apparent that to sustain the claim of plaintiff, it must be held that the effect of our statutes relative to irrigation districts, is to make each owner of land within a district the absolute owner of the proportionate share of the water of the district to which his land entitles him, to do with as he sees fit, even to the extent of diverting all thereof from the irrigation of lands within the district. It seems very clear that such a conclusion would be opposed to the whole plan or scheme of the legislation for irrigation districts, converting a district organized, acquiring and holding water solely for a certain specified purpose, viz., the procuring and furnishing of water for the improvement by irrigation of the lands included therein, into a mere agency for the distribution of its water to individuals for use by them outside the district for any purpose whatever. Under plaintiff's theory, the use to which the water is to be appropriated, is entirely immaterial, and the irrigation district is, in effect, although constituted and avowedly acquiring its water for an entirely different purpose, nothing more or less than an ordinary water company, the original absolute owners of the property of which are the landowners, each owning such proportion thereof as the value of his land entitles him to, and at liberty to deal with it as he sees fit, without regard to the improvement of the land of the district. He may retain it, and use the water for any purpose and in any place, or he may transfer it to any other person for any kind of use, and thereupon such transferee succeeds to his rights and becomes entitled to the water. Such a construction of the provisions of the irrigation act entirely ignores the object of its enactment. The whole object of the legislation authorizing the organization of irrigation districts is to enable owners of lands susceptible of irrigation from a common source and by the same system of works, to form a district composed of such lands, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district, the benefit of a common system of irrigation, and bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation. It was recognized that without such a common system the individual landowners might be unable to obtain water for the irrigation of their lands, and that a work which would be for the public benefit and general welfare, viz., the reclamation from aridity of large portions of the lands of the state, might never be accomplished if left to individual enterprise. The irrigation district legislation, under which a public municipal corporation may be created for the purpose of furnishing water for the irrigation of the land within the district, has been sustained upon the same ground as has the levee and reclamation district legislation, which is, in effect, that the land included within the limits of such a district, requires, by reason of its situation and condition, the protection or reclamation thus made possible, and that it is for the public welfare that such protection or reclamation should be afforded such land. See In re Madera Irr. Dist., 92 Cal. 296, 311-318, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

The ultimate purpose of a district organized under the irrigation act is the improvement, by irrigation, of the lands within the district. It can, under the law, be organized and exist and acquire property only for such purpose. This we think is so clearly apparent as not to require further discussion here. Such a district holds all property acquired by it solely in trust for such ultimate purpose, and can divert it to no other use. See section 29 of the act of 1897, St. 1897, p. 263, c. 189. It has to do solely with the irrigation of lands within the district, and cannot appropriate water to any other purpose. The right of a landowner of the district to the use of the water acquired by the district is a right to be exercised in consonance with and in furtherance of such ultimate purpose, viz., for the improvement by irrigation of lands within the district, and in no other way. His right is always in subordination to the ultimate purpose of the trust. So far as he proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose, such proportion as his assessment entitles him to. Section 18, Act 1897, St. 1897, p. 259, c. 189. To this extent only can he be held to be the owner of any share or portion of the water, except that, by virtue of the proviso of section 18 (St. 1897, p. 259, c. 189), he may assign the right to the whole or any portion of the share to which he is entitled. This does not mean, however, that he may make an effectual transfer of his share, free from the trust by which it is incumbered. It still remains subject to that trust, and, therefore, can be used only for the irrigation of lands within the district, and the irrigation district has no authority to distribute it for any other purpose. The right of assignment conferred by the act on a landowner is limited by the whole policy of the statute to an assignment for irrigation within the limits of the district. We do not understand the contrary to have been held in Board of Directors v. Tregea, 88 Cal. 334, 353, 26 Pac. 234.

We are satisfied that plaintiff was not entitled, either as owner or assignee of Burke, to have any water distributed to him by the defendants for use upon land without the limits of the district. As already stated, the record does not show that he has ever been denied water for use upon his land within the district. Plaintiff alleged in his complaint that for more than five years prior to the refusal of defendants to apportion and distribute to him water for the irrigation of his land outside the district, he had claimed the right to use and had used under such claim upon such land, more than three-fourths of the water allotted to him, and that such use by him had been adverse to the irrigation district and with its full knowledge. This allegation was, on motion of defendants, stricken from the complaint as irrelevant, and evidence offered in support thereof on the trial was excluded. There was no error in these rulings. If it be assumed that the statute of limitations runs against such a district, plaintiff could not establish title by prescription to this water as against the district in this action, and such plainly was not the object of the allegation or offered evidence. The allegation is not that he ever claimed to own the water as against the district, or in any other capacity than as a landowner of the district, but simply that he had claimed the right, as such landowner, under the law governing such districts, to use his share of the water on the lands outside the district, and had so used it for the five years under such claim and with the knowledge of the district. This could not give him any right by prescription to such use of the water, or afford him any ground upon which he could insist upon a continuance of the unwarranted use. It was wholly irrelevant in this action. In view of our conclusion upon the main question presented and already discussed, the other specifications of error in the record are immaterial, and require no discussion.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

149 Cal. 659

FOX v. TOWNSEND et al. (L. A. 1,471.)

(Supreme Court of California. Aug. 30, 1906.)

1. Appeal—Review—Grounds of Action of Court Below—Presumptions.

The statement in the brief of appellant as to the ground on which a motion to set aside a judgment was granted is no part of the record; and in the absence of any other showing in the record of the grounds for the action of the trial court, if there is any ground consistent with the record on which such action may be sustained, the court will sustain it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3667.]

2. Judgment — Setting Aside Default — Grounds—Statutes—Construction.

Code Civ. Proc. § 473, providing that, when a summons has not been personally served, the court may allow defendant, within one year after the rendition of any judgment, to answer to the merits, authorizes the court, on a proper showing and in the exercise of a sound discretion, to set aside a judgment as against a defendant not personally served and allow him to answer to the merits, though the proceedings by publication are regular and the judgment is valid on its face.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 251, 253, 265.]

3. Appeal—Presumptions.

In the absence of a showing to the contrary, the court on appeal will assume that a sufficient showing was made to warrant the court in setting aside a judgment rendered against a defendant not personally served.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3784, 3785.]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Edwin R. Fox against W. H. Townsend and others. From a judgment in favor of defendant, R. P. Mudge, rendered after setting aside a judgment in favor of plaintiff, he appeals. Affirmed.

See 83 Pac. 272.

Cole & Cole, for appellant. O. B. Carter, for respondents.

ANGELLOTTI, J. Plaintiff instituted this action to quiet his title as to various lots of land in the city of Los Angeles, against many defendants, including R. P. Mudge. As to most of said defendants, including Mudge, the only attempted service of summons was by publication. As to said defendants, they not having appeared, default was entered on October 3, 1902, and judgment was rendered on said default in favor of plaintiff and against said defendants on December 23, 1902. On July 3, 1903, the trial court made an order granting a motion of defendant Mudge to set aside a judgment as to him, and allowed him to answer to the merits of the original action, which he did on the same day, disclaiming any interest in the land described in the complaint, except one lot, as to which one lot he denied plaintiff's claim of ownership and alleged title in himself. On the issues thus made, the cause was tried as between the plaintiff and Mudge, and the trial court found in favor of Mudge, and gave judgment in his favor as to said lot. Plaintiff appeals from the order of July 3, 1903, setting aside the original judgment against Mudge, and also from the judgment finally entered in favor of Mudge, his only contention being, however, as to the order setting aside the original judgment. If that order was correctly made, there is no error shown by the record as to the subsequent proceedings.

The record on appeal consists solely of the judgment roll and the order setting aside the original judgment, there being no bill of exceptions. The record does not disclose the ground upon which the motion to set aside the judgment was based, or upon which the lower court acted, showing simply that a motion of Mudge to set aside the judgment was granted, and Mudge allowed to answer to the merits. Appellant, in his brief, states that the ground upon which the original judgment was set aside as to Mudge was that it was void for the reason that the court had not acquired jurisdiction as to him on account of the insufficiency of the affidavit for the publication of summons in its allegations as to his residence out of the state. He then attempts to show that the affidavit was legally sufficient in this respect to support the order for publication of summons, and hence that the judgment based thereon was not void upon its face. While we are inclined to the opinion that the affidavit was insufficient to support an affidavit for publication as to Mudge, and that the publication was, as to him, ineffectual to confer jurisdiction, it is not necessary to here determine that question. The statement in the brief as to the ground upon which the motion was granted constitutes, of course, no part of the record. On appeal every presumption is in favor of the action of the lower court, and if there be any ground consistent with the record upon which that action may be sustained, we are bound to sustain it.

As will be noted from what has already been said, the motion to set aside the judgment was granted within a year after the rendition of the judgment. Section 473, Code of Civil Procedure, provides: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." Mudge not having been personally served with summons, the superior court had the power, under this provision, upon a proper showing and in the exercise of a sound discretion, to set aside the judgment as to him and allow him to answer to the merits at any time within one year after the rendition of the original judgment against him, even though the proceedings by publication were entirely regular, and the judgment, therefore, valid on its face. This was exactly what the lower court did in this case. Whether or not the circumstances shown to the court on the hearing of this motion were such as to justify the making of the order is a question that we cannot determine in the absence of a record showing the facts presented to that court. In the absence of a showing to the contrary, we must here assume that a sufficient showing was made to warrant that court in exercising the power conferred by section 473, Code of Civil Procedure. There is, therefore, no warrant for reversing the order setting aside the original judgment as to Mudge.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

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149 Cal. 599

BANKS v. STOCKTON et al. (Sac. 1,222.)

(Supreme Court of California. Aug. 23, 1906.)

1. LIMITATION OF ACTIONS—MORTGAGES—ENFORCEMENT.

A suit for a decree adjudging a mortgage executed by a guardian to be a valid lien on the interest of the wards in the property covered by the mortgage, and directing a sale of the premises to pay the note for which the mortgage was given, brought more than 7 years after the accrual of the cause of action thereon, is barred by Code Civ. Proc. § 337, providing that an action on a contract founded on an instrument in writing is barred unless commenced within four years after the accrual of the cause of action.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 127.]

2. SAME—PERIOD OF LIMITATION—MISTAKE AS GROUND FOR RELIEF.

In a suit for a decree adjudging a mortgage executed by a guardian to be a valid lien on the interest of the wards in the property covered thereby, and directing a sale thereof to pay the note for which the mortgage was given, the complaint alleged that the property was devised to the wards; that the testator had incumbered a part thereof with a mortgage which, subsequent to his death, was foreclosed; that the sum borrowed, for which the note and mortgage were given, was used to redeem; that the money was borrowed by the guardian without any order of the court; that the guardian represented that he had authority to execute the note and mortgage; that it was the intention of the guardian and the mortgagee that the latter should have a valid lien; that the guardian and mortgagee believed that the mortgage was valid, and that their mistake was not discovered until within three years prior to the commencement of the action. *Held*, that the action was within section 337, providing that an action on a contract in writing is barred unless commenced within four years after the accrual of the cause of action, and not within section 338, subd. 4, allowing an action for relief for mistake to be commenced within 3 years after the discovery of the mistake.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 475.]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by James O. Banks against Annie E. Stockton, as guardian of Dorsey K. Stockton, and others. From a judgment for plaintiff, defendants appeal. Reversed.

Garoutte & Goodwin, for appellants. N. J. Barry, for respondent.

ANGELLOTTI, J. This action was commenced December 8, 1899, to obtain a decree adjudging a mortgage, executed by Annie E. Stockton as guardian of the person and estates of Dorsey K., Dexter C., H. C., and Pitt D. Stockton, who then, and until the year 1894, were minors, to be a valid lien upon the interest of said minors in the property described therein, and directing the sale of said property to pay the amount due on the note for which the mortgage was given as security. The mortgage was executed by said guardian on November 26, 1890, to secure a note of said guardian of the same date for the sum of $1,000, and bearing interest at the rate of 10 per cent. per annum, and payable two years after its date. A demurrer interposed to the complaint was overruled, and, an answer having been filed, the cause was tried and judgment given for plaintiff as prayed. This is an appeal by defendants from such judgment.

One of the grounds specified in the demurrer to the complaint was that the cause of action stated, if one was stated, was barred by the provisions of section 337 of the Code of Civil Procedure of the state of California, which provides that an action upon a contract founded upon an instrument in writing executed in this state is barred unless commenced within four years after the cause of action accrues. We can see no possible answer to the objection thus made.

So far as the action is for the recovery of the indebtedness evidenced by the promissory note and mortgage, the cause of action accrued, according to the allegation of the complaint, two years after November 26, 1890. When this action was commenced, December 8, 1899, more than seven years had elapsed after the cause of action accrued, and no facts are alleged in the complaint sufficient to avoid the effect of the running without action commenced of the time prescribed in this section.

Plaintiff relies upon certain facts alleged in the complaint as sufficient to defeat this objection. Substantially these facts are as follows: The property described in the mortgage was acquired by said minors under the provision of the will of their father. He had incumbered a portion thereof with a mortgage, which was a valid and subsisting lien thereon at the time of his death. Subsequent to his death this mortgage was foreclosed, and a sale of the premises had under the foreclosure decree. It was to redeem the property from such sale that the $1,000, for which the note and mortgage in suit were given, was borrowed from plaintiff, and the money was in fact used for that purpose. The money was borrowed by the guardian and the note and mortgage were given without any order of authorization therefor on the part of the superior court having jurisdiction of the guardianship proceedings. The guardian represented to plaintiff that as such guardian she had authority to execute the note and mortgage, and that such mortgage would be a valid lien on the minors' property, and it was the intention of both guardian and plaintiff that plaintiff should have a valid lien thereby. Both the guardian and plaintiff believed that the mortgage was good and valid, and their mistake in that regard was not discovered until within three years prior to the commencement of this action. We see nothing in these facts that can assist plaintiff. Plaintiff's theory apparently is that this is an action for relief on the ground of mistake, and that, therefore, under subdivision 4, § 338, Code Civ. Proc., he had three years after his discovery of the facts constituting the mistake within which to commence his action. It will be observed that the discovery by plaintiff as to the invalidity of his mortgage was not made until after the statute would have barred it, had it been a valid mortgage. We are at a loss to understand how plaintiff can be placed in any better position by reason of his mistake as to the validity of his mortgage than he would have been in had his mortgage been valid and there had been no mistake. As has been heretofore pointed out by this court in similar cases, this is not an action for relief upon the ground of mistake within the meaning of subdivision 4, § 338, Code Civ. Proc., but is substantially one to compel payment of the indebtedness evidenced by the note and mortgage executed by the guardian to plaintiff. The case is very similar to that of Clausen v. Meister, 93 Cal. 555, 29 Pac. 232, where the complaint alleged that a loan was made and the note and mortgage taken by reason of certain fraudulent representations that the maker was the owner of the mortgaged property, whereas in fact she was only the executrix of the will of the deceased owner, and entitled upon distribution to only one-fourth of the property. The money there loaned was used to pay a claim against the estate, thus benefiting all those interested in the property under the deceased. Within three years after the discovery of the facts, but more than four years after the maturity of his note and mortgage, the plaintiff brought his action for the amount due, and sought to be subrogated to the rights of the creditor of the estate whose claim had been paid with his money. This court there said: "The real cause of action is for the recovery of the money loaned by plaintiff, and the other relief demanded is but incidental to this, and the time allowed by the statute within which to commence an action for the recovery of this money cannot be extended by alleging the discovery, within three years, of facts which in equity would have entitled him to look for its repayment to other security than the mortgage which accompanied the note received by him at the time of the loan." See, also, Campbell v. Campbell, 133 Cal. 33, 65 Pac. 134. Whatever rights in equity this plaintiff may have originally had by reason of the facts alleged, such rights were available only to aid in the enforcement of the claim evidenced by the note and mortgage, and, when the bar of the statute attached to that claim, such incidental equitable rights were lost. Clausen v. Meister, supra.

The demurrer to the complaint should have been sustained.

The judgment is reversed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; SLOSS, J.

149 Cal. 603

MUTCHMOR v. McCARTY. (Sac. 1,404.)

(Supreme Court of California. Aug. 27, 1906.)

1. Mines and Minerals—Lode Claim—Location—Notice—Record—Effect.

The record of a notice of location of a lode claim, as required by St. 1875–76, p. 853, c. 562, is only effective to prove the bare fact of the record of such notice, and is not evidence that the notice was posted on the claim, that the location was so marked on the ground that its boundaries could be readily traced, that they included the apex of a lode, the existence of any valuable mineral deposit in place, or that the necessary assessment work had been done, all of which were essential to the validity of the location.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 50.]

2. Same—Validity—Description.

Where a notice of location of a lode claim failed to contain a description of the claim by reference to a natural object or permanent monument by which it could be identified, as required by Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], it was ineffective for any purpose.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 45, 46.]

3. Same — Validity of Location — Relocation.

Where plaintiff's alleged lode claims were mostly relocations of abandoned claims, and plaintiff failed to show actual possession prior to the commencement of the action, the doing of the requisite assessment work, or that there existed within the described boundaries of any of the claims a vein or deposit of ore sufficiently valuable to pay the cost of extraction or the cost of reduction, the claims were invalid.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 63.]

4. Same—Vein Within Placer Claim—Location of Lode Claim After Patent For Placer Claim.

Under Rev. St. U. S. § 2319 et seq. [U. S. Comp. St. 1901, p. 1424] providing for the disposition of lode or vein mining claims and placer deposits, a vein known to exist within the boundaries of a placer claim at the date of an application for a patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent.

5. Same.

Rev. St. U. S. § 2333 [U. S. Comp. St. 1901, p. 1433] provides that where a vein or lode is known to exist within the boundaries of a placer claim, an application for a patent for the placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of the vein or lode is not known, a patent for the placer claim shall convey all the minerals within its boundaries. *Held*, that a lode claim is known to exist within a placer location within such section when its existence is known to the placer claimant, when its existence is generally known, or when any examination of the ground, sufficient to enable the placer claimant to make oath that it is subject to location as such, would necessarily disclose the existence of the vein.

6. Same—Quartz Vein—Value.

A quartz vein which contains so small a portion of gold, silver, etc., as to be of no value for mining purposes, is not a known vein, within Rev. St. U. S. § 2333 [U. S. Comp. St. 1901, p. 1433] providing for the disposition of mining claims.

7. Witnesses—Adverse Witnesses—Discretion.

The trial court has power in its discretion to grant or refuse plaintiff permission to make defendant his own witness.

Department 2. Appeal from Superior Court Calaveras County; A. I. McSorley, Judge.

Action by T. W. Mutchmor against J. D. McCarty. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

W. J. Donovan, for appellant. Solinsky & Wehe, for respondent.

BEATTY, C. J. This is an action to quiet plaintiff's alleged title to nine separate quartz mining claims or lode locations, described by their respective names and by reference to the notices of location recorded in the office of the recorder of Calaveras county. The complaint contains the allegations usual in such cases. The defendant, by his answer, denies that the plaintiff is, or ever was, owner, in possession, or entitled to the possession, of any of said claims, or of any interest therein. He admits that he claims an interest and estate in all the real property described in the complaint, but denies that his claim is without right. He alleges that for more than 10 years last past he and his grantors have been the owners, and in the actual possession, of two placer mining claims held under patent from the United States—the Carson Hill, containing 146.50 acres, patented on the 18th of October, 1894, and the Blue Mountain, containing 151.26 acres, patented February 1, 1898—and also a certain quartz mining claim. He further alleges that for more than 20 years he and his grantors have been the owners, and in the actual possession, of 480 acres of agricultural land, contiguous to the Carson Hill and Blue Mountain placer claims, which is also held under patents issued to his grantors by the United States. He alleges that he is informed and believes that the real property described in the complaint conflicts with said placer mining claims and agricultural patents. The action was commenced in December, 1902, and was tried by the court without a jury in November, 1903. The court found that the plaintiff was not, and had never been, the owner, or entitled to the possession, of any part of the property described in his complaint, and that the defendant was the owner and entitled to the possession of all the property described in his answer. Judgment was entered accordingly in favor of the defendant for his costs. The appeal of plaintiff is from the judgment, and from an order denying a new trial.

Aside from one specification of error in the ruling of the court upon an objection to a question asked defendant on his cross-examination, the only point urged by appellant in support of his appeal is that the findings are contrary to the evidence in this: that the evidence showed a valid location of one of his claims (the Emerald) prior to any application for a patent for either of defendant's placer claims, and because all of his other claims, though located subsequent to the applications for the placer patents, were of mineral veins known to exist by the placer claimants prior to the date of their said applications, but not mentioned therein or in the patents, and which, therefore, remained open to appropriation by any qualified locator. This question of the right to locate a lode claim within the surface lines of a patented placer claim has been very fully argued by counsel for the respective parties, but it is extremely doubtful whether, in view of the evidence contained in the record, a decision upon the point is necessary to a final disposition of the case. For it does not appear that the first finding of the court to the effect that the plaintiff was not the owner of any interest in any of the claims described in his complaint was based upon the view that they were invalid only because the attempted locations were within the boundaries of the placer patents, and upon veins the existence of which was unknown at the time the patents were applied for. It may be that the court deemed the evidence offered by plaintiff insufficient to establish the validity of any of his alleged claims, irrespective of the objections based upon their conflict with the placer patents. As to the Emerald claim, the alleged location of which antedated the applications for patents, this must have been the ground of the decision, as it may have been with respect to the others, and, therefore, we have first to consider whether we should be warranted in holding that the evidence was such as to require a finding by the trial judge that the Emerald, or any of the other alleged claims, was valid in itself as a location, and whether the plaintiff made satisfactory proof that he was, when he commenced this action, even in the peaceable possession of any of the ground in controversy. It appears from the evidence that the Carson Hill and Blue Mountain placer claims are situated in what is known as the "Madame Felix Mining District" in Calaveras county and not far from Copperopolis, where active mining has been carried on for many years; that within the limits and in the neighborhood of those claims are numerous small veins or seams of quartz carrying an extremely small percentage of gold where not entirely barren. These little veins crop out at a number of places, and their existence has long been generally known. It was shown that as long ago as 1879 there were old prospecting shafts on some of these veins, which had remained untouched from that date until the date of the trial, from which it may be inferred that various lode claims had been located, prospected, and abandoned within and near these placer claims prior to the attempted location of the Emerald in June, 1890. A notice of this claim was recorded on the 18th of that month by one Kennedy in pursuance of a special act of the Legislature applicable to Calaveras county, requiring all notices of mining locations to be recorded in the county recorder's office. St. 1875-76, p. 853, c. 562. But this notice was invalid under the act of Congress (Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426]), for the reason that it contained no description of the claim by reference to any natural object or permanent monument by which it might be identified. And, besides, if it had contained every essential requisite of a location notice, the copy of the record would have proved nothing except the bare fact that such a notice had been recorded. It would not have proved that it was posted on the claim, or that the location was so marked on the ground that its boundaries could be readily traced, or that they included the apex of a lode, or any valuable mineral deposit in place, or that the necessary work had been done to keep the claim good. Every one of these things, with the possible exception of the posting of the notice, was essential to the validity of the claim, but it is difficult to find in the record any satisfactory evidence upon a single point. Kennedy was himself a witness, but he only testified that he had prospected "all these claims and found gold-bearing quartz," and that when he was working on the Emerald prior to the application for the placer patents, October 22, 1892, the defendant would come to his claim to inquire as to his prospects and get him to pan out some dirt, and when he did so "allowed he had as good a prospect as was on the hill." This is in substance the whole of his testimony as to his own claim. One of the other witnessses, Womble, testified generally that all of the claims in controversy that had been located prior to 1894 (which would include the Emerald) were so marked by mounds that he and a surveyor had no difficulty in finding the corners of the claims. He also testified that a man named Watson worked on the Emerald in 1893, and that Kennedy sunk a shaft on it in 1894. This is all the testimony I can find in the record bearing on the validity of the Emerald claim, and it is clearly insufficient to show that it was of any validity whatever at the commencement of this action. Aside from other objections there is no evidence that $100 worth of work was done on the claim in any year after its attempted location, and there is no evidence that any work has ever been done on it since the year 1894, or that either Kennedy or the plaintiff was in actual possession of the claim or of any part of it when this action was commenced.

All the other claims of plaintiff are of a date subsequent to the 22d of October, 1892, when the placer patents were applied for.

The notices were recorded and purport to have been posted as follows: Santa Cruz in July, 1893; Buena Vista in October, 1893; Democrat in October, 1894; Dandy in January, 1897; Cape Horn in January, 1899; Big Bonanza in January, 1900; Dead Men's Spring in January, 1900; Duplex in January, 1900. Several of these claims are relocations of old and abandoned claims. The Democrat was originally the Dead Cow, and by that name was prospected and abandoned, apparently, by the defendant prior to October, 1892. The Dandy was formerly the Bald Eagle. The Cape Horn was another of the defendant's old and abandoned locations. The Duplex was formerly the Opranso. There is no evidence of sufficient work to keep good a single one of these claims, and no evidence of actual possession of any part of any of them by plaintiff or a co-tenant at the commencement of this action, and as to those located subsequent to 1894 there is no evidence of a proper marking of the locations by visible monuments on the ground. There is no evidence of the existence within the described boundaries of any of them of a vein or deposit of ore of any practical value. Kennedy, it is true, testifies that he found gold-bearing quartz in all of them, but this would be true although none of the quartz carried gold enough to pay the cost of extraction or the cost of reduction. On the other hand, a witness for defendant, E. Boggs, a miner and practical assayer, testifies that in 1888 or 1889 he spent 10 days prospecting in the neighborhood of the claim then owned by the defendant and called the Dead Cow (now the Democrat) and could find no one that would assay $1 a ton—the best came from the Dead Cow and assayed only 80 cents. From the positive testimony of this witness, from the silence of plaintiff's witnesses as to the quality of the ore found in the small veins of quartz appearing within the limits of the placer patents, from the failure to prove assessment work on any of plaintiff's claims, and from the general agreement of all the testimony in the case that, although the ground covered by these claims lies within a short distance from a busy mining camp, and has been prospected for more than 30 years, during which time many claims have been located and abandoned after the usual tests by the sinking of shafts, etc., the court was entirely justified in concluding, if it did so conclude, that there was no vein or deposit of ore within any one of the claims dsecribed in the complaint of sufficient value or promise to justify its location as a lode claim, and, further, to conclude that the failure to prove that the work required by the act of Congress had been done on the claims was due to the fact that such work had not been done and that the claims, if ever valid, had been abandoned before the action was commenced. If the finding of the court against plaintiff's claim of ownership had no other support, it would be presumed that it was based upon this view, and we should be compelled to sustain it for the reasons stated. And this finding fully supports the judgment of dismissal, and is unaffected by the ruling of the court restricting the cross-examination of the defendant above referred to.

But if it were conceded that, as to one or more of the eight claims of plaintiff attempted to be located subsequent to the applications of the placer patents, there was satisfactory and uncontradicted evidence of full compliance with the federal statutes and local regulations governing the location and working of mining claims, this finding of the court would, even in that case, have abundant evidence to support it. The issuance by the government of its patents for the Carson Hill and Blue Mountain claims to the grantors of defendant is conclusive evidence in this proceeding that the land patented is placer ground, and that defendant, from the date of the applications for patents, has been the owner of everything within its surface boundaries excepting only such veins of ore or mineral deposits in place as were known to exist at the date of such applications, subject of course to the right of owners of exterior lode claims to follow their veins on the dip under the surface. As to the agricultural lands described in the answer, and which are held under homestead patents, defendant is the absolute owner under a title long antedating the location of any of plaintiff's claims, and, as far as they may conflict with those lands, there can be, and in fact is, no controversy. The sole question, therefore, with respect to those claims of plaintiff which are here assumed to have been regularly located and perfected subsequent to the 22d of October, 1892, is whether there was uncontradicted evidence from which the court should have found that they cover veins or mineral deposits in place which, within the meaning of section 2333 of the Revised Statutes [U. S. Comp. St. 1901, p. 1433], were known to exist at that date.

The Revised Statutes of the United States (section 2319 et seq. [U. S. Comp. St. 1901, p. 1424]) provide for the disposition alike of lodes or veins, and of placer deposits. The price of lode claims is $5 per acre of the surface while that of placer claims is only $2.50. It is therefore a fraud for a person cognizant of the existence of a vein of apparent value to attempt to acquire the title by means of a placer location and patent. It is accordingly provided by section 2333 that "where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known a patent for the placer claim shall convey all the valuable mineral and other deposits within the boundaries thereof." The patents for the Carson Hill and Blue Mountain claims contain express reservations in conformity with these provisions, as follows: "(1) That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on the 22d day of October, A. D. one thousand eight hundred and ninety-two. (2) That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents." There are other reservations in the patents, but they are immaterial to the present discussion.

The decisions of the Supreme Court of the United States and of other courts of high authority, both state and federal, have settled the construction of this provision of the Revised Statutes, and of these reservations in placer patents as applied to a great variety of cases, and especially as they apply to this case. A vein known to exist within the boundaries of a placer claim at the date of the application for patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent, and a vein is known to exist within the meaning of the statute (1) when it is known to the placer claimant; (2) when its existence is generally known; (3) when any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location, as such would necessarily disclose the existence of the vein. Iron S. M. Co. v. Mike & Star Co., 143 U. S. 403, 12 Sup. Ct. 543, 36 L. Ed. 201; Lindley on Mines, § 781 and cases cited. In this case it does appear that the Emerald, the Dead Cow (now the Democrat), the Cape Horn, and perhaps other veins, were known to the defendant several years before his grantors applied for the placer patents. It is reasonably certain that their existence was, prior to that date, generally known, and known to defendant's grantors. On this point we think the plaintiff's case was clearly proved, and without substantial conflict in the testimony. But upon another point essential to his case there was a failure of proof. A quartz vein which contains so small a percentage of gold, silver, etc., as to be of no value for mining purposes is not a known vein within the meaning of the law, and whether it is of any practical value is always a question for the jury (or in the absence of a jury for the court). Iron S. M. Co. v. Mike & Star, supra; Migeon v. Montana Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156, and cases therein cited. In this case there was not only a failure on the part of plaintiff to prove that any of the veins claimed by him could ever be expected to pay the cost of extracting the ore, but there was, on the contrary, a preponderance of evidence that, at the date of the application for the placer patents, they were generally regarded as valueless, and have since proven to be so. Upon this ground, therefore, if upon no other, the finding against plaintiff's claim of ownership is clearly supported by the evidence.

The questions asked by plaintiff's attorney on cross-examination of defendant, to which objections were sustained by the court, were clearly not proper as cross-examination, and the ruling of the court was correct. The real complaint of the plaintiff respecting this matter seems to be that he was not allowed to make the defendant his own witness. This the court had the right, in its discretion, to allow or to refuse, and we think its discretion was not abused in refusing to hear further evidence on the point to which the questions were directed. They related exclusively to defendant's knowledge of the existence of quartz veins within the boundaries of the placer claims prior to the application for patents. That fact had already been satisfactorily shown, but was immaterial for two reasons: First, because it was not his knowledge, but that of his grantors, and of the miners generally, that was important; and, second, because it had been shown that the veins were of no value, and not within the meaning of the law.

The judgment and order of the superior court are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

149 Cal. 647

CRISMAN et al. v. LANTERMAN et al.

(L. A. 1,635.)

(Supreme Court of California. Aug. 30, 1906.)

1. MORTGAGES—REMEDIES OF MORTGAGEE—EFFECT OF RELEASE OF MORTGAGE.

A mortgagee who releases the mortgage to a grantee of the mortgagor, without the latter's consent, cannot hold such mortgagor personally liable for the debt.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 761.]

2. SAME—MERGER OF SECURITIES—INTENTION OF PARTIES.

Whether a mortgage is merged and extinguished by the subsequent execution of a deed of trust on the property to the mortgagee securing the same with other indebtedness depends on the intention of the parties.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 897.]

3. SAME.

A grantee of mortgaged property executed a deed of trust thereon to the mortgagee, to secure the mortgage debt and other unsecured indebtedness, which recited that it was given "for the purpose of further securing any of said promissory notes which may now be secured by any mortgage," and provided that in case a sale thereunder should not realize sufficient to pay the entire indebtedness the creditors should "retain, have, and possess the same remedies to enforce the payment of said promissory notes or any of them which they would have or possess if this deed of trust had not been executed." The mortgagor whose note was secured by the mortgage consented to the giving of said deed. *Held*, that the mortgage was not merged in such trust deed, and that the right of the mortgagor to have the proceeds of the property applied to the payment of her note was not affected thereby.

4. TRIAL — FINDING OF FACTS — EFFECT OF STIPULATION OF FACTS.

Where a cause is tried to the court on a stipulation as to the facts in detail, but not embracing an ultimate fact in issue, it is the duty of the court to find such fact if it may be inferred from the stipulated facts, and such a finding is entitled to the same weight as one based on conflicting evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 880.]

5. EXECUTORS — ESTOPPEL — MORTGAGE — RELEASE.

Defendant's testatrix executed a mortgage securing her note, and afterward gave to the mortgagee other notes signed also by her son and one by defendant, who was her husband, and afterward her executor. She subsequently conveyed the mortgaged property to the son, who, with her consent, executed a trust deed thereon to the mortgagee as additional security and securing all of the notes. After her death the property was sold under the trust deed free of incumbrance, and the purchase money was paid only on the execution of a release of the original mortgage and a certificate from an abstract company that the property was free of incumbrance. Defendant attended the sale, made no objection to the terms, and demanded that the proceeds be applied first to payment of the later notes, but in this he acted individually, and not as executor. The money was so applied, leaving a balance due on the note of testatrix. *Held*, that the acquiescence and acts of defendant did not estop him as executor from defending against an action to charge the estate with liability for such balance on the ground that it was released by the failure to apply the proceeds of the sale thereon or by the release of the mortgage.

6. SAME.

A mortgagee who subsequently took a trust deed on the same property from a grantee of the mortgagor, securing the same and a further indebtedness, and sold the property thereunder free of incumbrance, releasing the mortgage, and realizing a sum sufficient to pay the mortgage debt but a part of which was applied to the other indebtedness, is estopped as against the purchaser from asserting the invalidity of the release, and, having no right to enforce the mortgage, cannot make it the basis of an action against the mortgagor to recover a deficiency judgment.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Albert J. Crisman and Dwight N. Lowell, executors, against J. L. Lanterman, executor, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Frank G. Finlayson, for appellants. M. W. Conkling and Chas. T. Howland, for respondents.

SLOSS, J. On June 18, 1895, Ammoretta J. Lanterman made her promissory note for $5,000, payable to Frederick S. Crisman or order, on or before 10 years after date. With the note, and as security for it, she delivered to Crisman a mortgage of the south 80 acres of lot 9 of the Rancho La Canada, in Los Angeles county, and certain shares of stock in a water company. The property mortgaged stood of record in the name of Ammoretta J. Lanterman, but, in fact, it belonged to Roy S. Lanterman, her son, and the note and mortgage were given in consideration of a loan of $5.000 by Frederick S. Crisman to Roy S. Lanterman. These facts were known to the lender. In 1900 Ammoretta J. conveyed to Roy S. Lanterman the mortgaged property. In the meanwhile three other notes had been made by members of the Lanterman family to Crisman, to wit: A note for $1,000, dated January 6, 1896, payable on or before eight years after date; a note for $500, dated March 20, 1896, payable on or before eight years after date; and a note for $2,800, dated July 1, 1896, payable on or before six years after date. All three of these notes were signed by Ammoretta J. and Roy S. Lanterman, and the last, the one for $2,800, bore, in addition, the signature of J. L. Lanterman, the husband of Ammoretta. In October, 1900, Frederick S. Crisman died, leaving a will by which Albert J. Crisman and Dwight N. Lowell were named executors. The will was duly proved, and letters testamentary issued. On August 1, 1902, all of the principal of said four notes and some of the interest being unpaid, Roy S. Lanterman made a deed of trust to Albert J. Crisman, as trustee, whereby, as security for these notes, he conveyed to said Crisman lot 9 of the Rancho La Canada, with the shares of water stock above mentioned. The property described included that which was covered by the mortgage given in 1895. The deed of trust, in which the grantor and his wife were described as parties of the first part, Albert J. Crisman as party of the second part, and the executors of Frederick S. Crisman's will as parties of the third part, provided for the sale of the property by the second party, in the event that any of the notes remained unpaid on the 1st day of May, 1903. In addition to the ordinary provisions of deeds of trust to secure indebtedness, the instrument contained certain recitals and provisions which will be referred to hereafter. The deed of trust was accompanied by a written consent to its execution, signed by Ammoretta J. Lanterman and her husband. In May, 1903, no payments having been made on account of either principal or interest since the making of the deed of trust, the trustee gave the required notice of sale to be had on June 2, 1903. Prior to this time, Ammoretta J. Lanterman had died testate, and her husband had been appointed executor of her will. At the time and place fixed, the trustee offered the property for sale. J. L. Lanterman was present, as was Frank D. Lanterman, one of his sons, together with M. W. Conkling, who was the attorney for the executor of Ammoretta's will and also for Frank D. Before calling for bids, the trustee read the published notice of sale, and a "statement of conditions of sale." The notice made no reference to any mortgage or other incumbrance, but the statement of conditions declared, among other things, that a deposit must be made by the successful bidder, and that the balance of the purchase price would be payable "as soon as the Title Insurance & Trust Company can certify that the title is in the successful purchaser, free and clear of all incumbrances." These papers having been read in the hearing of J. L. Lanterman and M. W. Conkling, neither of whom made any objection or said anything regarding the conditions of sale, J. L. Lanterman, by Mr. Conkling, stated that he would require the proceeds of the sale to be applied. First, upon the $2,800 note; second, upon the $500 note; third, upon the $1,000 note; and, lastly, upon the $5,000 note of June 18, 1895, executed by Ammoretta J. Lanterman alone. Thereupon the property was offered and struck off to Frank D. Lanterman for $10,000, that being the highest bid. The required deposit was made, and some two weeks later, Albert J. Crisman, as executor, acting under an order of court, executed a release of the mortgage of June 18, 1895. The deed was delivered to the purchaser, and the balance of the purchase money paid to the trustee, who applied it to the payment of the four notes in the order in which the application had been demanded. Thereby the three smaller notes were paid, and there remained a sum for application upon the principal and interest of the $5,000 note sufficient to reduce the unpaid part of such note to $2,274.41. For this amount the executors of Frederick S. Crisman's will presented a claim (as upon a note secured by mortgage) to Ammoretta J. Lanterman's executor. The claim having been rejected, this action, in form one to foreclose a mortgage, was commenced. Separate answers were filed, the defendants relying, in substance, upon the release of the mortgage as a defense. The case was presented to the superior court upon an agreed statement of facts, and judgment went for the defendants. The plaintiffs' appeal.

While the complaint is in the familiar form used in actions for the foreclosure of mortgages, the plaintiffs' theory really is that there is no mortgage to foreclose, and that they are entitled to a money judgment against Ammoretta's estate, payable in due course of administration. They concede, in effect, that if, at the time of the trustee's sale, the $5,000 note was secured by a subsisting mortgage on property which had been conveyed by the mortgagor, and, if the mortgagee, without the consent of such mortgagor (or her executor), gave to the owner of the land a valid release of the mortgage, they, as payees of the note, could not hold the mortgagor (or her estate) to a personal liability thereon. And this conclusion is, of course, inevitable under our statutory system of enforcing the payment of obligations secured by mortgage, as construed by this court. While a mortgage creates merely a lien as security for the debt, the Code provides that there can be but one action for the recovery of a debt so secured. Code Civ. Proc. § 726. By the judgment in such action, the land is subjected to a sale for the purpose of satisfying the plaintiff's demand, and if the proceeds be insufficient a judgment for the balance is then docketed against the defendants personally liable for the debt. Until there shall be a deficiency on such sale, there can be no personal judgment against the mortgagor, who is entitled to have his debt paid out of the land so far as the proceeds realized on foreclosure sale may render payment possible. The land is thus made primarily liable for the payment of the obligation, and the mortgagor can be called on to pay only where the proceeds of a sale of the land are insufficient. He is, therefore, entitled to insist that the mortgagee shall not, by releasing the land, which should be made to pay the debt, throw upon him a personal liability therefor. Bartlett v. Cottle, 63 Cal. 366; Biddel v. Brizzolara, 64 Cal. 354, 362, 30 Pac. 609; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Porter v. Muller, 65 Cal. 512, 4 Pac. 531; Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086; McKean v. German American Savings Bank, 118 Cal. 334, 50 Pac. 656; Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108. Recognizing these well-settled rules, the appellants deny their applicability here by contending: First, that by the execution of the trust deed, the mortgage became merged in the new security with the consent of the mortgagor, so that the debt thereafter was not one secured by mortgage; second, that even if the mortgage survived the making of the trust deed, the estate of Ammoretta J. Lanterman consented, at the trustee's sale, to the release of the mortgage given, or (which would amount to the same thing) such estate is, by the conduct of the executor at the time of the sale, estopped to deny that it consented to the release. And, finally, if the court should be against the appellants on both these points, they urge, third, that the purported release of mortgage was (for reasons which will appear hereafter) void and of no effect, and therefore cannot destroy their right to a judgment, which, under this view, should be one foreclosing the mortgage. If any one of these propositions be sound, it destroys the effect of the contention that Ammoretta, as a mortgagor, is relieved by the release of the land from the lien of the mortgage. And it may be remarked incidentally that any of these positions, if it be well taken, is equally fatal to the respondents' contention (which appears to have been adopted by the learned judge of the trial court) that, under all the circumstances, Roy became, in equity, the principal on the mortgage debt sued on, and Ammoretta a surety, and that the estate of the latter was exonerated by the release of the mortgage without Roy's consent, and the consequent release of Roy, the principal debtor. For, if there was no mortgage after the deed of trust was given, Roy could not, nor could his surety, be affected by a paper purporting to release it; if the release was with the consent of the surety, it would not relieve such surety from liability; and, lastly, if there was no valid release, neither principal nor surety has ground for complaint. It is unnecessary, therefore, to decide the question, which is fully argued in the briefs, as to whether Ammoretta was, as to the Crisman estate, a principal debtor or a surety. Whether she was the one or the other, her estate is liable unless there was a subsisting mortgage which was released as to the owner of the land without her consent or that of her executor.

First. Did the execution of the deed of trust with the consent of Ammoretta supersede the mortgage? The appellants' contention is that the trust deed, being given to secure (with other notes) the same obligation secured by the mortgage, and furnishing, as security, the same property described in the mortgage, in favor of the same obligees, it must be assumed that the intention of the parties (including Ammoretta, who consented to the trust deed) was to substitute a new security, to wit, that of the deed of trust, for the existing security of the mortgage. If that be so, the mortgage was, in effect, then released by mutual consent, and the subsequent formal release, following the trustee's sale, was a vain and idle act, not affecting the substantial rights of any of the parties. Whether the execution of the deed of trust accomplished such a merger of the mortgage, or, as it may be termed, a novation of securities, is a question of the intention of the parties, to be derived from their acts. It is not, in a legal sense, impossible for a mortgage to continue to exist, where there has been given to the mortgagee a further security on the same land for the same debt. It is argued that such situation may produce anomalous results, as, for example, if, by a sale under the junior security, the title to the land should become vested in the holder of the prior mortgage. But this might happen in any case where a deed of trust is given on land subject to an existing mortgage, and, even where the legal title becomes vested in the mortgagee, equity will sometimes, to avoid injustice, treat the mortgage as alive in determining the rights of the parties. The language of the deed of trust here in question would seem to indicate an intention that the mortgage should continue to exist. The instrument first recites that Roy S. Lanterman had borrowed from Frederick Crisman the sums represented by the four promissory notes above mentioned (including the $5,000 note signed by Ammoretta), that the parties have agreed that all the notes shall be deemed to have matured on May 1, 1903, and that Roy agrees to pay all of the notes, whether executed by him or not, and then grants the lot 9 of the Rancho La Canada, in consideration of the indebtedness, "and for the purpose of further securing any of said promissory notes which may now be secured by any mortgage * * * etc." The instrument contains, in addition, the provisions relative to reconveyance or sale which are customary in deeds of this character, and provides that in case of a sale which shall not realize sufficient to pay the entire indebtedness, "the said parties of the third part shall retain, have and possess the same remedies to enforce the payment of said promissory notes, or any of them, which they would have or possess if this deed of trust had not been executed." The clauses quoted certainly indicate that it was not the intention of the parties to have the new security supplant the old. It is described as "further security," which, in the ordinary acceptation of the term, means additional, not substituted, or superior, security; and, besides, the executors retain all the remedies they had before, one of which was to foreclose the mortgage on the $5,000 note. The argument that the parties would not be likely to intend to contract for two forced sales of the same property to satisfy (in part) the same debt does not seem to us a sufficient ground for disregarding any of the express provisions of their agreement. We think that even if the deed of trust had been made by Ammoretta, the mortgagor, herself, it should not be construed as accomplishing a merger of the mortgage. And, when we consider the terms of her consent to the deed, the conclusion that there was no substitution is strengthened. She signed a writing, which provided that "said trust deed shall not be deemed to in any manner whatsoever affect or waive any rights which the * * * estate of F. S. Crisman, deceased, may now or hereafter have against the undersigned * * * upon or by reason of the said promissory notes or any of them. * * *" This consent was intended to waive any defense which might be claimed to have accrued to Ammoretta on any of her notes by reason of the execution of the deed. But it was not intended to give new and greater rights against her. If the mortgage should be regarded as merged, her liability on her $5,000 note, which originally was merely "contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs" (Biddel v. Brizzolara, supra), would be converted into a liability, which might be enforced (as it is sought to be enforced here) after the security had been applied to other debts, or, perhaps, without any recourse to the security at all. See Herbert Kraft Company v. Bryan, 140 Cal. 73, 73 Pac. 745.

Second. Did the estate of Ammoretta J. Lanterman consent to the release of the mortgage? The answer to this question, depends largely upon the effect that is to be given to the findings of fact made by the trial court. Among them is a finding that the plaintiffs released the mortgage "without the consent of * * * the estate of Ammoretta J. Lanterman." As has been stated, the cause was tried upon an agreed statement of facts, and it is claimed by the appellants that where the facts are agreed, no findings are necessary, and that, if findings are made, they are entitled to no weight. There have been several rulings by this court to the effect that the want of findings affords no ground for reversing a judgment where the facts have been agreed upon. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Muller v. Rowell, 110 Cal. 318, 42 Pac. 804. But here the facts embraced in the stipulation were not the ultimate facts put in issue by the pleadings, but were (as to the question of consent) a recital of the circumstances surrounding the sale, from which the ultimate fact of consent is, as is claimed, inferable. If those circumstances would support an inference either way, it was not only proper but necessary that the trial court should make a finding of the ultimate fact. Such finding when made is entitled to the same weight as any other finding on conflicting evidence, and will not be overthrown unless the facts stipulated cannot by any reasonable inference support the conclusion reached by the trial court. The cases relied on by appellants as establishing the rule that no presumptions will be indulged in favor of the findings where all the evidence before the trial court was written (Wilson v. Cross, 33 Cal. 60; Lander v. Beers, 48 Cal. 546) are not in harmony with later decisions. Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Sheehan v. Osborn, 138 Cal. 515, 71 Pac. 622. In the case at bar, the appellants rely upon the conduct of J. L. Lanterman at the trustee's sale as constituting consent by the estate of Ammoretta, or an estoppel to deny consent. One element of such conduct consisted of his failure to object when the trustee read the conditions, showing that the title would be certified to the purchaser free and clear of incumbrances. So far as this silence is concerned, we do not see that it conclusively established an estoppel. No doubt there are cases in which mere silence may work an estoppel. But to effect this, it is essential: First, that the party against whom the estoppel is invoked has stood by and seen the other party committing an act infringing upon his rights; and second, that his failure to speak has induced the person committing the act to believe that he assents to its being committed. De Bussche v. Alt, 8 Chan. Div. 286; Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695. Here the proposed sale, free of incumbrance, in no way infringed upon the rights of the estate represented by J. L. Lanterman (even if we assume that he attended the sale in his representative capacity). The release of the mortgage by the voluntary act of the mortgagee would not injure the estate, but would benefit it by relieving it of personal liability for the debt. Nor did his nonaction in any way mislead the plaintiffs or induce them to believe that the estate of Ammoretta consented to be held liable on the $5,000 note without foreclosure of the mortgage. The facts were as well known to plaintiffs as to Lanterman. He had no reason to suppose that they, represented at the sale, as they were, by counsel, were ignorant of the legal effect of their proposed conduct, and was under no duty to warn them that a release of a mortgage without the consent of the mortgagor relieved such mortgagor from personal liability. And the request or demand for the application of the proceeds does not raise a necessary inference that J. L. Lanterman, as executor, consented to the release of the mortgage, or that his testatrix's estate was estopped to deny consent. The demand was that the proceeds be applied to the payment of the smaller notes before the payment of the $5,000 mortgage note. The interests of the estate, as mortgagor, required either that the mortgage, which made the estate's liability contingent on a foreclosure sale, should remain, or that, if the mortgage was to be released, the proceeds of the sale should be applied first to the satisfaction of the mortgage debt. Considered by itself, then, the demand that the $5,000 note be paid last, would imply, not a consent by Ammoretta's estate that the land be sold free from the mortgage, but rather a requirement that the mortgage lien remain for the protection of the estate. Furthermore, J. L. Lanterman did not state that he was acting as executor in attending the sale. As co-maker of one of the notes secured by the mortgage, he had an individual interest in the proceeding. And, in demanding that the proceeds of the sale be applied first to the satisfaction of his own debt, and last to that of the debt which, for the benefit of the estate, should have been paid first, it may well be said that he was acting in his individual, not in his representative, capacity. The trial court, by its finding as to consent, took this view, which finds additional support from the fact, stipulated in the record, that J. L. Lanterman would, if present, testify that he was acting for himself, and not for the estate. The fact that his demand included the application of the proceeds of the sale of two notes in which he was not individually interested is entitled to some weight, but is not sufficient, in itself, to overthrow the finding that the estate did not consent to the release of the mortgage.

Third. Was there a valid release of the mortgage? The instrument executed by the plaintiffs, so far as is material to the present inquiry, reads as follows: "Without in any manner waiving the right of the said executors of the estate of Frederick S. Crisman, deceased, to recover from the said estate of Ammoretta J. Lanterman, deceased, the balance of the principal and interest unpaid upon the said promissory note for $5,000; expressly reserving unto said estate of Frederick S. Crisman * * * all the rights now possessed by said estate * * * to recover and receive from the estate of said Ammoretta J. Lanterman, deceased * * * the unpaid balance of the principal and interest of said promissory note for $5,000, the undersigned * * * does hereby remise, release, relinquish and discharge from the said mortgage and from the lien thereof all the lands in said deed of trust described," etc. The contention of plaintiffs is that, if the mortgage lien still existed, it could not be released without releasing Ammoretta's estate, and that, therefore, a reservation of rights against said estate prevented the release from operating at all. We agree that there could not be a release of the lien of the mortgage as to her and a retention of the right to sue the mortgagor (unless she consented), but the conclusion that the release fails does not follow. Whatever might be the proper construction of the instrument, considered by itself, the circumstances under which it was given estop the plaintiffs, as against the defendant Frank D. Lanterman, to deny that the mortgage was released. The property was sold to him free of incumbrances, and he bid $10,000 upon the understanding that the balance of the purchase price beyond the deposit paid at the sale was to be paid upon a certificate being made by the abstract company that there was no incumbrance. The executors obtained an order of court authorizing them to release this mortgage, and delivered the document in question to the abstract company for the purpose of completing the sale. The abstract company gave the purchaser the certificate agreed upon, and paid the purchase price, previously deposited with it by him, to the trustee, who applied it on the indebtedness secured by the deed of trust. Such application paid in part the $5,000 note now sued on, and the plaintiffs recognize such payment in their complaint. They cannot be permitted to retain the purchaser's money, and still claim, as against him, that the mortgage, the release of which was a part of the consideration, still subsists as a lien upon his land. And, if the mortgage cannot be enforced as against the owner of the land, it cannot, for the reasons hereinbefore stated, be the foundation of an action against the original mortgagor. The plaintiffs contend that, as executors, they had no power to release the mortgage except upon full satisfaction of the debt. But a sum was realized sufficient to satisfy the mortgage, and if a full satisfaction was necessary to authorize the release which had been agreed upon, the purchase price should, so far as affects the purchaser's rights, be deemed to have been so applied. The fact that J. L. Lanterman and the trustee agreed upon a different application cannot bind Frank. This not being a voluntary payment, neither the debtor nor the creditor had any right to direct the application of the proceeds. The application is to be made by the court according to the equities of the case. Orleans Co. Nat Bank v. Moore, 112 N. Y. 543, 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. Rep. 775; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; Murdock v. Clarke, 88 Cal. 384, 26 Pac. 601. Without undertaking to review the many decisions, not all in harmony, upon the proper application of funds derived from forced sales, we think it sufficient to say that, under the peculiar circumstances of this case, the equities, as between the estate of F. S. Crisman and Frank D. Lanterman, required the amount paid by the latter to be applied to the satisfaction of the mortgage debt, if such satisfaction was essential to a valid release of the mortgage.

From these views, it follows that judgment was properly entered in favor of defendants.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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149 Cal. 627

WADLEIGH et al. v. PHELPS. (Sac. 1,316.)

(Supreme Court of California. Aug. 30, 1906. Rehearing Denied Sept. 28, 1906.)

1. EQUITY—BILL—LACHES—DEMURRER.

The defense of laches may be taken advantage of by demurrer to a bill for want of facts, where laches is apparent on the face of the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 498.]

2. SAME—AMENDMENT.

Where plaintiff sued to have certain deeds, absolute in form, declared to be mortgages given to secure a note of $7,120 and interest, a trial amendment alleging that one of the deeds was given, not only as further security for such indebtedness, but also to secure a payment to the grantee of a further sum of $1,500 alleged to have been paid by the grantee to C., did not in any degree detract from the effect of complainants' original claim that the property was conveyed to the grantee to hold as security for the $7,120 note and interest.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 567.]

3. ACTION—JOINDER.

Where property belonging to W., and other property belonging to another, from whom plaintiff held an absolute power of attorney, was conveyed by separate absolute deeds to secure a single indebtedness from W. to the grantee, the latter not being compelled to accept a partial payment of his claim or to make a partial surrender of his securities, a single suit was maintainable to have all the conveyances declared to operate as mortgages, and for redemption.

4. MORTGAGES—ACTION TO REDEEM—PARTIES.

Where plaintiff and another, from whom he held an absolute power of attorney, conveyed property owned by them in severalty, by absolute deeds to secure plaintiff's debt to the grantee, plaintiff and his principal were entitled to join as parties plaintiff in a suit to have such conveyances declared mortgages and for redemption, notwithstanding Code Civ. Proc. § 347, providing that if there is more than one mortgagor or person claiming under him, some of whom are not entitled to maintain an action to redeem, any one of them who is entitled to maintain such action may redeem a divided or undivided part of the mortgaged premises, according to his interest, etc.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1825–1832.]

5. SAME—REVIEW—PRESUMPTION—EVIDENCE.

The rule that a deed absolute in form is presumed to be an absolute conveyance does not require that the evidence in the record, on appeal from a decree declaring certain absolute conveyances to be mortgages, must be entirely plain and convincing to the appellate court in order that the decree should be sustained.

6. ESCROWS—AGREEMENTS—MEMORANDUM.

An unsigned memorandum in the handwriting of the grantee, found among his personal effects after his death, wrapped about a quitclaim deed of certain property from himself and his wife to his grantor, and apparently designed to accompany a deposit of the deed in escrow and to serve as a memorandum of the terms and conditions on which it was to be delivered, which memorandum had never been brought to the attention of the grantees in the quitclaim deed and to which no assent had been given was ineffective as a written contract establishing the terms on which the property had been conveyed to decedent and was to be held by him.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escrows, §§ 1–3.]

7. WITNESSES—TRANSACTION WITH DECEASED PERSON—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 1880, provides that parties or assignors of parties to an action or proceeding against an executor or administrator on a claim or demand against the estate of a deceased person, cannot testify as to any fact occurring before the death of such deceased person. *Held*, that such section related only to actions on such claims against the decedent as might have been enforced against him in his lifetime by a personal action for the recovery of money, and on which a money judgment could have been recovered, and did not apply to a suit against a decedent's executrix to have certain absolute conveyances to him declared to operate as mortgages, and for a redemption.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 572.]

8. MORTGAGES—MORTGAGEE IN POSSESSION—ADVERSE POSSESSION.

Code Civ. Proc. § 346, declares that an action to redeem a mortgage of real property may be brought against the mortgagee in possession at any time unless the mortgagee has maintained adverse possession of the mortgaged premises for five years after breach of condition. *Held*, that, so long as a mortgagee in possession held by the consent of the mortgagor and by virtue of his agreement to apply the rents and profits to the indebtedness, his holding was not adverse.

9. SAME—DUTIES OF MORTGAGEE.

Where a mortgagee was let into possession of certain mining claims under the mortgage, and it was left optional with him to work the claims or not, and to make leases of portions thereof or not as he saw fit, he was bound, independent of agreement, to pay the expenses of the operation of the claims, and to apply any net profits to the mortgage indebtedness.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 498–502.]

10. TENDER—EFFECT—INTEREST.

Civ. Code, § 1504, declares that an offer of payment or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest, and section 1498 declares that when the debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend on the due preformance of such conditions. *Held*, that where a grantor was entitled to a reconveyance of the property on payment of the debt to secure which it had been conveyed, a tender of the amount he claimed to be due "and any further sum of money due" conditioned on the delivery of a reconveyance, was effective to stop the running of interest.

11. MORTGAGES—ACCOUNTING.

Certain mining claims were conveyed to defendant's testator by a deed which was in fact a mortgage, under an agreement that he might operate the mines, paying the expenses from the proceeds and crediting the balance on the mortgage debt. He in fact contracted with M. to superintend and manage the mine under an agreement by which M. was required to look solely to the mining property for money expended and his salary. *Held*, that the amount due M. from the mine was no part of the indebtedness due testator from the mortgagors, though on redemption they might be required to accept the mining property charged with such claim for services.

12. EXECUTORS — CONVEYANCES OF LAND — STATUTES—APPLICATION.

Code Civ. Proc. § 1597, provides that when a person, who is bound by written contract to convey real estate, dies before making the conveyance, and in all cases when such decedent if living might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor to convey the property to the person entitled thereto. *Held*, that such section was applicable only where deceased was bound by a written contract to convey, and had no reference to a suit to compel an executrix to reconvey certain property conveyed to her testator by absolute deeds, which were in fact mortgages.

13. EVIDENCE—LETTERS.

In a suit against an executrix to compel reconveyance of property conveyed to her testator by deeds absolute in form which were in fact mortgages, letters passing between defendant's testator and the grantor and answers thereto, relative to their respective rights in the property, were admissible as admissions.

14. MORTGAGES—MORTGAGEE IN POSSESSION—SERVICES.

A mortgagee in possession is not entitled to compensation for personal services on account of the mortgaged property.

15. TRIAL—OPINION—FINDINGS—COSTS.

Where the written opinion of the trial court provided that each party should pay his own costs, but the findings and decision recited that plaintiffs were entitled to recover against the defendant a judgment for costs in the action, etc., the findings and decision controlled the written opinion, and entitled plaintiffs to a judgment for costs.

16. MORTGAGES—REDEMPTION—AMOUNT DUE—INTEREST—TENDER.

Where, in a suit to have certain absolute conveyances declared to operate as mortgages only and for redemption, defendant denied plaintiff's claim, but was defeated, she was entitled to interest on the amount found due her less the costs awarded plaintiffs, from the date the judgment became final to such time as plaintiffs under the judgment tendered her the amount due, or, in the event no tender was made, until foreclosure sale, ordered in that event, had been made.

Department 1. Appeal from Superior Court, Nevada County; F. T. Nilson, Judge.

Action by W. P. Wadleigh and others against Josephine A. Phelps, as executrix of the will of T. G. Phelps, deceased. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

See 82 Pac. 200.

Geo. F. Witter, for appellant. C. W. Cross, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment given in favor of plaintiffs in an action brought to have certain deeds of conveyance, absolute in form, decreed to be in fact only mortgages, the amount due thereon ascertained, and conveyances of the property therein described ordered executed upon the payment of the amount adjudged due. Other appeals taken by defendant from certain orders made after judgment, including an order denying her motion for a new trial, have heretofore been dismissed, and still other appeals shown by the transcript have been held unnecessary and fruitless, in that they were from nonappealable orders reviewable on the appeal from the judgment. Wadleigh et al. v. Phelps, 147 Cal. 135, 81 Pac. 418.

The case made by the complaint as originally first amended, and upon which the case went to trial and was partially tried, was substantially as follows: On November 15, 1889, defendant's testator, T. G. Phelps, loaned $5,500 to plaintiff Wadleigh, who gave Phelps his note for the amount, payable six months after date, and bearing 9 per cent. interest. At the same time, as security for the payment thereof, Wadleigh and his wife gave Phelps a deed of conveyance of certain lots in San Francisco, Cal., and other property in the state of Washington. On August 1, 1890, Phelps loaned Wadleigh $1,000 more, which, with the $5,500 and interest, made his indebtedness $6,830, for which amount a new note, bearing interest at 9 per cent. per annum, and payable six months after date was given, and it was agreed that Phelps should continue to hold as security the title to the lands previously conveyed. On April 23, 1891, Phelps and Wadleigh sold two of the San Francisco lots for $2,500, $2,000 of which was credited on the note and $500 paid to Wadleigh. On November 13, 1894, there was due on said note $6,823, and Phelps claimed that Wadleigh owed him, for moneys expended, the further sum of $297, making a total of $7,120, for which amount a new note, bearing the same rate of interest, and due six months after date, was given by Wadleigh. On that date, Wadleigh was the duly appointed attorney in fact of plaintiff Anna F. Smith, and she, by her said attorney, executed to Phelps a deed of certain mining property in Nevada county of which she was the owner and holder of the legal title, but in which "said Wadleigh had an equitable estate and interest," and of which property she and Wadleigh were the owners. This conveyance was made as further security for the payment of the indebtedness evidenced by the note. After the execution of this note, it was agreed by said Wadleigh, Smith, and Phelps, that Phelps might work said mining claim and make temporary leases of portions thereof, and that the proceeds should be applied, first, to the payment of the actual costs and expenses of such operations, and the surplus toward the payment and satisfaction of the indebtedness due Phelps. In accord with this agreement, Phelps did work said mining claim and make leases of limited portions thereof, from which he received money which plaintiffs are entitled to have credited on the indebtedness. On April 14, 1899, Wadleigh and Phelps agreed in writing to the extension of the $7,120 note, for a period of two years from that date. Phelps died June 11, 1899. His will was admitted to probate July 13, 1899, and defendant was then appointed executrix. Since his death, said executrix has continued to work said mine, and make leases of portions thereof. Wadleigh did not know what amounts had been received by Phelps and his executrix on account thereof. He has demanded an accounting from the executrix, but the same was refused, the executrix claiming that all of the property conveyed belonged absolutely to Phelps. On April 18, 1901, Wadleigh tendered, and offered to pay, the full amount due, on condition that the executrix make good and sufficient deeds of reconveyance of the various properties conveyed as security, but the executrix refused to receive such tender or offer, except as an unconditional payment, claiming that neither Wadleigh nor Smith was entitled to the reconveyance of any property upon the payment of the indebtedness. This action was commenced February 8, 1902, in the superior court of Nevada county. Defendant filed her answer, in which she denied that any of the deeds executed by Wadleigh or Smith were given as mortgages, claiming that they were what they purported to be, viz., absolute conveyances.

Upon the issues thus made, the case came to trial. After the trial had proceeded for some five days, plaintiffs were permitted by the court to amend their complaint by alleging that the deed of Anna F. Smith was given, not only as further security for the payment of the $7,120 indebtedness evidenced by the note, but also as security for the payment to said Phelps of the further sum of $1,500 alleged to have been paid by said Phelps to one C. W. Cross. Defendant thereupon amended her answer, admitting the allegations of the complaint as to all the conveyances except that of the mining property, but denying that the conveyance of the mining property was a mortgage, and claiming that it was an absolute conveyance of the property to Phelps. She denied the allegation of due tender, and also set up various provisions of the statute of limitations. Upon the trial the question as to whether the deed of the mining property was intended as a deed absolute or as security, and the question of adverse possession by Phelps of such property, were submitted to a jury impaneled to advise the court, and both questions were answered in plaintiff's favor. The court adopted these findings of the jury, and found the facts to be in accord with the allegations of the amended complaint. According to these findings, there was due the estate of Phelps $11,112.03 on April 18, 1901, and it was adjudged that Wadleigh make payment thereof within 30 days after the judgment becomes final; that, upon his failure so to do, the property be sold and the proceeds applied to the payment of the indebtedness; that, if such payment be made by Wadleigh as provided, said executrix shall make and deliver the necessary reconveyances; and that, if she fails to so do, a commissioner appointed by the court for that purpose execute such reconveyances. Plaintiffs were, by the judgment, awarded their costs. This somewhat elaborate statement as to the pleadings has been considered essential to a proper understanding of some of the many points made and strenuously relied on by defendant for a reversal.

1. A demurrer was interposed to the first amended complaint and this was overruled. It was stipulated that the same demurrer be considered as interposed to the complaint as amended upon the trial, and overruled. The principal contention made here as to the ruling on demurrer is that the complaint on its face showed that the cause of action therein set forth was barred by the laches of plaintiff and that the demurrer should, therefore, have been sustained upon the general ground stated therein that the complaint failed to state a cause of action. It is settled that the defense of laches may be set up in this way, where the laches is apparent on the face of the complaint, the condition then being that the complaint does not show equity, or, in other words, does not state facts sufficient to constitute a cause of action. Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 Pac. 516. But, while conceding the general principle to be as enunciated in the many decisions cited by the defendant upon the doctrine of laches, we are utterly unable to see any basis for the application of that doctrine, in the facts alleged in the complaint herein. There was absolutely nothing in the circumstances disclosed by this pleading tending to show any inexcusable delay on the part of plaintiffs in the commencement of proceedings to establish their claim, or any reason why it would be inequitable to then enter upon an inquiry as to the validity thereof. Whatever may be said as to the evidence, there was nothing in the facts alleged in the complaint to give the slightest intimation that Phelps ever did an act inconsistent with the theory that he held title to all the property involved, and held possession of the mining property, solely as security for an indebtedness of Wadleigh, the greater part of which, viz., the $7,120, was evidenced by the promissory note of November 13, 1894, and the time for payment of which, was only two months before Phelps' death, extended for a period of two years from April 14, 1899. There was nothing in the facts alleged to call for any assertion of their claims by plaintiffs prior to the death of Phelps and the maturity of the indebtedness. Immediately upon the expiration of the time of credit, plaintiffs offered payment and demanded a return of the property. A large portion of defendant's argument in support of the claim of laches is based upon the fact that it was not until the amendment made during the trial that plaintiffs made any allegation as to an alleged $1,500 indebtedness being also secured by the deeds. We cannot see that these allegations as to an additional indebtedness in any degree detracted from the effect of the original claim that the property was conveyed to Phelps and held by him as security for the $7,120 note and interest. That claim continued under the amended pleading, and the effect of the amendment was simply to show that there was still another item of indebtedness for which the property also stood as security, and which must be satisfied before a reconveyance could be had. We see nothing in the complaint upon which it can be held that defendant's general demurrer for want of facts should have been sustained on the ground of laches.

The demurrer also specified misjoinder of parties plaintiff, to wit, the joinder of Wadleigh with Mrs. Smith; and a misjoinder of causes of action, in that a cause of action in favor of Wadleigh was united with a cause of action of Mrs. Smith. The contention in this behalf is that, although all the property was mortgaged to secure the same indebtedness of Wadleigh to Phelps, Mrs. Smith was the only proper party plaintiff in an action to redeem as to her land, and Wadleigh was the only proper party plaintiff in an action to redeem as to his land, and that the so-called respective causes of action of these two parties could not be joined. There is no misjoinder of causes of action, for there is but a single cause of action stated. The effect of the various deeds given to secure the one indebtedness was to combine all the property thereby conveyed as a single security for the debt, just as completely as if there had been but one instrument of conveyance and but one mortgagor, and it is well settled that a mortgage creditor cannot be compelled to accept a partial payment of his claim, or make a partial surrender of his securities. No redemption as to a portion of the mortgaged premises can be insisted upon without a payment of the whole indebtedness. There can be no such thing as a partial redemption against the will of the mortgagee. While it is true that the owner of only a portion of the mortgaged premises may maintain redemption proceedings, his proceedings must necessarily be for a total redemption. "The debt being a unit, no party interested in the whole premises, or in any portion of them, can compel the mortgagee to accept a part of the debt, and to relieve the property pro tanto from the lien. * * * If the person redeeming has only a partial interest, and there are other partial owners also interested in having the lien of the mortgage removed from their estates, * * * he must himself redeem the whole mortgage, and his only equity against them consists in his right to enforce the mortgage upon their estates as a security for obtaining a subsequent contribution." 3 Pom. Eq. Jur. (2d Ed.) § 1220. See, also, Gibson v. Crehore, 5 Pick. (Mass.) 146; Powers v. Golden Lumber Co., 43 Mich. 468, 5 N. W. 656; 17 Ency. Pl. & Pr. p. 949. The action, whether brought by one or all of the parties entitled to redeem, is an action to redeem as to all the mortgages given to secure the single indebtedness, to accomplish a total redemption as to such indebtedness, and a complaint setting up the facts essential to such relief states but a single cause of action.

The fact that two persons owning different portions of the mortgaged property join as plaintiffs in such an action, asking that upon payment of the indebtedness the alleged portion of each be conveyed to him, does not change the character of the action or cause the complaint to state two causes of action. It is simply a case of two plaintiffs uniting in the statement of a single cause of action, each claiming a portion of the premises sought to be released from the mortgage, and each conceding the validity of the other's claim. What we have said upon this subject is undoubtedly the general rule. If that rule has been modified at all in this state by the provisions of our section 347, Code of Civil Procedure, relative to the case where there is more than one mortgagor, or more than one person claiming under a mortgagor, "some of whom are not entitled to maintain" an action to redeem against the mortgagee in possession, the modification has been thereby made only as to the case therein specified, and this is not such a case. That two persons so situated may join as parties plaintiff in such an action is beyond question. Notwithstanding the fact that their interests in the mortgaged property are several, they have such a common interest in the subject of the action and in obtaining the general relief demanded, viz., the redemption as to the whole mortgaged property, as entitles them to join. See Bliss on Code Pleading, §§ 73 to 76; Code Civ. Proc. §§ 378, 381. By the judgment granting such relief, in which they have a common interest, the ultimate rights of the plaintiffs as between themselves may be determined. Code Civ. Proc. § 578. Mr. Pomeroy, in his Code Remedies, says: "The rule which regulates actions to foreclose prevails also in those brought to redeem. As all the persons entitled to share in the mortgage debt must unite in the foreclosure suit, so, in a suit to redeem, the mortgagor and all others who have a common right with him to redeem, must be made parties—in strict theory they should be coplaintiffs. * * * The general doctrine above stated is strictly enforced in redemption suits of all varieties, the underlying principle being that a redemption must be complete and total; that the creditor shall not be compelled to accept a partial payment of his claim, or to make a partial surrender of his securities. When two tracts of land are mortgaged to the same person to secure the same debt, and they afterward come into the hands of different proprietors, one of them cannot be redeemed without the other; the owners of both the parcels and all persons interested in them must be parties to the action, if not as plaintiffs then, at least, as defendants." Section 256. The principle therein stated is equally applicable where two tracts have been mortgaged by different persons to another person to secure a single indebtedness. It is also clear that even if Wadleigh had no interest whatever in any of the real property mortgaged, he would be a proper, if not a necessary, party in any action brought by Mrs. Smith for an accounting and ascertainment of the amount due on the mortgages and the redemption thereof. See Pomeroy, Code Remedies, §§ 249, 256, 257.

Other points were made in defendant's opening brief in support of the demurrer, but none of them are of sufficient importance to warrant discussion here. The demurrer was properly overruled.

2. A careful examination of the 850 pages of the record, showing the evidence given on the trial of this case, has satisfied us that we would not be warranted in disturbing the conclusion of both jury and judge to the effect that the mining property deed of Mrs. Smith was given solely as security for Wadleigh's indebtedness. It is, of course, the universal rule that the presumption of law, independent of proof, is that such a deed is what it purports to be, viz., an absolute conveyance, and that this presumption must prevail unless the evidence to the contrary is entirely plain and convincing. This, however, does not mean that the evidence in the record on appeal must be entirely plain and convincing to an appellate court. This question of fact, like other questions of fact, is one for the trial court, and while, as said in Sheehan v. Sullivan, 126 Cal. 189, 193, 58 Pac. 543, the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court. The rule in this matter is declared in the cases cited by defendant. In Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175, the same contention as to insufficiency of evidence was made, and this court after admitting that the presumption of absolute conveyance should prevail unless the evidence to the contrary was entirely plain and convincing, said: "But whether the evidence is of such character and strength as to produce this conviction is a question for the trial court to determine. That court ought always to be governed, in weighing the evidence and reaching the conclusion as to the facts, by this rule, which requires the plaintiff, in an action like this, to present a case free from doubt, and, unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a deed, was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff. But we cannot say from the record which is before us that the superior court disregarded this rule in making its findings." In that case the court held that the evidence upon this material issue being conflicting in a substantial degree, the finding of the trial court that the deed was a mortgage must be allowed to stand. See, also, Penney v. Simmons, 99 Cal. 380, 382, 33 Pac. 1121; Sherman v. Sandell, 106 Cal. 373, 375, 39 Pac. 797, 798. In the last case cited, it was said: "To the extent that its determination rests upon the mere preponderance of evidence, or consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court."

It would unduly lengthen this opinion and would serve no useful purpose to here review the great volume of evidence elicted upon this question. Counsel for defendant has ably and industriously made many points in his briefs in regard thereto that should have been, and probably were, made before the tribunal whose province it was to determine this question of fact, and whose decision thereon, in view of the evidence, must be held to be conclusive. It must suffice here to state that the positive evidence of three witnesses, including plaintiff Wadleigh, was to the effect that the title to the mining property of Mrs. Smith was received and held by Phelps as security for the Wadleigh indebtedness, just as the title to Wadleigh's property previously conveyed was received and held; that such evidence finds some corroboration in the dealings between Wadleigh and Phelps and in the correspondence between them and the receipt given by Phelps to Wadleigh for the deeds delivered as security at the inception of the original indebtedness on November 15, 1889; that there is nothing in the record from which it can fairly be concluded that Phelps to the knowledge of Wadleigh ever assumed or claimed to be the absolute owner of the mining property, free of claims of Wadleigh, Mrs. Smith, and others interested; and that there is nothing in the record that necessarily destroys the effect of all this evidence. There was in this sufficient support for the finding of the trial court to the effect that the deed of the mining property was given to secure the payment of the Wadleigh indebtedness.

3. Counsel for defendant does not dispute the well-settled proposition that parol evidence is admissible to show that a deed absolute in form was in fact given as a mortgage, but he claims that parol evidence was not admissible in this case as to the mining property, for the alleged reason that there was a separate contract in writing between the parties as to the terms upon which the property was conveyed and was to be held. The difficulty as to this contention is that there was no evidence of any such written contract. The unsigned memorandum in Mr. Phelps handwriting, found among his personal effects after his death, wrapped about a quitclaim deed of this property from Mr. Phelps and his wife to Mrs. Smith, and apparently designed to accompany a deposit of this deed in escrow and serve as a memorandum of the terms and conditions upon which it was to be delivered, did not show such a contract. Wadleigh testified positively that the understanding was that such a deed should be placed in escrow for delivery to him upon the payment of his indebtedness to Phelps,

but that he never saw or heard of the memorandum found, and never knew or assented to the conditions therein specified. There is nothing in any of his letters to Phelps to indicate the contrary. A different question would be presented were the evidence such as to warrant the conclusion that Wadleigh knew of the memorandum and its contents, and might be held to have assented thereto, and the cases cited by counsel for defendant would then be in point. It does not appear that any delivery in escrow was ever made. It should be noted in this connection that Mrs. Smith was never in the state of California, and that Phelps never had any personal dealings with her, all the business being transacted through Wadleigh, who, apparently, was authorized by Mrs. Smith to use her property for his own purposes as he saw fit.

4. There is nothing in the point that, under section 1880, Code Civ. Proc., Wadleigh was incompetent to testify as to any matter of fact occurring before the death of Phelps. It is settled that this provision of our law applies only to actions upon such claims or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment could have been rendered. Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192; Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140. The case of Bernardis v. Allen, 136 Cal. 7, 68 Pac. 110, cited by defendant, was a suit brought to declare a partnership in mining property, against the successors of a deceased person, and it was there recognized that, where an action is not technically founded upon a claim against the estate, the plaintiff is not within the prohibition of section 1880, Code Civ. Proc. While the reasons for the rule declared in that section may be as applicable in a case of the character before us as in the case of a money claim against a deceased, the Legislature has not seen fit to make the rule cover such cases.

5. No foundation for the defense of laches was laid by any averment in the answer of defendant. Cook v. Ceas, 147 Cal. 614, 619, 82 Pac. 370. As we have already held, the complaint on its face did not show laches. If we assume that, under such circumstances, a trial court in the exercise of its own inherent powers, may ever, in the absence of such a plea in the answer, refuse relief upon the ground that the evidence shows laches, it is clear that the evidence was not such as to warrant any such unusual action by the court in this case.

6. It is strenuously urged that plaintiff's action is barred by the statute of limitations, but the finding of the court against this contention cannot be disturbed. Under section 346, Code Civ. Proc., an action to redeem a mortgage of real property may be brought against the mortgagee in possession at any time, unless the mortgagee has maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. As long as the mortgagee in possession by the consent of the mortgagor is apparently holding as such mortgagee and by virtue of his agreement with the mortgagor, and has not made manifest any other claim, his holding is not adverse. See Murdock v. Clarke, 90 Cal. 429, 27 Pac. 275; Peshine v. Ord, 119 Cal. 311, 51 Pac. 536, 63 Am. St. Rep. 131; Warder v. Enslen, 73 Cal. 291, 14 Pac. 874; Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866. There was sufficient evidence to support the conclusion of the trial court to the effect that Phelps entered into possession of the mining property under the agreement alleged, the effect of which was to make him a mortgagee in possession, and that there was no adverse holding at any time prior to his death. The strongest evidence to the contrary is that contained in the letter of October 6, 1896, from Phelps to Wadleigh, which, taken in connection with all the rest of the correspondence and the evidence as to the dealings between the parties, is not sufficient to warrant us in holding that the finding is not sufficiently supported.

7. There was no trust shown by either complaint or evidence, except in so far as there is always a trust relation between a mortgagor and a mortgagee in possession. The duties imposed upon Phelps by the agreement alleged and found were only such as are incumbent upon a mortgagee in possession. It was left optional with him to work the mine or not, and to make leases of portions thereof or not, as he saw fit, and, under the law, independent of agreement, he was bound to pay from the rents and profits the expenses of such operations, and apply any net profits in the manner specified.

8. Defendant's contention that the amount adjudged to be paid to her by Wadleigh is too small, is principally based upon the fact that interest was allowed in such indebtedness only to April 18, 1901, although this action was not commenced until February 8, 1902, and judgment was not given until June 30, 1903. The trial court found, and there was sufficient evidence to support the finding, that on April 18, 1901, Wadleigh, having with him two sacks of coin containing $13,500, and being able, ready, and willing to pay his indebtedness, offered in writing to pay to defendant in the presence of her attorneys, the full amount due from him, upon condition that she make and deliver good and sufficient deeds of reconveyance of the mortgaged property, but that defendant refused to receive any payment

except as an unconditional payment, and expressly declared that she would make no reconveyance of any of said property. Although the precise amount named in the writing was $11,150, the offer was also to pay "any further sum of money due," and the evidence shows that the refusal to accept the terms of the offer was solely because of the condition annexed for a reconveyance of the mortgaged property and that the giving of any reconveyance was absolutely refused. On April 23, 1901, defendant commenced an action against Wadleigh in the superior court of San Mateo county upon the $7,120 note. On May 24, 1901, Wadleigh filed his answer in said action, setting up the facts stated in his original complaint in this action, and also alleging that, by reason of the fact that such note was secured by mortgage upon property none of which was in San Mateo county, the court had no jurisdiction of the action. The court, on December 30, 1901, finding the last plea stated to be sustained by the evidence, gave judgment for Wadleigh. Thereupon, on February 8, 1902, this action was commenced. As already stated, in her original answer to the complaint in this action, defendant denied that any of the deeds were given as mortgages. Our Civil Code is clear and explicit as to the effect of a tender upon the running of interest. Section 1504 provides: "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation and has the same effect upon all its incidents as a performance thereof." Such was held to be the effect of a tender in Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308, where it was also held that no subsequent deposit of the money was necessary in order to keep the tender good. We presume that there can be no question as to this under our existing code provisions, nor do we think that there can be any question as to there having been a tender "duly made." Section 1498, Civ. Code, provides: "When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such conditions." Undoubtedly, Wadleigh was entitled to have the reconveyance of the mortgaged property delivered upon payment of the mortgage debt, and was, therefore, entitled to make his offer depend upon the execution by defendant of such reconveyances. See Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Ferrea v. Tubbs, supra.

According to the findings of the court, the amount named in the tender was more than sufficient to pay the indebtedness due on April 18, 1901, and the evidence appears to be sufficient to sustain this conclusion. There was evidence which, if believed by the trial court, was sufficient to warrant it in concluding that Wm. Maguire, who actually superintended and managed the business of the mine, had an agreement with Phelps in regard thereto, under the terms of which he could not look personally to Phelps either for salary or money expended, but must look solely to the mining property therefor, and could continue in possession of such property until the proceeds thereof paid his claim. Maguire himself testified positively to this, and while he presented a claim against the estate of Phelps, such claim stated this agreement and stated no case of personal liability on the part of the deceased. Assuming all this to be true, as we must in view of the finding, the amount due Maguire from the mine was no part of the indebtedness due Phelps from the plaintiffs. If they recover the mining property, they will take it subject to any claim Maguire may have against it. We are unable to see any inconsistency in the findings as to the amount due. A tender free from conditions which the creditor was not bound to perform having been duly made on April 18, 1901, the action of the court in refusing to allow interest thereafter accruing was correct.

9. The contention that the real motive of Wadleigh and Smith for the conveyances to Phelps was the defrauding of their creditors is fully answered by the findings as to the purpose of such conveyances, which findings, as we have already held, are sufficiently supported by the evidence.

10. It is claimed that the court should have dismissed the action for the reason that, under section 1597 of the Code of Civil Procedure, the controversy between these parties could be settled only in the court having jurisdiction of the probate proceedings in the matter of the estate of deceased, and that the sole remedy of plaintiffs was by petition to that court. It is sufficient to say, in reply to this claim, that section 1597 of the Code of Civil Procedure as construed by this court, is applicable only where the deceased was bound by written contract to convey. Cory v. Hyde, 49 Cal. 469, 471; Estate of Healy, 137 Cal. 474, 478, 70 Pac. 455.

11. It is claimed that many errors were committed by the trial court in admitting in evidence letters from Wadleigh to Phelps and from Phelps to Wadleigh. There is no claim that these letters were not received in due course of mail by the respective parties. An examination of those letters discloses no reason why they were not relevant and competent evidence. They constituted what were, in effect, conversations between the parties relative to their respective rights in the property that was subsequently in controversy, and were admissible, just as a conversation between the parties relative to such matters would have been admissible for the purpose of showing how each of

these parties, to the knowledge of the other, regarded this property, with reference to their respective rights therein, and their admissions in regard thereto, thus throwing light upon the ultimate questions to be determined as to whether the deeds were in fact originally given solely as security for an indebtedness, and whether there was any adverse holding by Phelps. It is suggested that the letters written prior to November 13, 1894, the date of the giving of the mining property deed, which was finally the sole matter in controversy, were incompetent and irrelevant so far as said property was concerned. If we assume this contention to be good, there was no error in admitting them, for, at the time of their admission, they were competent and relevant upon the then issues as to the other deeds. The motion to strike out, made subsequent to the amendments to the answer eliminating the issues as to such other deeds, was too broad, being a motion to strike out all letters, including those written subsequent to Nov. 13, 1894, and was properly denied, regardless of the question as to whether the earlier letters were proper evidence upon the issue as to the mining property.

12. It is claimed that Phelps should have been allowed compensation for personal services in the care and management of the mining property, and that the court erred in excluding certain evidence offered to show the value of such services. Upon the case made by the findings, Phelps was, as to such mining property, simply a mortgagee in possession, and was, therefore, not entitled to compensation for personal services on account of the mortgaged property. See 3 Pomeroy, Equity Jurisprudence (2d Ed.) §§ 1216, 1217; Moss v. Odell, 141 Cal. 335, 337, 74 Pac. 999.

13. It is claimed that the judgment for costs in favor of plaintiff is erroneous, for the reason that in its written opinion in the case filed May 18, 1903, the court said: "Let each party herein pay his, her, or their own costs." In the findings and decision in writing, filed June 30, 1903, the court "further finds and decides, that the said plaintiffs are entitled to recover against the said defendant, judgment for the plaintiffs' costs in this action," and the judgment, following the findings and decision, ordered that "plaintiffs recover their costs incurred in this action." The claim is that the court having announced its view as to the costs in the written opinion, could not in the findings and judgment make different provision from that indicated in the opinion. This written opinion was, however, no part of the decision in the case, cannot be treated as such, and was entirely without legal effect. It was, as has been said by this court in a similar case, "no more than its name imports—the informal views of the court, subject to future modification, * * * the legal expression of those views being found, as only properly they could be found, in the formal findings of fact and conclusions of law." Montecito, etc., Co. v. City of Santa Barbara, 144 Cal. 578, 595, 77 Pac. 1113, 1119.

We have now discussed what may fairly be said to the main contentions of defendant.

14. Several hundred errors are assigned by counsel for defendant on this appeal, many of which assignments of error are based upon claims already discussed and disposed of. As to the others, we have examined each one, and find none that merits discussion here. There was no error that could be held to have prejudicially affected the substantial rights of the defendant—indeed, for a case which was apparently so strenuously contested and required so many rulings on the part of the trial court, the record is unusually free of even technical error.

In one respect, not referred to in the briefs, we think the judgment should be modified. Defendant is undoubtedly entitled to legal interest upon the amount adjudged due her, less the costs awarded plaintiffs, from the time the judgment becomes final, to such time as the plaintiffs, under the judgment, tender her such amount, or in the event that they fail to make such tender, until the foreclosure sale ordered had in that event, has been had. We are of the opinion that the judgment as it now stands does not give her this, but limits her to the recovery of $11,112.03 less $1,185.05 costs, regardless of how long such payment may be deferred, and regardless of the fact that the plaintiffs can have no legal right to the use of defendant's money, without interest, for a single day after the determination as to the relative rights of the parties has become final. The judgment should therefore be modified by inserting in the paragraph adjudging that Wadleigh have 30 days in which to pay the sum of $11,112.03 in gold coin, after the words "in gold coin," the following: "less the sum of $1,185.05 hereinafter awarded plaintiff as costs, together with interest at the rate of 7 per cent. per annum on $9,926.98 from the date on which this judgment shall become final to the date on which payment or lawful tender of payment be made"; and also in the paragraph providing for a commissioner's sale of the property in the event of nonpayment, by inserting after the words "said indebtedness" in each of the three places wherein said words occur, "less the sum of $1,185.05 hereinafter awarded plaintiffs as costs, together with interest at the rate of 7 per cent. per annum on $9,926.98 from the date on which this judgment shall become final."

The judgment appealed from is modified as above indicated, and, as so modified, is affirmed. Appellant shall not recover her costs of appeal.

We concur: SHAW, J.; SLOSS, J.

149 Cal. 575

CROCKER v. SCOTT, Tax Collector. (S. F. 3,089.)

(Supreme Court of California. Aug. 17, 1906.)

1. TAXATION — NATIONAL BANK SHARES — STATUTES—CONSTRUCTION.

Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502] providing that nothing therein contained shall prevent all shares of any national bank from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located, etc., authorizes the assessment of shares of national banking associations located within a state, in such manner as the Legislature of the state may provide, subject only to the restrictions that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by nonresidents shall be taxed in the city or town where the bank is located and not elsewhere.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 27–30.]

2. SAME—DISCRIMINATION.

The fact that under the laws of California shares of stock in state banks and other state moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that Pol. Code, §§ 3609, 3610, providing for the taxation of shares in national banks constitutes an invalid discrimination against national banks, where a different method has been adopted by the state for the assessment and taxation of all the property of such state corporations embraced in the assessment of shares of stock in national banks.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 30.]

3. COURTS—RULES OF DECISION—CONSTRUCTION OF STATE STATUTES.

The Supreme Court of the state is the court of last resort for the determination of questions of construction of provisions of the state Constitution and statutes, and is therefore not bound by the decision of such questions by the federal Supreme Court.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Courts, §§ 329, 333.]

4. TAXATION—EXEMPTIONS — CONSTITUTIONAL PROVISIONS—STATUTES.

Const. 1879, art. 13, § 1, providing that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, and defining the word "property" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership, requires the taxing of everything capable of private ownership, and deprives the Legislature of power to exempt from taxation any such property not exempted by the Constitution itself.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 312, 313.]

5. SAME—TAXATION OF MONEYED CORPORATIONS—STOCK.

Const. 1879, art. 13, § 1, required taxation of all nonexempt property in proportion to value and defined "property" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters or things, capable of private ownership. Pol. Code, § 3607, provided that all property not exempt must be taxed, except that nothing therein contained should be construed to authorize double taxation, and section 3608 declared that shares of stock in corporations possessed no intrinsic value over the actual value of the property of the corporation, and that all such property should be assessed and taxed, but that no assessment should be made of shares of stock, nor should any holder thereof be taxed thereon. The section was subsequently amended to exclude national bank shares. *Held*, that since, under such provisions, all the elements of value contained in corporate stock were subject to taxation to the corporation, Pol. Code, §§ 3609, 3610, providing for the taxation of stock in national banks, did not constitute a discrimination against the latter, prohibited by Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502.]

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 30.]

6. SAME — FRANCHISE — DETERMINATION OF VALUE.

The value of the franchise of a corporation for the purpose of taxation is the difference between the market value of its shares, and the value of its tangible property.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 625.]

7. SAME — ENFORCEMENT OF TAX — PROCEEDINGS—INJUNCTION.

An injunction will not lie to restrain proceedings for the enforcement of a tax merely because the tax is illegal, unless it appears that the injunction is necessary to protect the rights of the property owner, and that he has no adequate remedy at law.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1230–1234.]

8. SAME—CLOUD ON TITLE.

In a suit to restrain proceedings for the enforcement of a tax, a general allegation that the acts of the officers will cast a cloud on complainant's title, and will be to her great and irreparable injury, is insufficient to justify such relief where the laws of the state clearly show that no such effect can be produced.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1241.]

9. SAME—LIEN.

The only cloud on the title of a taxpayer created prior to the execution of a tax deed, as authorized by Pol. Code, §§ 3786, 3787, which cannot be executed by the tax collector until five years from the date of sale, is such cloud as arises from the fact that the tax is a lien on the taxpayer's property in favor of the state, attaching as of the date of the assessment, and continuing until the taxes are paid or the property is sold, which lien is not increased by anything required to be done by the tax collector prior to the execution of the deed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1241.]

10. SAME—INTERMEDIATE PROCEEDINGS—PURPOSE.

Pol. Code, §§ 3764–3778, provides that on nonpayment of a tax, the tax collector shall make publication of the entire delinquent list within a certain period with a notice that, at a stated time, the property on which the lien exists will be sold to the state, etc., and requires an entry on the delinquent list and the filing of record of a certificate of the sale. *Held*, that the only purpose of such provisions was to preserve the rights of the state, and to start running the period of five years within which redemption can be effected, and at the expiration of which a deed may be issued to the state.

11. SAME—VALIDITY OF ASSESSMENT—PRIMA FACIE EVIDENCE.

Where property is sold for delinquent taxes, neither the certificate of sale nor any of the acts of the tax collector antecedent to the deed constitute even prima facie evidence as to the validity of the assessment or levy.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1377.]

12. SAME—EXECUTION OF DEED—INJUNCTION.

Where property is illegally sold for taxes, the owner has full and complete protection against the creation of any cloud on his title by a suit to enjoin the execution of the deed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1241.]

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Suit by Ethel W. Crocker against Joseph H. Scott, as tax collector, etc. From an order denying a motion to dissolve an injunction, defendant appeals. Reversed.

Franklin K. Lane, City Atty., Percy V. Long, City Atty., W. I. Brobeck, Asst. City Atty., William G. Burke, City Atty., and A. S. Newburgh, Asst. City Atty., for appellant. Lloyd & Wood (W. S. Wood, of counsel), for respondent.

ANGELLOTTI, J. Plaintiff, who is the owner of 5,096 shares of the capital stock of the Crocker-Woolworth National Bank, sought by this action to have it adjudged that the assessment and taxation of said shares for the fiscal year ending June 30, 1901, were illegal and void, and to obtain an injunction restraining defendant tax collector from selling or declaring sold to the state, on account of said taxes, certain real property of plaintiff also assessed to her, and upon which said taxes on the shares of stock constituted a lien (Pol. Code, § 3717), or making any certificate of such sale, and for such other relief as might be proper. By the allegations of her complaint, filed June 12, 1901, it appeared that the defendant had advertised said real property for sale on account of said taxes, and would on June 24, 1901, unless restrained, sell said property to the state of California, and enter the words "sold to the state" on the delinquent assessment list opposite the tax levied on the property of plaintiff, and execute a certificate of delinquent tax sale for said real property, dated June 24, 1901, to the state, and that five years thereafter he, or his successor in office, would execute a deed of said real property conveying to the state the absolute title to said property. An injunction pendente lite was asked for, and upon the filing of the complaint such an injunction was issued, restraining defendant from selling or declaring sold said real property to the state of California, from making the entry "sold to the state" on the delinquent assessment book opposite the tax levied on plaintiff's property, from making out or executing a certificate of delinquent tax sale to said property, and from in any manner interfering with said property. Upon the filing of the answer, in which the allegations as to the invalidity of the tax were denied, defendant moved that this injunction pendente lite be dissolved. This motion was denied. This is an appeal by defendant from the order refusing to dissolve such injunction.

The principal question involved on this appeal, and the one principally discussed by counsel, is as to the proper construction of our revenue laws relative to the assessment and taxation of the property of California corporations, which question is of considerable practical importance, in view of the decision of the United States Supreme Court in the recent case of San Francisco National Bank v. Dodge, Assessor, 197 U. S. 70, 25 Sup. Ct. 384, 49 L. Ed. 669. The assessment and taxation of plaintiff's shares of stock were made under the supposed authority of the act of 1899 (St. 1899, p. 96, c. 80) amending section 3608 of the Political Code, and adding two new sections to said Code, known as "Sections 3609 and 3610." By these sections, it is required that the stockholders in every national banking association doing business in this state and having its principal place of business herein, "shall be assessed and taxed on the value of their shares of stock therein," the same to be "valued and assessed as is other property for taxation." It is provided that in making such assessment to each stockholder, "there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate" (the real estate being assessed directly to the banking corporation), "and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said tional bank." The statute further provides that in the assessment of said shares "each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits," and also declares that the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. These sections were enacted in an effort of this state to avail itself of the permission of Congress, evidenced by section 5219 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3502], to tax shares of national banking associations to the holders thereof. It is now so well settled as to no longer require the citation of authorities that, under this section, the holders of shares of national banking associations located within a state may be assessed and taxed therefor in such manner as the Legislature of such state may provide, subject only to two restrictions, viz: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." While there are general allegations in the complaint to the effect that the assessment of plaintiff's shares of stock was not made in the manner prescribed by sections 3609 and 3610, Pol. Code, the specific allegations in support of such general allegations show that the various provisions of those sections were fully complied with, and that if the assessment be invalid, it is so solely because those sections provide a method of assessment and taxation for national bank shares, the effect of which, in its practical execution, is to discriminate in favor of state banks and other state moneyed corporations, and against national banks.

With one exception, all contentions made by learned counsel for plaintiff against the legality of the method thus adopted by the state of California for the taxation of national bank shares, appear to have been already disposed of adversely to him by the Supreme Court of the United States in the opinion delivered in the case of San Francisco Nat. Bank v. Dodge, Assessor, supra, wherein the views expressed by the Circuit Court of Appeals for the Ninth Circuit as to similar contentions in another case (Nevada Nat. Bank v. Dodge, 119 Fed. 57, 56 C. C. A. 145) were approved. It should be noted in passing that this is the first case that has come to this court, involving any question as to the validity of sections 3609 and 3610 of the Political Code, the cases above referred to having been instituted in the federal courts. It was specially pointed out by the United States Supreme Court in the San Francisco National Bank Case above referred to, following Davenport Nat'l Bank v. Board of Equalization, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94, that the mere fact that, under the laws of this state, shares of stock in state banks and other state moneyed corporations are not permitted to be assessed and taxed, was not sufficient to show in a statute requiring the assessment and taxation of national bank shares, any discrimination against national banks, provided a different method adopted by the state for the assessment and taxation of the property of such state corporations, accomplished the inclusion in the assessment of the property of such corporations of all those elements which are embraced in the assessment of shares of stock in national banks to the holders thereof. It was said by the Supreme Court of the United States in the Davenport Case cited above, upholding a statute of the state of Iowa providing for the taxation on national bank shares, where no such assessment was allowable in case of a savings bank, the property of which was assessed directly to the corporation: "It is strongly urged that in no other mode than by taxing the stockholders of each and of all the banks can a perfect equality of taxation be obtained. * * * It has never been held by this court that the state should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither the language nor its purpose can be construed to go any further. Within these limits, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of Congress." Citing this case, upon this point, the Supreme Court said in the Dodge Case: "As, then, no conflict necessarily arises between the act of Congress and the state law solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention that the state law, for that reason, is repugnant to the act of Congress is without merit." In the Dodge Case, however, it was held by the United States Supreme Court (four of the justices dissenting) that the California law relative to the assessment of the property of corporations, as construed by the California Supreme Court, does not compel the assessing officers in the valuation of the property of such corporations, to include all those elements of value which are embraced in the assessment of shares of stock in national banks, and that, for this reason, and the additional reason, held to have been shown by the record in that case, that assessors generally in their assessment of state corporations had failed to include all such elements, the law requiring the assessment of national bank shares at their full cash value to the holders thereof is, both by its terms and in its practical execution, a discrimination in favor of other moneyed capital against national banks, forbidden by the act of Congress which authorizes the assessment and taxation of such shares.

It is claimed that the decision of the Supreme Court in the Dodge Case effectually determines for all time the question as to the validity or invalidity of our existing statute relative to the assessment of national bank shares. But we do not so understand the majority opinion in that case, or the effect of the decision rendered. It, doubtless, effectually disposed of the assessments involved in that case. Its decision to the effect that our statute relative to the assessment of national bank shares cannot be enforced, so long as our laws relative to the assessment of state corporations are construed by this court not to require the assessment officers to include in the assessment of such corporations all of those elements of value which are embraced in an assessment of national bank shares, so as to produce equality of taxation as respects national banks, is, also, undoubtedly a decision upon a federal question, binding upon us. It may also be conceded that upon a showing in any case of such facts as were held to be shown by the record in the Dodge Case, as to the practical application of the law relative to state corporations by assessors generally, we would be compelled to follow the decision in the Dodge Case, and hold the assessment complained of void. But throughout the opinion in that case, the Supreme Court recognized the rule repeatedly declared by it to the effect that in the interpretation of the Constitution and statutes of a state, the construction placed upon them by the court of last resort of such state is conclusive and binding upon the Supreme Court of the United States and all federal courts (see Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546), and that opinion ended as follows: "Our conclusion, therefore, does not deny the power of the state of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that, if the statutes of California, either from their text *or as construed by the highest court of that state*, compelled the assessing officers in the valuation of the property of state banks and other state moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks, so that there would be an equality of taxation as respects national banks, *the discrimination which we find to exist under the present state of the law in California would disappear.*" (The italics are ours.) Surely it cannot be contended that this court is precluded by anything decided by the United States Supreme Court in the Dodge Case from now holding that, under the constitutional and statutory provisions of this state, and the decisions of this court construing the same, the assessing officers are compelled, in their valuation of the property of state banks and other state moneyed corporations for purposes of assessment, to include all those elements of value which would be embraced in an assessment of the shares of stock therein. Whether or not this is the proper construction of our revenue laws is a question as to which this is the court of last resort. While the views expressed on that question in the majority opinion of the Supreme Court necessarily merit the respect and careful consideration due to every expression of that justly distinguished tribunal, this court is not compelled, or, indeed, at liberty, to follow it, if it is of the opinion that such views are erroneous. Addressing ourselves to this question:

The portion of the majority opinion in the Dodge Case last quoted recognizes that a state is at liberty to adopt a method for the assessment of state corporations, under which all those elements of value which are embraced in an assessment of the shares of stock would be required to be included in an assessment of the property of the corporation to the corporation. Such was the method upheld by the Supreme Court of the United States in the Adams Express Co. Cases (Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; Id., 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; Weir v. Norman, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960), and in the State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663. See, also, Michigan Central R. R. Co. v. Powers, (U. S.) 26 Sup. Ct. 459–462, 50 L. Ed. 744. Unless we are now prepared to repudiate the doctrine of the case of People ex rel. Burke v. Badlam, 57 Cal. 594, and hold that section 3608 of the Political Code, prohibiting any assessment of shares of stock of state corporations is unconstitutional, it must be held that such has been the method or system provided by our laws for the assessment of state corporations, for the last 25 years. That this must necessarily be so, will clearly appear from a consideration of the provision of our Constitution declaring what property shall be taxed, the legislation thereunder, and the decision above referred to. Section 1 of article 13 of the Constitution adopted in 1879 was, so far as is material in this connection, as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership. * * *" No amendment of this portion of the section has ever been made. The section, as originally adopted, contained a proviso exempting growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, or municipal corporation within this state. The section has been amended to include among the exemptions, property used for free public libraries and free museums. Other sections have been added exempting certain property such as buildings used solely for religious worship, state, county and municipal corporation bonds, personal property of a householder to the extent of $100.00, and fruit and nut bearing trees under the age of four years and grape vines under the age of three years, none of which changes is material to the question here under consideration, except in so far as such changes emphasize the fact that it has always been recognized that nothing capable of private ownership can be exempted from taxation, unless it be specifically declared to be exempt by constitutional provision. There has never been any question as to the effect of this mandatory provision of our Constitution. The definition of property required to be taxed in proportion to its value was so sweeping and comprehensive that it has uniformly been held that it included everything capable of private ownership, and that the provision placed it beyond the power of the Legislature to exempt from taxation either totally or partially anything capable of private ownership, not exempted by the Constitution itself. This, of course, is so clear as to property specifically mentioned in the provision, such as bonds, stocks, franchises, etc., as to require no argument. As said in Mackey v. San Francisco, 113 Cal. 392, 397, 45 Pac. 696: "The Constitution not only provides that all 'property' shall be taxed, but defines the word 'property' and expressly includes 'bonds' in that definition, thus placing it beyond the power of the Legislature or the courts to say that bonds are not property within the meaning and intent of the Constitution." The same is, of course, true as to shares of stock, which are also expressly included. See Bank of California v. San Francisco, 142 Cal. 276, 285, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130.

The taxation of all property not specifically exempted, including shares of stock, was thus required by constitutional provision. The only thing left for the legislative department to do was to provide a method for the ascertainment of the value of the property to be taxed. To this extent, the constitutional provision was not self-executing. McHenry v. Downer, 116 Cal. 20, 24, 47 Pac. 779, 45 L. R. A. 737. At its first session after the adoption of this Constitution, the Legislature, by act approved March 22, 1880, amending certain sections of the Political Code, performed its duty in this behalf. Amendments to Political Code 1880, p. 5, c. 31. Substantially re-enacting provisions of the Code in force at the time of the adoption of the Constitution, by section 3627 it was provided that "all taxable property must be assessed at its full cash value," and by section 3617 it was declared that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." In these respects there has never been an amendment of either of these sections. Section 3627, as then enacted, contained a provision to the effect that the proportionate value of the stock of domestic corporations, for purposes of assessment and taxation, should be its "market value," deducting the value of such property assessed to the corporation "in this state, or elsewhere, of which such capital stock is the representative," but this portion was eliminated by the amendment of 1881, of which we shall presently speak. The act also included section 3640, providing for the assessment of shares of stock, "the assessable value of each share of its stock" to be ascertained "by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which it is divided." As was said in the majority opinion of the United States Supreme Court in the Dodge Case, the words "market value" are, and as here used were, but synonymous with the terms "value" and "full cash value," defined in section 3617, "for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that the general market value of stock is its true cash value." We thus had in 1880, as we have ever since had, a mandatory constitutional provision, specifically requiring the asessment and taxation of shares of stock, and the assessment, under the statutory rule applicable to all property, then adopted and ever since in force, was to be at the "full cash value," or, "market value," as those terms have already been defined. It has several times been said, although it is so self-evident as not to require statement, that an assessment of the shares of stock as required by the Constitution would necessarily include an assessment of every element entering into and giving value to the shares. For the purposes of taxation, all such elements, tangible and intangible, were, by the Constitution, in effect declared to be property subject to taxation. As we have seen, the legislation of 1880 was entirely consistent with this constitutional provision. By the act of March 7, 1881 (see amendments to Codes 1881, p. 56, c. 53), certain changes were made by the Legislature. Section 3607, providing that all property not exempt must be taxed, was amended by the addition of a proviso to the effect that nothing in the Code should be construed to require or permit double taxation, the provisions of sections 3627 and 3640 as to the assessment of shares of stock directly were eliminated, and section 3608 was added. The last-named section was as follows: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares, and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." This section has been amended only once, viz., in 1899, and then simply by excepting from its operation national banking associations.

It requires no argument to show that this section was in absolute defiance of the constitutional provision expressly requiring shares of stock to be taxed in proportion to their value, if its legal effect was to relieve from taxation a single element that entered into and gave value to the shares of stock. As we have seen, the effect of the constitutional provision was to render all of such elements for the purposes of taxation, property required to be taxed in proportion to their value. This legislation could be sustained as a valid exercise of legislative power only upon the theory that, under our laws, all of these elements constituted, for the purposes of taxation, property "belonging to the corporation," which must be included in the assessment of the property of the corporation. Upon this theory, section 3608 was upheld by this court in the case of People ex rel. Burke v. Badlam, 57 Cal. 594, generally known as "Burke v. Badlam." The court there had under consideration an application for a writ of mandate to compel the assessor of the city and county of San Francisco to assess shares of stock in various corporations, to the holders thereof, and to assess to depositors in savings banks the sums deposited by them. So far as the first proposition was concerned, the proceeding was brought to determine the validity of section 3608, which was claimed by the applicant to be in conflict with the constitutional provision requiring stocks to be taxed. The case was most elaborately argued by eminent counsel, and the decision is clear and direct upon the question here under discussion. The opinion was written by Mr. Justice Ross, and signed by Justices Sharpstein, McKee, and Thornton, and Justices McKinstry and Myrick specially concurred in the views of the majority upon the point we are considering. It was held therein that the language of the Constitution neither required nor permitted double taxation—that the Legislature had the right thereunder to say, and had said by section 3608, that all of the property of the corporation should be assessed to the corporation and should not again be assessed for the same tax—that the property of the corporation included its franchise and everything else evidenced by the certificates of stock; that while the share of each stockholder was undoubtedly property, it was an interest in the very property held by the corporation, "his right to a proportionate share of the dividends and other property of the corporation, nothing more"—and that when all the property of the corporation, including its franchise, was assessed, which it was to be presumed would be done by the assessor in obedience to the requirements of the law, any further assessment of the shares to the individual stockholders would be double taxation. It was said therein, among other things: "Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed, its franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with. * * * To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all of the stockholders, and again separately to the individual stockholders. * * * In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property. * * * In the case of the corporations to which we have referred, the Legislature has declared that all the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the Constitution itself, and, of course, could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say."

As we have seen, section 3608 could be upheld as a constitutional enactment only on the theory that under it and other existing statutory provisions, everything entering into and giving value to the shares of stock was "property belonging to the corporation" to be included in the assessment of the property of the corporation. What we have said as to Burke v. Badlam shows that section 3608 was therein held to be valid upon this ground. That case has always been recognized as involving the question as to the constitutionality of that section and as decisive thereon. See Spring Valley W. W. v. Schottler, 62 Cal. 69, 115; McHenry v. Downer, 116 Cal. 20, 28, 47 Pac. 779, 782, 45 L. R. A. 737; Bank of Cal. v. San Francisco, 142 Cal. 276, 285, 75 Pac. 832, 836, 64 L. R. A. 918, 100 Am. St. Rep. 130. Of it we said in the case last cited: "This case necessarily involved the question as to the constitutionality of section 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. According to the decision of the court they were under the law to be otherwise assessed—i. e., everything to be represented by the certificates was to be assessed to the corporation." Burke v.

Badlam, supra, is the only case prior to this appeal in which the precise question here under consideration was necessarily involved. In the discussion of this question, that case nevertheless appears to have been entirely overlooked in the majority opinion of the United States Supreme Court in the Dodge Case. The views expressed in the opinion in that case have never been questioned by any later expressions of this court, and for more than 25 years the decision has stood as a construction of our statutes, to the effect that those statutes require that everything entering into and giving value to the shares of stock of a corporation shall be assessed to the corporation as property of the corporation. This construction of the statutes of California has, during all this time, been the only warrant for the enforcement of the statute prohibiting the assessment of shares of stock. In the later case of Spring Valley W. W. v. Schottler, 62 Cal. 69, 118, this court said: "But, by declaring, as was done in section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; that everything entering into and giving value to the shares should be taxed. It cannot be doubted that the Legislature in acting on the subject of revenue and taxation during the session of 1881, did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations, should escape taxation. To come to any other conclusion would be to impute to that body a most culpable dereliction of duty."

There is certainly nothing in the opinion in Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130, which can reasonably be construed as throwing any doubt upon the doctrine of Burke v. Badlam, supra. That was an action brought to recover taxes paid under protest, and involved simply a question as to the validity of an assessment of $750,000 upon the mere corporate franchise of a banking corporation, the plaintiff bank challenging the validity of the assessment upon the ground that it had no assessable franchise whatever. It appeared that the assessor had found that the difference between the value of the tangible property of the bank and the market value of its shares was over $2,000,000, and had determined this to be the value of the corporate franchise, and had valued the franchise for purposes of assessment at the sum of $750,000. As suggested by Mr. Justice Brewer in the dissenting opinion in the Dodge Case, the state was not challenging the assessment, and the question as to whether the assessment should have been higher was not considered. Proceeding expressly upon the authority of Burke v. Badlam, supra, and Spring Valley Water Works v. Schottler, supra, it was held that such a corporate franchise was, under our laws, assessable as a part of the property of the corporation, and the assessment was sustained. It was not necessary in that case to determine whether or not all of those elements, exclusive of the tangible property of such a corporation, that give value to the shares of stock, should be assessed as "franchise," which was the assessment under consideration in that case. It was enough for all the purposes of that case that the corporation had such an assessable franchise, and that the value thereof was at least a portion, if not all, of the difference between the tangible property and the aggregate market value of the shares. But upon the question as to whether the assessing officers are, under our laws, required to assess in some form, as property of the corporation, everything that gives value to the shares, no doubt whatever as to the correctness in any respect of any prior decision was expressed in the opinion, or can reasonably be implied therefrom. It was said by the dissenting justices in the Dodge Case, speaking of the construction placed by this court upon our statutes in this regard: "Obviously, that court construes them as including within the corporate property the aggregate value of all the shares of stock, and that, while they forbid the assessment and taxation of shares of stock in a state corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that, when you ascertain the value of a single share of stock, and multiply that by the number of shares in the corporation, you have the value of the corporate property subject to taxation." This appears to us to be the necessary result of our decisions upon this question. Such a construction does not, of course, require the assessment as intangible property of the value of such tangible property as is exempt from taxation under the laws of the United States and this state.

It is urged that many elements entering into and helping to fix the market value of stock, which would be included in an assessment of the shares themselves, such as good will, dividend, or profit earning power, etc., could not be assessed by the assessing officers as property of the corporation, and if they could be so assessed, there is nothing in our law requiring the assessor to so value those things that the entire valuation of the property of the state corporation will equal the market value of the shares. If this be true, it must follow, as we have already shown, that section 3608 of the Political Code, prohibiting any assessment of shares of stock, is unconstitutional. That a system of taxation may be adopted by a state under which all those elements may be included as property of the corporation in the assessment against the corporation was, as we have seen, held by the United States Supreme Court in several cases. (See cases cited, supra, and recognized both in the Davenport Case, and in the majority and minority opinions in the Dodge Case.) This conclusion necessarily follows the undisputed doctrine that a state may assess and tax at their full cash value shares of stock in corporations. That our statutes, as construed by this court, positively command the assessment of all such elements in such a manner as to make the aggregate value of the corporate property measure up in amount to the aggregate market value of the shares, appears very clear to us. Those statutes expressly require that all property belonging to corporations shall be assessed and taxed at its "full cash value," defined to be the amount at which the property will be taken in payment of a just debt due from a solvent debtor, and this positive injunction is as applicable to the intangible property of a corporation, such as its corporate franchise, which admittedly must be assessed and taxed, as it is to the tangible property, such as real estate. As was said by Mr. Justice Brewer, in the dissenting opinion in the Dodge Case: "But it is said there is no specific command to include in the property of a state corporation the good will, dividend-earning power, and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend-earning power and the like, for they are 'capable of private ownership.' They belong to the corporation. There is no good will in a share of stock over and above the good will which belongs to the corporation, and, if the corporation sells and conveys all that it possesses 'capable of private ownership' it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read." The statutes expressly requiring the assessment of all the property, both tangible and intangible, to be at its full cash value, it is obvious that there is but one method by which the cash value of the intangible property can be ascertained, a method ordinarily much more certain and accurate in its results than any method that can be devised for the ascertainment of the value of real estate and many articles of personal property. It is settled law in this state that a proper method for ascertaining the value of the franchise of a corporation is by deducting from the aggregate market value of its shares the value of its tangible property, and taking the difference as the value of the franchise. See San José Gas Co. v. January, 57 Cal. 614; Spring Valley Water Works v. Schottler, 62 Cal. 69, 117; Spring Valley Water Works v. Barber, 99 Cal. 36, 38, 33 Pac. 735, 21 L. R. A. 416; Bank of California v. San Francisco, 142 Cal. 276, 287, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130. It was said by Chief Justice Beatty in his concurring opinion in Stockton Gas and C. Co. v. San Joaquin Co. (Cal. Sup.) 83 Pac. 59, that the method of ascertaining the value of a corporate franchise by taking the difference between the market value of the shares and the value of the tangible property as the basis of assessment has been sanctioned in several cases, and nowhere disapproved. It appears too clear for question that such difference between the market value of the shares of stock and the value of the tangible property is necessarily the aggregate cash value of such intangible property as under our system must be held to belong to the corporation, call it franchise, good will, or dividend or profit-earning power, or what you please. Whatever it is, our laws positively require it to be assessed by the assessing officers to the corporation at its full cash value, precisely as all other property is required to be assessed at its full cash value. The aggregate value of the shares evidenced by the certificates of stock, must be the aggregate cash value of the property of the corporation held by it in trust for its stockholders. This being so, the method already approved by the decisions of this court as a "proper method" is not only a "proper method." It is the only method by which the cash value of the intangible property required to be assessed can be ascertained, and is, therefore, the method necessarily enjoined by our laws upon the assessing officers. Whether or not in the case of a banking corporation which possesses no other franchise than its corporate franchise, the whole of its intangible property may be considered "franchise" and be assessed eo nomine, as seems to be clearly intimated by the cases we have cited, is not absolutely necessary to a determination of the question under discussion. This was also true of the case of Bank of California v. San Francisco, supra, where the decision of such question was expressly withheld. 142 Cal. 289, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130. It is enough for the purposes of this discussion, that all of such intangible property must be assessed under some name as the property of the corporation. It is, however, apparent that, while it is a simple matter enough to fix the value of the whole, it would be impossible to segregate and apportion the value of all the elements entering into the making up this property, and nothing of benefit to any one could be accomplished by any such attempted segregation. We are satisfied that under the system of taxation in this state as construed by our decisions, all such intangible property may be properly included in the assessment of the corporate franchise of the corporation.

Another question presented upon this appeal is as to the propriety of the remedy by injunction. We are satisfied that no injunction pendente lite restraining such acts upon the part of the tax collector as were specified in the injunction, should have been issued, and that the motion to dissolve this injunction should have been granted. It is well settled by the decisions in this state that the equitable remedy by injunction will not be granted to restrain proceedings of the officers on whom is devolved the duty of enforcing the tax laws, merely because the tax sought to be enforced is illegal. To justify the exercise of such a remedy, it must appear that the same is necessary to protect the rights of the property owner and that he has no adequate remedy at law. In the matter of granting such relief, therefore, a court of equity will go no further than is necessary to protect the rights of the property owner, and will not to any greater extent impede the officers of the state in the performance of their duties. This general matter has several times been under consideration by this court, notably in the cases of Sav. and Loan Soc. v. Austin, 46 Cal. 415, 488, and Houghton v. Austin, 47 Cal. 646, 650, 666. In the first of these cases, which was an appeal from an order refusing to dissolve an injunction, this court said: "If the tax were conceded to be illegal, it does not necessarily follow that, for that reason alone, the plaintiff would be entitled to an injunction. In Dows v. City of Chicago, 11 Wall. (U. S.) 110, 20 L. Ed. 65, Mr. Justice Field, in delivering the opinion of the court, says: "Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. This, we think, is a correct statement of the rule, as established by the weight of authority." This ruling was affirmed in Houghton v. Austin, supra, and these cases have never been overruled or modified in this respect by any later decision. The rule appears to be founded on well-settled equitable principles and appears to us to be absolutely essential to prevent embarrassment in the matter of the execution of revenue laws by the proper officers, and to be specially applicable in the matter of preliminary injunctions where the question as to the legality of the tax has not been finally determined. Under that rule, no act on the part of officers required by the law to be performed in the execution of the revenue measures will be stayed by injunction, unless that act is of such a nature, and will have such an effect, as to irreparably injure the property owner, or, as said in the case above cited and quoted from, "where the property is real estate, throw a cloud upon the title of the complainant." It is obvious that a general allegation that such an act will cast a cloud upon the title of the complainant, and will be to her great and irreparable injury is insufficient to justify such relief, where the laws of the state show clearly that no such effect can be produced.

We have already stated the acts specifically prohibited by the temporary injunction here involved. It is very clear that, under our law, none of these acts could have the effect heretofore stated. It may be conceded that the execution of a deed of said property by the tax collector to the state of California, which deed, by express provision of the Political Code, would purport to convey the absolute title, and be primary evidence as to certain matters affecting the regularity of the proceedings and conclusive evidence as to other of said matters (sections 3786, 3787), would constitute a cloud upon the title, within the rule enunciated in a long line of cases (see Maskey v. Lackmann, 146 Cal. 777, 780, 81 Pac. 115), and that, therefore, the execution of such a deed, pending proceedings to determine the validity of the assessment, might, in a proper case, be enjoined. Such, however, was not one of the acts specifically enjoined here, all of those acts being things required by the law to be done before any deed can be executed. No such deed could be executed by the tax collector until the expiration of five years from the date of sale (Pol. Code, §§ 3781, 3785). We are satisfied that, under our law, none of these acts so enjoined could in any way prejudice plaintiff's rights, or throw a cloud upon her title. Under our present system, the only cloud upon the title of the taxpayer created prior to the execution of such a deed to the state, is such cloud as arises from the fact that the tax is a lien upon his property in favor of the state, attaching as of the first Monday in March (the date of assessment), and continuing until the taxes are paid or the property sold for the payment of the tax. Pol. Code, §§ 3716, 3717, 3718. The effect of this lien is in no degree practically added to by anything required to be done by the tax collector prior to the execution of the deed. To comply with the laws of the state looking to the enforcement of unpaid taxes, the tax collector is required to make publication of the entire delinquent list within a certain period, together with a notice that at a stated time, the property upon which the lien of the state exists will, by operation of law, be sold to the state, and at the time stated, to declare all such property, as to which the taxes have not been paid, sold to the state, to make an entry accordingly upon the delinquent list, and to make out and file of record a certificate of such sale (Pol. Code, §§ 3764 to 3778). The only practical effect of a compliance with these provisions, in addition to preserving the rights of the state in the matter of such taxes as are ultimately found to be valid, is to start running the period of five years within which redemption can be effected and at the expiration of which a deed may be issued to the state. During this period, the legal title to the property continues in the taxpayer, subject to the lien in favor of the state created by the assessment and levy. Neither the certificate of sale (see Clarke v. Mead, 102 Cal. 516, 36 Pac. 862), nor any of these acts of the tax collector constitutes even prima facie evidence as to the validity of assessment or levy, and the taxpayer has a full and complete protection against the creation of any cloud upon his title in the enjoining of the execution of the deed. Under such circumstances, equity will not interpose to the extent of preventing the performance of those preliminary acts which cannot affect the rights of a taxpayer, the failure to perform which may result in prejudice to the state in the enforcement of its revenue laws.

The order denying the motion to dissolve the injunction is reversed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

I dissent: McFARLAND, J.

HENSHAW, J. I concur in the judgment, and generally in the reasoning and principles announced in the prevailing opinion. Something more, however, remains to be said upon the question, and no better time for its saying presents itself than is offered by the present case. Concededly it is of the highest importance to the commonwealth that the tax system should be uniform and just and that no one person or class of persons should be exempt from the payment of a tax, the collection of which is enforced against others. Per contra, that no one person or class of persons should be compelled to pay a tax which is not enforced against others. The fault of our system in this regard—a fault of which the taxpayer may justly be heard to complain—is not in the assessment of intangible property represented by the difference between the market value of the stock and the value of the tangible property, but it is in calling this difference the value of the "franchise" and taxing it as franchise. A franchise is simply a special privilege granted by the state directly or through one of its mandatories. When that privilege is the privilege of being a corporation, when the franchise granted is simply the franchise to be a corporation, that franchise can have no greater value than what it has cost the incorporators to obtain it and what it would cost other incorporators to obtain the identical privilege. Since in this state these franchises are open to all upon the same conditions, that cost is the mere expense of filing papers and procuring clerks' certificates, say $10, and it cannot be said that such a franchise or privilege can ever be worth more than that amount while our laws remain unchanged. A tremendous distinction is, of course, to be observed between this franchise to be a corporation and some special franchise to do a particular thing, as the franchise to use a particular city street for street railroad purposes. Such a franchise, and others of like kind, often have enormous value, and this value comes from the fact that once granted, no other person can obtain them. It is not open to citizens upon the same terms, but it is in its nature monopolistic. But I advert to this merely in passing, for we are here dealing with the franchise to be a corporation.

To illustrate the fallacy of assessing the difference in value between the market value of stock and the value of the tangible property as franchise let us instance a case. Three men as copartners are engaged in the business of selling dry goods. By the exercise of varied qualities which go to make a business success they have developed an enormous and profitable business. They are assessed for the value of their tangible property, the stock on their shelves and their solvent credits or book accounts. They decide to incorporate, and without the slightest change in location, stock, book accounts, without the slightest change of any kind, they pay $10 to the state of California, obtain articles of incorporation and issue to themselves each one-third of the shares. These shares have a value far in excess of the total value of the goods on the shelves and of the solvent credits. Upon an investment say of $1,000,000 their profits show a return of 6 per cent. upon $10,000,000. Finding, therefore, the value of the solvent credits, and goods on hand at $1,000,000 and the value of the stock at $10,000,000, the assessor assesses this corporation $9,000,000 for its franchise, for which franchise but the day before it paid the state $10, and as to which franchise —which is merely the privilege as a corporation to carry on the business of buying and selling dry goods—any 3 men in the state of California may secure the identical privilege for the same expenditure of money. The necessary result would be that while yesterday the privilege was assessed for $1,000,000, to-day the corporation is assessed for $10,000,000, $9,000,000 of which is the so-called value of the franchise. I am not disputing the existence of this $9,000,000 of property. I do insist that it was not called into being, nor in any way created, through the privilege to be a corporation so granted by the state. This $9,000,000 is, and logically can be, nothing other than the good will of the business, which good will is itself a species of property distinctly recognized by the laws of this state, property capable of private ownership, and, therefore, property which should be assessed. And not only should it be assessed, but I insist it should be assessed not under the misleading and deceptive misnomer of franchise, but assessed, for what it really is, good will. (Civ. Code, §§ 655, 992, 993.) Even if the Legislature should declare that it should be assessed as franchise, this declaration does not make it franchise. The legislative declaration that it should be assessed as "beauty" would not make it beauty. The simple proof of the matter is that of this $9,000,000 assessed as franchise, $8,999,990 are in effect good will, and the remaining $10, is the value of the franchise. Nor do I think that this matter should be lightly put aside with the statement that as the property after all is assessed it does not matter under what name it pays its taxes. Logical results can only be reached by correct reasoning and correct reasoning and a true interpretation is essential to that great desideratum, the uniformity in operation of our revenue system. Therefore I am here contending that the property which is assessed should be assessed under its true name, and that this should be declared by this court, not only because it is the logical and correct interpretation of the law, but because it is of great moment that the assessors themselves should be properly directed in their delicate tasks, and that the taxpayer in turn should know upon just what property of his the law is imposing its burden. My position, therefore, is not that corporations should not pay this tax. But they should not be expected to pay it under the blind and misleading guise of franchise. They should be called upon to pay taxes upon the property as it actually is—the good will.

No Justice of this court, I think, disagrees with me upon the proposition that in fact it is the good will which is being assessed under the guise of franchise, and no one will question but if the good will of a corporation is thus subject to assessment in this state, the good will of every other business, whether carried on by a partnership or an individual, should equally be subject to taxation.

149 Cal. 662

WESTERN UNION TELEGRAPH CO. v. MODESTO IRRIGATION CO. et al.

(Sac. 1,408.)

(Supreme Court of California. Aug. 31, 1906.)

1. Waters and Water Courses—Irrigation Districts — Assessments — Telegraph Lines.

An irrigation district, organized under St. 1887, p. 29, c. 34, authorizing the assessment of all the real property in the district for its revenue purposes, cannot assess the poles and wires of a telegraph company placed on the land of a railway company under a contract reserving them as the personal property of the telegraph company, as they are not real property within such provision.

2. Same.

Under Pol. Code, §§ 3617, 3663, defining real estate for taxable purposes as land including the improvements, except telegraph lines, which shall be assessed as personalty, and Bridgeford Act (St. 1897, p. 267, c. 189) § 39, providing that, on refusal of the directors to make the assessments in irrigation districts, the assessment made by the county assessor and the state board of equalization shall be the basis of assessment, an irrigation district cannot assess for revenue purpose the poles and wires of a telegraph company placed on the land of a railway company under a contract reserving such property as personalty.

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Western Union Telegraph Company against the Modesto Irrigation Company and others to determine the validity of an irrigation assessment. From a judgment for defendants, plaintiff appeals. Judgment reversed, and the superior court directed to render judgment for plaintiff.

Brown & Wells, R. B. Carpenter, and Alexander H. Van Cott, for appellant. Dennett & Walthall, for respondents.

McFARLAND, J. The plaintiff is a well-known corporation organized under the laws of the state of New York, engaged in the business of telegraphy, having certain franchises, rights, and privileges granted by the government of the United States, and having many telegraph lines in California, and in other parts of the United States and adjoining countries. The defendant the Modesto Irrigation Company is an irrigation district organized in July, 1887, under an act of the Legislature of this state providing for the organization of irrigation districts, approved March 7, 1887 (St. 1887, p. 29, c. 34), and generally known as the "Wright Act," and it has ever since continued its existence as such district under said acts and acts amendatory thereof and supplemental thereto. The other defendants are directors of said irrigation district. The plaintiff is, and at the times mentioned in the complaint was, the owner of certain property, consisting of poles, wires, and other appliances, constituting 9½ miles of one of its telegraph lines, which runs over a right of way of a certain railroad corporation known as the "Southern Pacific Company" within the boundaries of the said Modesto irrigation district. The plaintiff put its said 9½ miles of poles, wires, etc., under a written contract with the said railroad which expressly declared that the poles, wires, etc., constituting said 9½ miles of telegraph line "shall be and remain the personal property of said plaintiff." In 1904 the defendants caused the said 9½ miles of poles, etc., to be assessed at the value of $1,100 as property taxable for the purpose of raising revenue for said irrigation district. Thereupon the plaintiff brought this suit to have determined the validity of said assessment, as it was authorized to do by section 69 of an act to provide for the organization of irrigation districts, approved March 31, 1897 (St. 1897, p. 276, c. 189), and generally known as the "Bridgeford Act." The case was tried without a jury and upon a stipulated state of facts, and the court rendered judgment for defendants. From this judgment plaintiff appeals.

There is no contest as to the facts in the case, which are substantially as above stated. The only question is whether the said property of plaintiff is legally assessable and taxable by the irrigation district. The main purpose of the statutes providing for irrigation districts is to enable owners of land that may be made more productive of vegetable growth by irrigation, and which are "susceptible of irrigation from a common source," to organize so as to more effectually accomplish such irrigation; and there is, therefore, some room for the alleged absurdity of irrigating the poles and wires of a telegraph line. But we will assume that such property is within the taxing power of the district if the letter of the law necessarily includes it. The statute under which the defendant was organized provides that for the purpose of revenue the assessor must assess "all of the real property within the district" (St. 1887, p. 37, § 18); and it is conceded, or, at least, it is the law, that no personal property can be subjected to taxation for such purpose. Said section provides that the assessor must prepare an assessment book, with headings, in which must be listed "all such property"; that is, all real property. One of the headings is "Land by Township, Range," etc., or "by Metes and Bounds or Other Sufficient Description," and the "Improvements Thereon." Another is "City and Town Lots, * * * with the Improvements Thereon." Under another heading there must be stated the cash value of the improvements on the land, whether city land or other lands, and also the "Cash Value of the Improvements of the Real Estate Assessed to Persons Other Than the Owners of the Real Estate." However, in providing for the enforcement of the payment of taxes, the statute seems to refer to land alone; as, for instance, by section 26, in the case of delinquency, the collector must add certain penalties to "each lot, tract, or piece of land," and in the event of sale for delinquency he must commence the sale at the head of the list of property and continue the sale in the numerical order of "the lots, or blocks"; and by section 27 he must sell to the person who will take "the least quantity of the land," and he must give to the purchaser a certificate containing a "description of the land sold"; and by section 30 it is provided that if no redemption be made the collector must make a deed to the purchaser, which shall convey to him the absolute title "to the land described therein." (These provisions are substantially the same as those contained upon the same subjects in the Bridgeford act.) It is therefore doubtful whether it is the intent of the law to enforce any tax upon mere "improvements," except as a part of the land improved, and whether the cash value of the improvements is not required merely to show the value of the land as enhanced by the improvements; and it is doubtful if the sale for delinquency of "an improvement," as distinct from the land, is contemplated. Plaintiff also contends that the right of way of the railroad company is not real property within the meaning of the statutes here relied on, and, further, that, even if it were, the poles, wires, etc., are not an "improvement," but really a burden. We notice these points because they are urged, but we do not think it necessary to pass upon them definitely because we think that the poles, wires, etc., are not assessable for the reason that they are not real property, but only personal property.

There is no doubt that articles of personal property owned by one person may be attached to land owned by another without becoming a part of the realty and without losing their character as personal property. For instance, trade fixtures annexed to land by tenants do not become part of the freehold even without any special agreement. And the general rule is that the intention of the parties determines the character of the annexed chattels and that they remain personal property if that be the intention of the parties when they are attached. This rule applies to third parties acquiring an interest in the land—as mortgagees, grantees, etc.—except where the mode of annexation is such that the attached property loses its character as personal property, as where it could not be removed without destroying it, or where it is necessary to the support or safety of that to which it is attached. In Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107, the court say: "It is well settled, as said by the Court of Appeals of New York, in Tifft v. Horton, 53 N. Y. 380, 13 Am. Rep. 537, 'that chattels may be annexed to the real estate and still retain their character as personal property.' See Voorhees v. McGinnis, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not, by annexation, become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy (Ford v. Cobb, 20 N. Y. 344), as when the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached." See, also, Tifft v. Horton, 53 N. Y. 380, 13 Am. Rep. 537; Memphis, etc., v. State, 6 Cold. (Tenn.) 311, 98 Am. Dec. 452; Chelsea Waterworks v. Bowley, 17 Q. B. 359; and Wiggins v. Ohio, 142 U. S. 415, 12 Sup. Ct. 188, 35 L. Ed. 1055. In the case at bar the poles, wires, etc., were easily removable and are in no sense essential to the support of that to which they are attached. We think, therefore, that they are not real property within the meaning of the irrigation law, but are personal property, not assessable for the revenue purposes of the district.

2. Moreover, we think that, for the purpose of the revenue to the district, the definitions of real property and personal property in the general revenue and taxation laws of the state as found in the Political Code, must prevail. They relate to the same subject as the revenue part of the law covering irrigation districts. Indeed it is expressly provided in section 39 of the Bridgeford act (St. 1897, p. 267, c. 189) that "in case of the neglect or refusal of the board of directors to cause such assessments and levies to be made, as in this act provided, then the assessment of property made by the county assessor and state board of equalization shall be adopted, and it shall be the basis of assessment for the district." Now, in section 3617 of the Political Code real estate is defined, for taxable purposes, as land including various kinds of interests therein, and "improvements" and it is declared that "the term 'improvements' includes all buildings, structures, fixtures, fences, and improvements erected upon or affixed to land, except telephone and telegraph lines"; and in section 3663 of said Code it is provided that telegraph and telephone lines shall be "assessed as personal property by the assessor of the county." Considering these provisions of the general law touching assessment and taxation, we do not think that the respondent is in a position to ignore the character of personal property given to the poles, wires, etc., of appellant by the contract between it and the railroad company on whose right of way they were placed.

The judgment appealed from is reversed, and the superior court is directed to render judgment for plaintiff as prayed for in its complaint.

We concur: SHAW, J.; HENSHAW, J.

We concur on the ground last stated. SLOSS, J.; ANGELLOTTI, J.

BEATTY, C. J. (concurring). It has been assumed by both parties to this action and by the court that it is authorized by the terms of the Bridgeford act. I think it more than doubtful whether the provisions of sections 68, 69, of that act (St. 1897, p. 276, c. 189) were ever intended, or can be construed, to authorize an action to determine the validity of the assessment of particular property to an individual taxpayer. But, waiving that question, I concur in the judgment, and in the opinion as to the matters discussed.

149 Cal. 613

WHITE v. SAGE. (Sac. 1,380.)

(Supreme Court of California. Aug. 30, 1906.)

1. SPECIFIC PERFORMANCE—COMPLAINT.

A complaint setting out a contract of sale of land by plaintiff to defendant, averring tender of deed by plaintiff, accompanied by demand for payment of price, refusal of defendant to pay, that plaintiff is the owner in fee and ready and willing to convey; that he has a lien, as vendor, for the price, and asking judgment for the balance of purchase money; that defendant be given a reasonable time to pay the same; and that, in default of such payment, defendant's interest in the land be sold, the proceeds applied on the amount due, defendant's rights to the land foreclosed, and execution be awarded against defendant's other property for any balance after such application of the proceeds—is one for specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 356, 357.]

2. SAME—ALLEGATIONS AS TO CONSIDERATION.

A complaint by the vendor for specific performance of a contract of sale, merely alleging the contract price, without showing that the consideration of defendant's contract to buy was adequate, or that as to him the contract was just and reasonable, in the absence of which facts Civ. Code, § 3391, provides that a contract cannot be specifically enforced against a party, is insufficient.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 358.]

3. SAME—JUDGMENT—FINDINGS.

Failure to find the value of the land is ground for reversal of a judgment for specific performance of a contract to buy land.

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by S. J. White against W. A. Sage. Judgment for plaintiff. Defendant appeals. Reversed, with directions.

Frank McGowan and Elmer Westlake, for appellant. F. B. Brown and Dixon L. Phillips, for respondent.

SHAW, J. The defendant, Sage, appeals from a judgment in favor of the plaintiff. The complaint is by the vendor in an executory agreement for the sale of land to enforce the performance of the contract by the vendee. It sets out the contract, a tender by the plaintiff accompanied by a demand for payment of the price, and the refusal of the defendant to pay, avers that the plaintiff is the owner in fee and is ready and willing to convey, and that he has a lien, as vendor, for the price, upon the defendant's equitable interest under the contract, and asks for judgment against the defendant for the balance of the purchase money unpaid, that defendant be given a reasonable time, to be fixed by the court, within which to pay the same, and that, in default of such payment, the defendant's interest in the land be sold, the proceeds applied on the amount adjudged due, that defendant's rights to the land be thereupon foreclosed, and for judgment and execution against the other property of the defendant for any balance of the price remaining unpaid after the application thereon of the proceeds of said sale. It is clearly a suit of the character formerly cognizable in equity alone to enforce the specific performance of a contract, and is an appeal to the equity jurisdiction of the court. Sparks v. Hess, 15 Cal. 194; Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. A demurrer to the complaint on the ground that it does not state facts sufficient to state a cause of action was overruled by the court.

We think the complaint was insufficient, and that the demurrer should have been sustained. By the contract sought to be enforced, which was executed on July 28, 1903, White agreed to sell and convey to Sage 80 acres of land for the sum of $11,000, and Sage agreed to buy the same at said price, paid $10 down, and promised to pay the remainder of $10,990 on or before August 15, 1903. There is no allegation that the land was worth the price agreed to be paid, nor any allegation whatever as to its value, nor any averment that the price is adequate or in fair proportion to the value of the land, nor that Sage ever had possession of the land nor of any other facts going to show that the consideration of the contract of Sage to buy the land was adequate, or that, as to him, it is just and reasonable. For want of such showing the complaint must be held insufficient to authorize a court of equity to enforce performance.

Civ. Code, § 3391, declares that "specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable; (3) if his assent was obtained by the misrepresentation, concealment, circumvention or unfair practices of any party to whom performance would become due under the contract." In Bruck v. Tucker, 42 Cal. 353, upon this point the court said: "The agreement alleged must be one which in all its features appeals to the judicial discretion as being fit to be enforced in specie—as having been obtained without any intermixture of unfairness. Hence, if it appear that the bargain, though obligatory in point of mere law, and one not to be set aside in equity, is, nevertheless, a hard bargain, the court will not relieve. Of such a bargain Lord Hardwicke said: 'The constant rule of the court is not to carry it into execution.' The same view was asserted by the chancellor in Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222, where the value which the complainant was to pay was, by the estimate of the court, a little less than one-half that of the estate bargained for." In Prince v. Lamb, 128 Cal. 128, 60 Pac. 692, the same principle was approved, and it was said: "These principles are not restricted to contracts for the conveyance of land, but they apply in all cases where the equitable jurisdiction of the court is invoked to enforce the specific performance of any obligation." In Stiles v. Cain, 134 Cal. 171, 66 Pac. 232, Mr. Justice Temple says on this subject: "There are, then, contracts which are perfectly valid, and which a court of equity will not set aside for fraud, mistake, or for any unfairness, but which, nevertheless, are so unfair that specific performance will not be decreed. This has always been the rule with courts of equity. They will not aid in the enforcement of a harsh and unjust contract, even though it be valid." This doctrine has been repeatedly affirmed by this court in other cases. Agard v. Valencia, 39 Cal. 302; Nicholson v. Tarpey, 70 Cal. 609, 12 Pac. 778; Kelly v. C. P. R. R. Co., 74 Cal. 562, 16 Pac. 386, 5 Am. St. Rep. 470; Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Ward v. Yorba, 123 Cal. 447, 56 Pac. 58; Windsor v. Miner, 124 Cal. 494, 57 Pac. 386; Fleishman v. Woods, 135 Cal. 261, 67 Pac. 276. These are all cases in which the vendee was seeking to compel the vendor to perform the contract by the execution of a deed. But this does not affect the rule of the Code. It applies with equal force to both parties. There is no reason why the "conscience of a chancellor" should not be as tender toward the buyer as toward the seller, if he is the victim of an unconscionable bargain.

The rule that the party seeking in equity the specific performance of a contract must aver facts which affirmatively show adequacy of consideration, and that it is just and reasonable as to the other party, is also well settled. In the first case on the subject (Agard v. Valencia, supra) the court says: "Another well-established rule in courts of equity is that in a suit for a specific performance it must be affirmatively shown that the contract is fair and just and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression but in such cases will leave the party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it." Bruck v. Tucker, supra, is to the same effect. In Stiles v. Cain, supra, upon this proposition the court said: "This does not mean that it must be alleged in hæc verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor, in the respects mentioned, must appear from a proper statement of facts." The same rule of pleading is declared in Ward v. Yorba, supra, Windsor v. Miner, supra, Prince v. Lamb, supra, Nicholson v. Tarpey, supra, Morrill v. Everson, supra, and Fleishman v. Woods, supra. The effect of these decisions is that the mere statement of the price agreed to be paid, as in this case, will not suffice. There must be a showing of the value, at least, so that the court can determine whether or not it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements. There is an entire absence of anything of this nature in the complaint under consideration. The answer alleged that the value of the land at the time of the contract did not exceed $4,400, which was considerably less than one-half the price that Sage was to pay. The finding is evasive upon this question. There is no finding of the actual value of the land, but it is said therein that it is not true that "the said land was of the value and worth not exceeding the sum of $4,400," which finding could be true if the land was worth only $1 more. The failure to find on this issue also requires a reversal of the judgment. There is a bill of exceptions in the record, the authenticity of which is disputed, from which it appears that the uncontradicted evidence was that the value of the land did not exceed $4,400, so that if this bill of exceptions could be considered the finding, even in its evasive form, would be contrary to the evidence. But we do not consider it necessary to determine the question whether the bill of exceptions is properly in the record or not. It being incumbent upon the plaintiff to allege in his complaint facts showing adequacy of the consideration, and that the contract was just and reasonable as to the defendant, the demurrer should have been sustained, and for this error and the failure to find the value the judgment must be reversed, regardless of the question whether the evidence sustains the findings.

It is but fair to the court below to say that there is nothing in the record, or in the briefs, indicating that this defect in the complaint was ever called to its attention in argument.

The judgment is reversed, with directions to the court below to sustain the demurrer to the complaint and for further proceedings.

We concur: ANGELLOTTI, J.; SLOSS, J.

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149 Cal. 677

EDWARDS v. LECHLEITER (LECHLEITER et al., Interveners). (Sac. 1,210.)

(Supreme Court of California. Sept. 5, 1906.)

1. Appeal—Review—Findings by Court—Conflicting Evidence.

Findings of the trial court, based on a material conflict in the evidence, will not be disturbed on appeal.

2. Vendor and Purchaser—Improvements.

Where the purchaser of land took possession before paying the purchase price, and contracted that all buildings placed upon the land should be the property of the seller until the seller should be repaid advances that might be made by him to the purchaser, and the wife of the purchaser knew of the contract, the fact that one of the buildings was erected with her money did not entitle her to claim ownership of the building as against the seller, who had not been paid the purchase price or his advances.

Department No. 2. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by D. P. Edwards against J. A. Lechleiter, in which Mrs. J. A. Lechleiter and others intervene. From an order denying a new trial after judgment for plaintiff, defendant and certain interveners appeal. Affirmed.

Wm. M. Sims, for appellants. Chas. W. Thomas, for respondent.

McFARLAND, J. Judgment in the trial court went for plaintiff. The defendant, J. A. Lechleiter, and the interveners Mrs. J. A. Lechleiter and Emma Lechleiter, made a joint motion for a new trial. This motion was denied; and from the order denying it the defendant and interveners appeal. There is no appeal from the judgment.

About one-half of the transcript consists of numerous, voluminous, and rather wearisome pleadings and findings. The court found, in accordance with the material averments of the complaint, that on or about February 28, 1889, plaintiff was, and still is, the owner of three described lots of land in the town of Willows in Yolo county; that at said time the defendant contracted with plaintiff that he would pay to the latter the sum of $800 for said lots; that in pursuance of such contract defendant entered upon the possession of the lots and erected thereon a machine and blacksmith shop and placed therein certain machinery, implements, tools, etc., for the operation of the same, and constructed thereon a dwelling house; that it was also contracted between the parties that plaintiff should advance to defendant all the money necessary for the construction of said buildings and for the equipment of said shop with machinery, apparatus, implements, and tools, and that all the buildings, machinery, tools and other personal property placed by defendant on the lots should be, and remain, the property of the plaintiff until defendant should have repaid to plaintiff all the advances that should be made by the latter as aforesaid, and with interest; that plaintiff did advance money to defendant for said purposes to the amount of $1,100; that the defendant has not paid to plaintiff any part of the $800 to be paid for the lots or of the said $1,100 advanced by plaintiff; and that there is now due from defendant to plaintiff upon said contract the sum of $2,184.66. The judgment is that, if defendant shall pay to plaintiff the said sum of $2,184.64, with costs, within 60 days after the entry of the judgment, the plaintiff shall execute to defendant a deed conveying and transferring to him all the said property; but, if defendant shall fail to pay said money within said 60 days, then all the property shall be sold according to the law relative to the sale of property under execution, and the proceeds of the sale, or as much thereof as shall be necessary, applied to the satisfaction of the expenses of the sale and to the payment of the said sum of $2,184.66, and costs. It appears that at one time plaintiff and defendant agreed that $1,100 was the amount due for the advancements made by plaintiff, and that defendant gave plaintiff a note for that amount bearing interest, and, also, a chattel mortgage of all the property, as additional security. This chattel mortgage was of no material importance, except as showing the amount due for advancements at the time of its date. As there is no appeal from the judgment, no question arises as to its sufficiency in form or substance.

On the appeal from the order denying the motion for a new trial there are a few exceptions made to rulings on the admissibility of evidence, but we see no error in these rulings, and, moreover, they relate to matters of no vital consequence. The main points made by appellants are that the findings are not supported by the evidence, but there was material evidence in support of all the findings. The principal contention of defendant is that the $1,100 was the whole amount due including the $800 to be paid for the lots, but the testimony of plaintiff was directly to the point that the $1,100 was for the amount of the advancements, and was in addition to the $800; and, while the testimony of defendant contradicts that of plaintiff on this point, still there was on the subject only that material conflict of evidence which placed the determination of the fact entirely within the province of the trial court.

There is nothing in the contentions of the interveners. The intervener Mrs. J. A. Lechleiter is the wife of defendant, and her claim is that the residence building on the plaintiff's lots was destroyed by fire, and that it was rebuilt with her money. It is useless to inquire whether or not there was evidence enough to support that contention. She knew that plaintiff owned the lots, and knew of the contract between plaintiff and defendant, and there is no principle upon which she could claim ownership of the building erected on plaintiff's land. The other intervener is defendant's daughter, and her claim is that she got a money judgment in a justice's court against the defendant, and that execution issued thereon, and was levied on the property here involved. There is no evidence in the record showing the issuance or levy of such execution, but neither such execution or judgment would be of any value against the property of plaintiff herein.

The order denying a new trial is affirmed, and it is ordered that the 60 days mentioned in the judgment do now commence to run from the date of the filing of the remittitur on this appeal in the lower court.

We concur: HENSHAW, J.; LORIGAN, J.

149 Cal. 617

BURNS v. HIATT. (Sac. 1,403, 1,410.)

(Supreme Court of California. Aug. 30, 1906. On Rehearing, Sept. 29, 1906.)

1. MORTGAGES—FORECLOSURE—ACTION—PARTIES—PURCHASER FROM MORTGAGOR.

The title of a purchaser from a mortgagor is not affected by foreclosure proceedings to which he is not made a party.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1685, 1685½.]

2. SAME—OPERATION—INVALID FORECLOSURE.

The foreclosure of a mortgage without bringing in one who purchased the property after the execution of the mortgage does not devest the lien as to such purchaser's interest.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1682–1685½.]

3. QUIETING TITLE—PERSON ENTITLED TO RELIEF—MORTGAGOR—INVALID FORECLOSURE.

A purchaser from a mortgagor after the execution of the mortgage, who has not been made a party to subsequent foreclosure proceedings, cannot maintain action to quiet title against the mortgagee without offering to pay the debt, even though it is barred by limitations.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 46.]

4. MORTGAGES—FORECLOSURE—EFFECT—INVALID PROCEEDINGS—POSSESSION.

A mortgagee who has foreclosed his mortgage without bringing in a purchaser from the mortgagor, and who has entered into possession under such proceedings, though without the consent of such purchaser, is entitled to retain possession until his lien is released by payment, even though the debt is barred by limitations.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1682–1685½.]

5. SAME—LIEN—MANNER OF RELEASE.

Where a mortgage covering more land than was included in a sale made after the execution of the mortgage was foreclosed without making the purchaser a party, and possession of all the property was taken by the mortgagee, the owner of the portion sold was only obliged to pay a portion of the debt to release his property from the mortgage lien and secure possession thereof.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 784, 785.]

Department 1. Appeal from Superior Court, Yolo County; A. J. Buckles, Judge.

Action to quiet title by D. M. Burns against G. W. Hiatt. From a judgment determining the parties' rights, plaintiff and defendant appeal. Reversed on defendant's appeal, and remanded.

E. B. Mering, G. V. Martin, and W. A. Anderson, for plaintiff. A. C. Huston, for defendant.

ANGELLOTTI, J. This action was brought by plaintiff to obtain a decree quieting his title to the west 22 feet of lot 2, in block 4, in the city of Woodland; he alleging in his complaint that he was the owner and entitled to the possession of said property. The complaint was in the usual form of complaints in actions to quiet title. Judgment was given, first, that plaintiff was the owner in fee simple and entitled to the possession of said property; second, that he owns the same "subject to the rights of the defendant, Hiatt, under a certain indenture of mortgage made, executed and delivered on the 18th day of August, 1892, by George H. Jackson to the said G. W. Hiatt"; third, that said Hiatt has no right, title, or interest in said premises, "except such right, title, or interest as may be derived by the said Hiatt, under the said mortgage"; and, fourth, that a certain foreclosure proceeding instituted by said Hiatt on said mortgage, and the decree, judgment, and all proceedings therein, are null and void so far as plaintiff is concerned, and in no way bind him. These are appeals from said judgment, one by the defendant from the judgment in favor of plaintiff, and the other by plaintiff from that portion of the judgment decreeing that his ownership of the property is subject to the rights of defendant under said mortgage. Both appeals are on the judgment roll.

According to the findings of the trial court, based upon appropriate allegations in that behalf contained in defendant's answer, the material facts are as follows: On August 18, 1892, one Jackson was the owner and in possession of the property in controversy and other property, and on that day he borrowed $1,000 from defendant, giving him his note therefor, payable one day after date, with interest at the rate of 9 per cent. per annum, and also, as security for the payment thereof a mortgage on said premises, which mortgage was duly recorded on August 22, 1892. On November 29, 1893, said Jackson executed and delivered to plaintiff a grant, bargain, and sale deed of the property in controversy, which deed was duly recorded on the same day. On August 15, 1896, said note and mortgage being wholly unpaid, defendant commenced an action against Jackson for the foreclosure of said mortgage. Plaintiff was never made a party to this action. Proceedings were had in such action, resulting, on December 1, 1898, in a judgment for the sale of the mortgaged premises and the application of the proceeds to the payment of the amount found due, viz., $1,344.89. At the sale so ordered, defendant became the purchaser for the sum of $1,200. He subsequently, on August 30, 1899, received from the commissioner appointed to make the sale a deed for the premises, and immediately entered into the possession of all of the mortgaged premises, and has ever since been, and now is, in the actual and peaceable possession of the same, claiming to own the whole thereof. The court further found that the possession of said premises taken by defendant after the delivery of the commissioner's deed was without the consent of the plaintiff, and also that the note and mortgage are barred by the provisions of section 337 of the Code of Civil Procedure.

This action to quiet title was commenced on July 22, 1904, almost five years after defendant's possession commenced. Plaintiff not having been made a party to the foreclosure proceedings, his title to the mortgaged premises was, of course, in no way affected thereby. It is the universally accepted rule wherever a mortgage is only a lien not only before, but after, default in its conditions on the part of the mortgagor, that the title of the grantee of mortgaged premises is not affected by a foreclosure of the mortgage in an action commenced after the conveyance to him, unless he is made a party to the action. As to him, under such circumstances there is no foreclosure. This is not disputed by defendant. It does not, however, follow from this that he is entitled to a decree quieting his title against the mortgagee. He took the property under his deed from the mortgagor, subject to the lien of the mortgage, and as to such lien, he thenceforth stood in the place of the mortgagor. The proceeding to enforce such lien, although ineffectual against plaintiff by reason of the fact that he was not made a party, did not operate to divest the lien. His rights were in no way affected by the proceeding, and he acquired no additional right thereby. He simply continued to be the owner of the property, subject to the lien which had not been enforced; his situation in this regard being precisely the same as it would have been had no attempt to foreclose been made. The mortgage was not extinguished by the ineffectual attempt to enforce it. It is clear that where, for any reason, foreclosure proceedings are void, the legal title continues subject to the lien of the unpaid mortgage, and it appears to be well settled that a purchaser of the property at a foreclosure sale in such void proceedings thereby becomes an assignee of such mortgage, and the debt thereby secured, of which the mortgage is an incident, with all the rights of the original mortgagee. See Miner v. Beekman, 50 N. Y. 337; Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891; Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; Bryan v. Kales, 162 U. S. 411, 16 Sup. Ct. 802, 40 L. Ed. 1020; Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022; Investment Sec. Co. v. Adams (Wash.) 79 Pac. 625; Frische v. Kramer's Lessee, 16 Ohio, 125, 47 Am. Dec. 368; 2 Jones on Mortgages, § 1395.

So far, therefore, as the claim of plaintiff that his title should be quieted against the mortgage is concerned, we have the case presented in Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763, viz., that of a party standing in the position of a mortgagor seeking to quiet his title against the mortgagee, without paying or offering to pay the debt for which the mortgage was created. It is the settled rule in this state that this cannot be done, even though the mortgage debt be barred by the statute of limitations. In Brandt v. Thompson, supra, which was an action by a mortgagor in possession to quiet his title against the mortgagee under such circumstances, it was said: "But such a result cannot be achieved. It would be against general equitable principles and adjudicated cases [citing cases]. * * * The only way for a party in respondent's position to quiet a mortgage is to pay it. * * * Respondent can have no remedy in the premises without paying or tendering the amount due appellant on his mortgages." The same rule was previously applied in Booth v. Hoskins, 75 Cal. 276, 17 Pac. 225, which was also an action to quiet title by a mortgagor in possession, and in which the mortgage debt was barred by the statute of limitations. In Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, which was an action in ejectment by the successor of the mortgagor against a mortgagee in possession, it was pointed out that the rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and and protection of those rights, are of equitable origin and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. It was there said: "Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the conditions that he shall do that which is consonant with equity." It was further declared in that case that the fact that the debt is barred by the statute of limitations is immaterial in such a case; the statute barring the remedy only, and not extinguishing, or even impairing, the obligation of the debtor. As long as the obligation to pay the debt exists, it is not equitable that the mortgagor should have relief against the mortgage given to secure the same, and such relief can be given only on condition that he discharges the obligation. From what has been said, it is clear that plaintiff cannot complain of the judgment. He was not entitled to a judgment decreeing him to be the owner of the property free and clear of the alleged mortgage. It is suggested by him that the defendant in his answer does not set up any equity. He does fully set up the facts already stated, which show such equity, and we know of no reason why this is not sufficient.

Another question is presented by defendant's appeal from the judgment. Is he thereby given everything to which he is entitled upon the facts already stated? While the judgment declares that plaintiff's ownership is subject to the rights of defendant under the mortgage, and probably saves to defendant the right to take such affirmative proceedings as the law allows for the collection of the debt, a somewhat valueless privilege if the statute of limitations has run against his debt, as the court finds, it also undoubtedly entitles plaintiff to take and retain possession of the property. He is expressly adjudged as against defendant to be "the owner in fee simple and entitled to the possession" of the property, and this adjudication as to his right to possession is not at all qualified by any other portion of the judgment. The defendant, standing in the position of a mortgagee, is in possession of the mortgaged premises; this possession having been taken without the consent of plaintiff, standing in the position of the mortgagor, but having been taken and peaceably retained by him under a claim made in good faith that he owns the same by virtue of the attempted, but ineffectual, sale made in the foreclosure proceedings. By the judgment the person standing in the position of a mortgagor is given possession of the mortgaged premises without being compelled to pay the mortgage debt. The question is thus presented as to whether a mortgagee who has entered into and holds possession of the mortgaged premises, under such circumstances, can be thus disturbed in his possession, at the suit of a mortgagor having the legal title, who does not pay or offer to pay the mortgage debt.

In Spect v. Spect, supra, it was declared that, in consonance with the equitable principles applicable in the determination of the relative rights of mortgagor and mortgagee, "it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." This was said with reference to a mortgagee who had been placed in possession by the mortgagor; and as to such a case it is not seriously disputed by plaintiff that the rule is as stated in that case. It is universally declared by the decisions that ejectment will not lie on behalf of the mortgagor against a mortgagee who may properly be called a "mortgagee in possession." The contention of plaintiff is that no one can be included in that term unless he has entered into possession by reason of the agreement or assent of the mortgagor or his assigns that he have such possession under the mortgage and because of it—that, the mortgage being a mere lien not entitling the mortgagee to possession, some assent on the part of the mortgagor thereto is absolutely essential to a right to possession in the mortgagee. If we disregard all equitable considerations, this position of plaintiff is apparently impregnable. But the rule is based solely upon equitable considerations (see Spect v. Spect, 88 Cal. 443, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314), and, we think, means more than plaintiff's contention would make it mean.

Mr. Pomeroy, in his Equity Jurisprudence, declares the doctrine established by the courts in this matter to be that, while the mortgagee is declared to have no legal estate and is unable to recover possession against an unwilling mortgagor or owner of the fee subject to the mortgage, yet if the mortgagee, while the mortgage is still subsisting, does "in any lawful manner" obtain the possession, his interest under the mortgage enables him to retain such possession, and to defend it against the mortgagor, or those succeeding to his title. He further says: "If, through his [the mortgagor's] express consent, or through any other lawful means, the mortgagee has been permitted to obtain possession of the land, the mortgagor's only remedy is the equitable suit for a redemption." While admitting that it is difficult to reconcile this doctrine, on principle, with the theory that the mortgage is purely a lien, he declares that the doctrine is retained by the courts as settled. 3 Pomeroy, Eq. Juris. §§ 1189, 1190. Thus stated, in a manner which seems to us to be fully warranted by the authorities, the true rule would appear to be that where the mortgagee has, under color of the mortgage or legal proceedings based thereon, acquired possession without resort to force, fraud, or any other unlawful or wrongful means upon which he would be estopped to found a right, and under such circumstances as not to make it inequitable that he should retain such possession as security, he will be regarded as a mortgagee in possession, and his possession will not be disturbed at the suit of the mortgagor, unless the mortgagor first pay the mortgage debt. So stated, the rule is in consonance with the equitable maxim that he who seeks equity must do equity, and with the well-recognized rule applicable in determining the relative rights of mortgagor and mortgagee that, whatever the mere form of the action as shown by the complaint, the courts will not aid the mortgagor in obtaining a remedy that is inequitable, and will grant him the relief sought to which he may be entitled under strict legal rules only upon the condition that he shall do that which is equitable.

A long line of authorities holds that, where for any reason foreclosure proceedings are void, not only does the mortgage continue alive for the benefit of the mortgagee, or the purchaser at the foreclosure sale, as his assignee, but also, if the person entitled to the benefit of the mortgage peaceably and in good faith, under color of such foreclosure proceedings, enter into possession of the mortgaged premises, he does obtain possession in a lawful manner and is a mortgagee in possession, with all the rights incident thereto, and cannot be dispossessed by the mortgagor without payment of the debt. See Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891; Croner v. Cowdrey, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716; Shriver v. Shriver et al., 86 N. Y. 575; Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; Bryan v. Keles, 162 U. S. 411, 16 Sup. Ct. 802, 40 L. Ed. 1020; Romig v. Gillett, 187 U. S. 111, 23 Sup. Ct. 40, 47 L. Ed. 97; Investment Sec. Co. v. Adams (Wash.) 79 Pac. 625; Stouffer v. Har-

lan (Kan.) 74 Pac. 610, 64 L. R. A. 320; Backus v. Burke (Minn.) 65 N. W. 459. Under the rule as declared in these cases, it is immaterial whether possession is taken with or without the consent, express or implied, of the mortgagor. In Backus v. Burke, supra, the Supreme Court of Minnesota repudiated the doctrine enunciated in the earlier case of Roger v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, relied on by plaintiff, to the effect that consent of the mortgagor, express or implied, is essential. In Bryan v. Kales, supra, the Supreme Court of the United States declares the rule enunciated above to be the rule prevailing generally in the United States. In Stouffer v. Harlan, supra, is to be found an extended discussion of the question and the decisions thereon. It is there declared that the requirement of the rule that the mortgagee's possession must be obtained by lawful means does not mean that it must be obtained under a formal right capable of enforcement by legal process, but simply that it must not be obtained through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. While decisions may be found upholding a contrary doctrine, we are of the opinion that the rule enunciated by the authorities cited is in full accord with equitable principles, and the necessary result of the views of this court as expressed in Brandt v. Thompson, supra, Booth v. Huskins, supra, and Spect v. Spect, supra. The justice of such a rule is shown by the facts of this case, where the possession peaceably and in good faith acquired under color of the foreclosure proceedings has been peaceably and in good faith maintained thereunder for nearly five years, and, the debt being barred, now constitutes the only real security for the debt for which the mortgage was given. The mortgagee ought not to be deprived of the security thus obtained and held, without payment of the amount thereby secured, and equitable principles prevent the accomplishment of such a result at the suit of the mortgagor or his successor.

Plaintiff claims that his contention that plaintiff may recover possession without paying the mortgage debt is fully supported by the decision of this court in Davenport v. Turpin, 43 Cal. 597, and this may be admitted. But we are satisfied that, in so far as that case supports such a contention, it is so opposed to the principles enunciated in the later California cases already cited that it cannot now be accepted as authority. The other California cases cited upon the question as to what constitutes a mortgagee in possession we do not consider in point here. As we understand the record, the land of plaintiff constituted only a portion of the mortgaged premises, and defendant purchased at the foreclosure sale and entered into possession of all of the mortgaged premises. Under these circumstances, the land of plaintiff is justly liable for only a portion of the original debt. The amount of the debt, and the proportion for which plaintiff's land is justly liable are questions that could have been determined in an action brought by plaintiff against defendant to have those matters determined, and possession awarded him upon paying the amount adjudged. Whether this can now be done in this action we do not decide.

The judgment is reversed, and the cause remanded for such proceedings as are not inconsistent with the views herein expressed. Plaintiff shall not recover his costs of appeal. Defendant shall recover his costs of appeal.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. By the present decision the case of Davenport v. Turpin, 43 Cal. 597, is overruled, upon the assumption that it has been heretofore overruled, or set aside, by the decisions in Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763, Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, and other cases. It cannot be contended that Davenport v. Turpin has ever been expressly overruled or brought into question, and it has not been set aside by implication from the other decisions cited from our own reports for the reason that all those cases are clearly distinguishable on the facts. In those cases the mortgagees went into possession lawfully under the mortgagor while he was entitled to transfer the possession. In this case the defendant took possession of plaintiff's lot unlawfully after his mortgagor had transferred his right of possession to the plaintiff. He was not in any just sense a mortgagee in possession. Of the decisions cited from other jurisdictions it may be said that, with the single exception of Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891, they may all be distinguished by the fact that the mortgagee was rightfully in possession by consent of the mortgagor while he retained the title, or where the mortgagee had gone into possession under defective foreclosure proceedings, and where the controversy was wholly between mortgagor and mortgagee. Of course, in such cases the equity of the mortgagee against his mortgagor is more substantial than it is against a grantee of the mortgagor, whose right of possession by virtue of his grant has been violated by the unlawful entry of the mortgagee. The decision in the New York case does support the present decision, but it cannot be held to justify a reversal of one of our own decisions which has stood so long as a rule of property.

149 Cal. 511

GLASSELL et al. v. HANSEN et al. (Sac. 1,370.)

(Supreme Court of California. July 31, 1906.)

APPEAL—REVERSAL—SCOPE OF ISSUES.

Plaintiff claimed the land in controversy as an accretion to his land, which was bounded by a river, and defendant claimed that the land first appeared as an island in the river and grew by accretions until the channel between the island and plaintiff's land was nearly filled up. The court found for defendant, and on appeal it was held that the evidence justified the finding, but that the court erred in not awarding plaintiff a strip of land included in the complaint and not a part of the island. The judgment was merely "Judgment and order reversed." *Held*, that on the next trial plaintiff was entitled to prove his original claim.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4713.]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Hugh Glassell and others against Ross Hansen and others. From a judgment in favor of defendant Hansen, and from an order denying a new trial, plaintiffs appeal. Reversed.

George A. Lamont, Frank R. Devlin, and McNutt & Hannon, for appellants. A. C. Freeman, for respondents.

McFARLAND, J. At the time of the commencement of this action the plaintiffs were, and for a great many years prior thereto they and their predecessors in interest had been, the owners in fee of a tract of land in Solano county known generally as the "Toland Ranch," and having as its eastern boundary what at the time of the inception of their title, and for many years after, was the western bank of the Sacramento river. After plaintiffs had become the owners of the Toland ranch the Sacramento river in front of said ranch commenced to fill up with alluvial deposits which increased in size from year to year until at the time of the bringing of this present action (May 23, 1899), the "made" land in what was formerly a part of the river, and in front of said ranch, amounted to about 140 acres. This present action was brought to recover this made land; the averments of the complaint being that plaintiffs were seised in fee and entitled to the possession thereof, and that defendants had entered thereon and ousted plaintiffs therefrom. The complaint was not verified, and the defendant Ross Hansen filed an answer in which he "denies each and every allegation in the plaintiffs' complaint contained"; and he afterwards filed a supplemental answer, in which he averred that the land in contest was swamp and overflowed land belonging to the state, and that the state in 1885 conveyed said land by a patent to one Kate Nelson, from whom the title by mesne conveyances vested in said defendant. The other defendants disclaim. The court, on the trial out of which this present appeal arises, gave judgment for defendant Hansen. Plaintiffs made a motion for a new trial, which was denied, and from the order denying the motion for a new trial plaintiffs now appeal.

There had been a prior trial of the case, and an appeal from a judgment in favor of defendants and from an order denying plaintiffs' motion for a new trial. See Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964. At the first trial plaintiffs claimed title upon the theory that the said made land in the river was the result of accretions to plaintiffs' said land lying on the west bank of the river, and, therefore, by a well-established principle, belonging to them as owners of the land to which the made land was thus annexed. Defendants' position was that the origin of this new land was an island which first appeared near the center of the river; that for a time this island divided the river into two nearly equal streams—one flowing to the east and the other to the west of the island, each large enough for the passage of steamboats; that gradually the island, which was called "Decker Island," grew by accretions to its western side until the western stream of the river became nearly filled up, although there still remains between the island and the mainland a depression or slough which plainly divides the one from the other, and that the accretions were all to the island, and not to the Toland ranch on the mainland; and that therefore the new land was, under section 1016 of the Civil Code, the property of the state, and did not become part of plaintiffs' mainland by accretion. At the first trial the court found in accordance with defendants' contention and rendered judgment accordingly. Plaintiffs appealed from that judgment, and also from an order denying their motion for a new trial. This court disposed of the appeals by holding that the trial court was right in finding that the land in contest, outside of the calls of the original patent of the Toland ranch, was an island, and did not belong to plaintiffs by accretion, but that the court erred in not giving plaintiffs judgment for a strip of land described in the complaint which was not part of the island; and for this latter reason the judgment and order denying a new trial were reversed.

When the case came on to be heard at the second trial, out of which this present appeal arises, the plaintiffs offered to introduce evidence tending to support their original claim that said made land consisted of accretions to the said mainland; but the court refused to allow them to introduce such evidence upon the ground that the judgment of this court on the first appeal had finally determined that the new or made land in the river was an island, and not formed by accretions to the mainland owned by plaintiffs. This ruling was clearly erroneous. On that appeal this court merely held, as matter of law, that if the land was an island with its accretions, and was not made by accretions from the mainland, then it did not belong to plaintiffs, and that on the said first trial the evidence justified the finding of the lower court that the land was an island. But the court reversed the judgment and order denying a new trial upon another ground, namely, that there appeared to be a small strip of land included in the complaint and belonging to plaintiffs which was not part of the island, that the court had not found that the defendant was not in possession of that strip, and that therefore the judgment and order must be reversed. In reversing the case this court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial. However, it did not do so, and the judgment was merely in the general terms "the judgment and order are reversed." This clearly left the whole case to be tried anew, as if it had not been tried before. Falkner v. Hendy, 107 Cal. 54, 40 Pac. 21, 386, and cases there cited. Of course, the law of the case was settled to be that islands formed in the beds of rivers belong to the state and not to the owners of land fronting on the river bank; but the question whether or not the land in contest in the case at bar was an island or was formed by accretions from the mainland was as fully at issue at the second trial as at the first.

The learned counsel for respondents contends that the court did not limit the evidence as above stated; but this contention cannot be maintained. At the beginning of the statement on motion for a new trial the following appears: "After a discussion between the court and counsel as to the issues to be tried, the court held that, under the decision of the Supreme Court in this case (135 Cal. 547, 67 Pac. 964), the issues as to the island are settled, and that no testimony is to be introduced on that subject. The Court (after reading the said decision of the Supreme Court): Proceed with your testimony. I see no reason for opening that again. There will not be any testimony on the island part at all. That I think is sufficiently settled by this decision. Mr. McNutt (appearing for plaintiff): We want to reserve the question, of course. I suppose the regular way would be to introduce the witness and offer proof. The Court: Suppose you offer a witness and make statement of what you propose to prove by this witness; then you could get your objection to the ruling of the court. Thereupon, E. C. Dozier was called as a witness for the plaintiffs. (Explanation, and the map used on a former trial is brought in and affixed to the blackboard.) The witness testified that he knew the land in controversy since 1869, and knew the Sacramento river since that time, and knew there had been some filling in of the river since he resided there, and that he had opportunities of observing how the river had filled in. Q. By Mr. Lamont (attorney for plaintiffs): Now I wish you would explain to the court how that has taken place there with regard to this land in controversy. Mr. Freeman (attorney for defendant): I object, now, that it appears that the testimony is to be respecting land in the Sacramento river, to which plaintiffs have shown no title or claim of title. The testimony of the witness should be excluded until there is some evidence. Mr. Lamont: Of course, we will follow that. Mr. Freeman: It seems to me that it ought to precede it, although it is in the discretion of the court at last. The Court: What is the purpose of this testimony? Mr. Lamont: The purpose is to show that this is accretions from the mainland. We will follow that by the patent and deraignment of title, of course, from the government down to the plaintiffs in this action. The Court: As I understand it, you propose by this witness to show that this piece of land in controversy—all of it—is accretions to the land to which it is now joined. Mr. Lamont: Yes, or, at least, a portion of it. The Court: In other words, the purpose is to show that this piece of land in controversy, which has been called an island by the Supreme Court, is, in fact, not an island, but is accretions to the land of your client. Mr. Lamont: That is our idea."

There were further offers and discussions similar to the preceding, and the court sustained objections to the testimony. The foregoing shows, we think, very clearly that the court excluded evidence as above stated, and the effect of the ruling was not changed because afterwards plaintiffs were allowed to introduce evidence tending to show that "if the land grows both ways from the land side and from the island side" a certain part of the land in contest was comprised of accretions from the land side. Plaintiffs should have been allowed to show, if they could, that all the land in the river in front of their land was formed by accretions from their land. Plaintiffs sought, also, to show title to the land in contest by prescription, claiming to have been in the actual and adverse possession thereof for more than five years before the commencement of the action. There was a good deal of evidence introduced by both parties on this issue of plaintiffs' title by prescription. We do not deem it necessary to notice such evidence in detail. It is sufficient to say that plaintiffs failed to show such title by actual possession, by pasturing of stock, or by any other means; and, as this issue was fully and fairly tried, we do not think that it would be right or just to compel defendant to try it over again.

A new trial will, therefore, be ordered only as to the question: Was the made land in contest formed by an island and its accretions, or by accretions from the mainland?

The order denying plaintiffs' motion for a new trial is reversed, and the cause is remanded for a new trial on the sole issue whether the made land in the Sacramento river opposite plaintiffs' tract of land called the "Toland Ranch" was formed by accretions from the mainland belonging to plaintiffs, or whether said made land appeared as an island and grew from accretions to such island.

We concur: HENSHAW, J.; LORIGAN, J.

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4 Cal. App. 41

MURRAY v. LLEWELLYN IRON WORKS CO.

(Court of Appeal, Second District, California. June 27, 1906.)

1. NEGLIGENCE—FIRES—ORIGIN—CIRCUMSTANTIAL EVIDENCE.
In an action for damages from fire alleged to have resulted from the negligence of defendant's servants, the fact that the evidence as to the origin of the fire was circumstantial did not render it inadmissible.

2. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.
An instruction that the jury should consider the facts in evidence in determining whether or not the fire referred to in the complaint was due to a specified cause was not objectionable as a charge on the weight of the evidence.

3. WITNESSES—CREDIBILITY—EMPLOYMENT BY PARTY.
An instruction that the jury should receive the testimony of the defendant's employés the same as the testimony of any other witness, and determine the credibility of such employés by the same principles and tests as would be applied to any other witness, was erroneous and properly denied.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1187.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by C. F. Murray against the Llewellyn Iron Works Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones & Weller and Davis, Rush & Willis, for appellant. Russ Avery and Anderson & Anderson, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff and an order denying the defendant's motion for a new trial. The plaintiff is the owner of a building and lot fronting on Los Angeles street, adjoining the Huntington Building, which extends from Los Angeles street to Main street and abuts on the north on Sixth street; and he brought this suit for damages to his building and other property on his lot from fire, alleged to have been caused by the negligence of the defendant's servants, who at that time were engaged in working on the Huntington Building. There was no direct proof of the origin of the fire, which occurred in the early hours of the 6th of October; but it appears from the evidence that the work on which the defendant's employés were engaged required the use of rivets heated to a white heat, which were habitually thrown from the heater to the riveter and caught for the latter in a bucket. It sometimes happened, however, that the rivets were not caught, but, while the men were working on the south side of the building, would sometimes fall over the line onto the land of the plaintiff, or the land of his neighbor adjoining on the rear. It was in proof that this happened twice on the morning of the 5th, between the hours of 10 and 12 o'clock, the rivet falling, on one occasion, on the lot adjoining just to the rear of plaintiff's lot, and the other across the fence on his lot; and on each occasion a fire was started, which was extinguished by the defendant's employés. Evidence of similar occurrences upon other occasions before and after the fire was also given. The plaintiff's theory is that the origin of the fire in question was similar to that of the fires that had thus occurred, and much evidence was introduced to exclude the probability of its having originated otherwise.

Numerous points are urged by the defendant, but we think they are all untenable. The evidence as to the origin of the fire was, indeed, circumstantial only; but it was not on that account inadmissible (Code Civ. Proc. § 1832), and we think it was sufficient to sustain the verdict. The instruction complained of does not instruct the jury as to the weight of evidence, but simply that they were to consider the facts in evidence "in determining whether or not the fire referred to in the complaint * * * was due to the same cause." Nor did the court refuse to instruct the jury that "defendant's employés were entitled to due credit as witnesses." The request of the defendant was that the jury should be instructed "to receive the testimony of such witness * * * the same as that of the testimony of any other witness, and to determine the credibility of such employé by the same principles and tests by which they would determine the credibility of any other witness," which would have been manifestly erroneous.

There are some other objections on the part of appellant, but we deem it unnecessary to consider them. On the whole, we find no error in the record.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 76

SOUTHERN PAC. R. CO. v. BOVARD.

(Court of Appeal, Second District, California. July 9, 1906.)

PUBLIC LANDS—RAILROAD GRANTS—INDEMNITY LANDS—SELECTION.

The determination by the United States Supreme Court that the grant to the Southern Pacific Railroad Company by Act Cong. March 3, 1871, 16 Stat. 573, c. 122, did not include land within the limits of the grant made by Act Cong. July 27, 1866, 14 Stat. 292, c. 278, to the Atlantic & Pacific Company, refers only to lands within the 20-mile limit of the Southern Pacific Railroad Line falling within the like limits of the Atlantic & Pacific, and does not apply to indemnity lands to which the title accrues only on selection, and which may be selected from any public lands of the United States within the indemnity limits.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the Southern Pacific Railroad Company against M. M. Bovard. From a judgment for plaintiff, defendant appeals. Affirmed.

M. C. Hester, for appellant. William Singer, Jr., and Guy Shoup, for appellee.

SMITH, J. The suit was brought to foreclose the rights of the defendant under a contract for the sale of the land in question, made by the plaintiff to the defendant March 9, 1887. Judgment was entered in favor of the plaintiff, requiring the defendant to pay the plaintiff the sums due on the contract, amounting to $2,681.19, with interest, etc., within 30 days of the date of the decree, or otherwise to be foreclosed of his rights under the contract. The defendant appeals from the judgment.

By the terms of the agreement the plaintiff agreed to sell and the defendant to buy the land described in the contract for the sum of $1,536.70, payable with interest, as follows: $307.34 and one year's interest in advance on the remainder, $86.06, on the execution of the contract; and the balance, with interest at 7 per cent., March 9, 1892. It was further provided that a deed should be executed upon receipt of a patent, and, in case it should appear that plaintiff was not entitled to a patent, all moneys paid should be returned without interest. The defense is, in effect, that it has been finally determined by the decisions of the Supreme Court of the United States that plaintiff is not entitled to a patent; and in a cross-complaint the defendant seeks to recover the amount paid under the contract. The land in question "is within the place limits of the grant made to the Atlantic & Pacific Railroad Company by act of Congress approved July 27, 1866 (14 Stat. 292, c. 278), and is also within the indemnity limits of the grant made to the Southern Pacific Railroad Company by act of Congress approved March 3, 1871 (16 Stat. 573, c. 122), and was selected by said Southern Pacific Railroad Company in due form under the act of March 3, 1871." This selection was approved by the register and receiver of the United States land office at Los Angeles on October 3, 1887; but it appears from the stipulation that the selection was set aside by order of the Secretary of the Interior and the Commissioner of the General Land Office on April 15, 1898, and the lands included in the selection, including the land in controversy, restored to the public domain.

It is found by the court that it has not been determined, by the decisions of the Supreme Court of the United States or otherwise, that plaintiff is not entitled to a patent; and whether upon the facts stipulated this finding can be sustained is the only question involved. The contrary is claimed by the appellant upon the authority of U. S. v. S. P. R. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, Id., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and Southern Pac. R. R. Co. v. Painter, 113 Cal. 251, 45 Pac. 320; where it is held, in effect, that the grant to the Southern Pacific Railroad Company by the act of March 3, 1871, did not include land within the limits of the grant made by the act of 1866 to the Atlantic & Pacific Company. But these decisions refer only to lands within the 20-mile limit of the Southern Pacific Railroad falling within the like limits of the Atlantic and Pacific. They have no application to indemnity lands, to which the title accrues only upon selection, and which may be selected from any public lands of the United States within the indemnity limits. U. S. v. S. P. R. R. Co., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104; S. P. R. R. Co. v. U. S., 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307; Ryan v. Railroad Co., 99 U. S. 382, 25 L. Ed. 305; Southern Pac. Co. v. Lipman (Cal. Sup.) 83 Pac. 445.

We are of the opinion that the judgment must be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 94

WYCKOFF v. SOUTHERN PAC. CO.

(Court of Appeal, Second District, California. July 10, 1906.)

TRIAL—INSTRUCTIONS AS TO MATTER OF FACT.

Under Const. art. 6, § 19, providing that judges shall not charge with respect to matters of fact, but may state the testimony and declare the law, it is error to charge that the fact, if found, that the engine colliding with a team at a crossing was running 35 miles an hour does not establish negligence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 442–445.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Will E. Wyckoff against the Southern Pacific Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

J. W. McKinley, for appellant. Charles H. Mattingly, for respondent.

GRAY, P. J. This is an action for personal injuries to plaintiff, incurred in a collision between a locomotive of defendant and a span of horses and wagon driven by plaintiff at a street crossing in the town of Burbank in Los Angeles county. The verdict was for the defendant, and the defendant appeals from an order of the court granting plaintiff a new trial.

The testimony of the plaintiff as a witness in his own behalf was in effect as follows: Plaintiff and his father were driving into the town of Burbank in a two-horse wagon on Verdugo street. About 300 feet from defendant's track they discovered a horse fast in a wire fence. They stopped there, and both went to the relief of the horse. Finding it necessary to cut the wire, that the horse might be released, the plaintiff returned to the wagon and drove in a walk in the direction of the railroad track, intending to cross the same for the purpose of obtaining some wire nippers. When he reached the wagon he looked and listened to learn whether any trains were approaching. He could hear none and see none "on account of the boxcars that were along the side track between the main track and the section houses, and the shade trees around the section houses, and also the drying plant." As he proceeded toward the track he kept up a diligent looking and listening for trains. He had no view of the track until he emerged from between two box cars standing on the side track only a few feet from the main track. He knew the next train due would be from the south, and accordingly, as soon as he could see the track he looked in that direction, and, seeing no train, looked the other way, discovering a "wild" locomotive approaching at a speed of some 35 miles an hour without giving any warning of its approach with bell or whistle. He was then very near the track, and, as he says, "I was terribly excited to find myself in such peril, and my first thought was to get across and get out of the way, and I jumped forward into the wagon and tried my best to get across, and come nearly getting across, and the engine got the back end of the wagon and hurled it into the air." He also says: "There was no time from the time I started across the railroad track when I was not looking and listening for that train." There was other evidence tending to show that the bell was sounded and warning duly given on approaching the crossing, and otherwise conflicting with the foregoing.

The new trial was granted because of an instruction given to the jury, which reads as follows: "If you find that the engine was running at the rate of 35 miles an hour, that fact does not establish negligence upon the part of defendant, because no duty rested upon it to run its train or engine at a less rate of speed at the point in question." With reference to this instruction, we quote from the opinion of the trial court as follows: "Section 19 of article 6 of our state Constitution provides: 'Judges shall not charge juries with respect to matters of fact but may state the testimony and declare the law.' The rate of speed under the circumstances of the case was a question of fact and not a question of law. It was one of the ingredients of negligence charged against the defendant by the plaintiff. The court could not say, as a matter of law, under the circumstances of the case, that it was not negligent for the defendant to run its engine at so great a rate of speed." We think this is sound, and that the new trial was properly granted, for the reason given by the trial court.

It will be needless to discuss any other points raised in the briefs, for the reason that they may not arise upon a new trial of the case.

The order appealed from is affirmed.

We concur: ALLEN, J.; SMITH, J.

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4 Cal. App. 108

FREEMAN v. BROWN.

(Court of Appeal, Second District, California. July 12, 1906.)

APPEAL—ORDERS APPEALABLE—MOTION FOR NEW TRIAL—AMENDMENT OF STATEMENT.

An order denying defendant's motion to amend his statement on motion for a new trial by inserting specifications therein, under Code Civ. Proc. § 473, providing for the amendment of pleadings, is appealable.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by J. W. Freeman against Robert A. Brown. From an order denying defendant's motion to amend his statement on motion for a new trial, he appeals. On motion to dismiss. Denied.

George L. Keefer and Walter L. Bowers, for appellant. H. M. Barstow and Barstow & Variel, for respondent.

PER CURIAM. This is an appeal from an order denying the defendant's motion to amend his statement on motion for a new trial by inserting specifications therein. The plaintiff moves to dismiss the appeal on the ground that the order is not appealable.

Appellant by his motion and application sought relief under section 473, Code Civ. Proc. The order denying such relief is appealable. Murphy v. Stelling, 138 Cal. 642, 72 Pac. 176; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497.

Motion to dismiss is denied.

SMITH, J. I concur in the order denying the motion to dismiss the appeal in this case, and also in the opinion that the decision in Murphy v. Stelling, 138 Cal. 642, 72 Pac. 176, is directly in point. But I regard that case as merely an application of the more general principle that all orders made in proceedings for a new trial which have the effect of finally disposing of the motion are special orders made after final judgment, and therefore appealable. Hayne on New Trial, § 146; Calderwood v. Peyser, 42 Cal. 115, and cases cited; McDonald v. McConkey, 57 Cal. 326; Clark v. Crane, 57 Cal. 633; Griess v. State Investment Co., 93 Cal. 411, 28 Pac. 1041; Stoneesifer v. Kilburn, 94 Cal. 42, 29 Pac. 332; Sutton v. Symons, 97 Cal. 476, 32 Pac. 588; Id., 100 Cal. 576, 35 Pac. 158; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176. This, however, as said in the case last cited, will not apply to a mere refusal of the court to settle the statement in cases where the moving party is by law entitled to have it settled. In such a case there is no order, and therefore the only remedy is mandamus.

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4 Cal. App. 97

SOULE v. SOULE.

(Court of Appeal, First District, California. July 12, 1906.)

1. DIVORCE—DECREE FOR ALIMONY—MODIFICATION—JURISDICTION.

Civ. Code, § 139, provides that, where a divorce is granted for an offense of the husband, the court may compel him to make a suitable allowance to the wife for her support during her life or for a shorter period, and may from time to time modify its orders in such respect. *Held* that, where a divorce decree awarded plaintiff alimony at the rate of $75 per month, the court had statutory authority to modify the decree so as to relieve defendant from further payment of such alimony, though the decree contained no reservation for such modification.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 692.]

2. SAME—CONSENT DECREE—EVIDENCE.

In a proceeding by a husband to obtain a modification of a decree for alimony, evidence *held* insufficient to establish that the provision for alimony was inserted pursuant to an agreement of the parties that the alimony should be paid during plaintiff's life.

3. SAME — PERMANENT ALIMONY — MODIFICATION.

Permanent alimony, being distinguished from temporary alimony only in the sense that it is awarded on or after the determination of the suit, is subject to be increased or diminished, as authorized by Civ. Code, § 139.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 692–695.

4. TRIAL—FINDINGS BY COURT—EFFECT.

On an application for a modification of permanent alimony, the failure of the court to find in accordance with plaintiff's averment that her transfers of property were made in consideration of an agreement on defendant's part to pay her $75 a month as alimony for the remainder of her life was, in legal effect, a finding that such conveyances were not made on that consideration.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 940–945.]

5. DIVORCE — ALIMONY — DECREE—MODIFICATION.

A divorce decree awarded plaintiff alimony in the sum of $75 per month. On an application for modification, the court found that defendant was entitled to an order modifying the decree and exempting him from payment of any allowance to plaintiff until further order of the court. An order was subsequently entered that the decree "be, and the same is, hereby modified by annulling" that portion thereof directing payment of such alimony. *Held*, that the portion of such decree annulling so much of the former decree as awarded alimony was erroneous and in excess of the court's jurisdiction.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 92–95.]

Appeal from Superior Court, Alameda County; H. A. Melvin, Judge.

Suit by Ella Bacon Soule against Frank Soule. On petition of defendant for modification of a decree awarding plaintiff alimony. From an order granting such relief, plaintiff appeals. Modified and affirmed.

Lloyd & Wood and A. Heynemann, for appellant. Deamer & Stetson, for respondent.

HARRISON, P. J. A decree of divorce between the parties herein was rendered by the superior court of the county of Alameda December 19, 1896, of which the following is a portion: "It is further ordered, adjudged, and decreed by this court that the defendant shall pay to the plaintiff the sum of $75 per month in United States gold coin for her support, which said sum of $75 shall be payable on the 5th day of each and every month and shall be permanent alimony." In August, 1903, the defendant therein, in pursuance of previous notice thereof, moved the court for an order vacating and annulling the above portion of the judgment, and releasing him from the payment of any further sums under the provisions of the decree, stating generally as the grounds of his motion that the circumstances of the parties to the judgment had materially changed since its rendition; that he was unable further to continue said payments, and that the plaintiff had no need of support from him; that it was not necessary, just, or equitable that he be longer required to make any payment for her support; and in connection therewith presented an affidavit setting forth the facts relied upon by him in support of said motion. The plaintiff filed an objection to the court entertaining the motion, on the ground that, inasmuch as no appeal had been taken from the judgment and the time for an appeal had expired, the court had no jurisdiction to make the order asked for. The court overruled this objection, and the plaintiff then filed her affidavit in reply to the application, traversing many of its averments, and averring that intermediate the commencement of the action and the rendition of the decree the defendant agreed with her that, if she would assign her interest in certain insurance policies and in certain real estate, he would, in consideration of such assignment and transfer, pay to her the sum of $75 per month as alimony, and that said payment should continue for all time during the life of the plaintiff; that she accepted said proposition and made said assignments; and that the court signed a decree in conformity with such agreement. At the hearing of the motion testimony was given by the respective parties, and by the attorneys by whom the action for divorce had been conducted, and upon its conclusion the court found, among other facts that the plaintiff is a wealthy woman; that her fortune has greatly increased since the making and entry of the decree, and is more than sufficient for her support and maintenance and the support and maintenance of her children; that the defendant is poor and in debt, and that his income has not increased since the making and entry of said decree, but his necessary expenses and the cost of living have increased; that the monthly payment of said sum of $75 to the plaintiff by him works a hardship on him, and is not necessary to the plaintiff for her support and maintenance, or for the support or maintenance of any one depending upon her; that said sum is necessary for the proper support of the defendant and his family. The court also found that prior to the entry of the decree the plaintiff quitclaimed to the attorneys for the defendant her interest in certain of his separate real property (of the value of about $1,500) and in certain community property (of the value of about $400) which he had previously conveyed to them as security for their fees, and transferred to her children, the issue of the marriage between her and the defendant, her interest in a certain paid-up policy of life insurance (her interest therein being contingent upon her surviving the defendant, and in case she did not survive him the policy being payable to the said children); that, as a part of the consideration for the said assignments, it was agreed between the plaintiff and the defendant that the decree in the action should contain the above-quoted provision. The court further found that the defendant did not agree to or with the plaintiff that he would pay the said sum of $75 per month or any sum during her life, or that any sum agreed by him to be paid to her as alimony or allowance was agreed by him to be paid for any period, and that he never agreed to pay to her or for her support any money or allowance for any fixed time, or for or during her lifetime, and never agreed or intended that said decree should be unchangeable in respect to the allowance to her. Upon the facts found by it the superior court held that "the defendant is entitled to an order of the court modifying said decree, and exempting him from the payment of any allowance to the plaintiff until the further order of the court," and directed that an order to that effect be entered. From the order entered thereon the present appeal has been taken.

1. The court had jurisdiction to entertain the application of the defendant notwithstanding his failure to appeal from the judgment. Section 139, Civil Code, declares: "Where a divorce is granted for an offense of the husband the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." This statutory provision enters into every decree in an action for divorce which provides for the payment by the husband of an allowance for the support of the wife, as fully as though it should be incorporated into the terms of the decree. The authority of the court to modify its decree in this respect does not depend upon a reservation therefor in the decree itself, but exists by virtue of the statute, and, being conferred upon it by the Legislature, it is beyond its power to divest itself of such authority. Campbell v. Campbell, 37 Wis. 206.

2. The objection that under its power to "modify" its decree the court is not authorized to grant the defendant a temporary exemption or release from the payment of any alimony must be overruled. The section of the Code places no limitation upon the extent to which it may make such modification, the principle upon which the authority is to be exercised being that which determines its original order, viz., that the allowance to be made by the order as modified shall be such as the court may deem just, "having regard to the circumstances of the case." Under this section it may modify its former order, either by increasing or reducing the amount of money to be paid at any one time, or enlarging or diminishing the frequency with which the payments are to be made. Neither is the authority to modify the decree limited by the section to a mere change in the amount of the allowance to be paid, but it includes a modification of the order in any respect which, under the circumstances of the particular case, may seem just to the court. Under such discretionary authority, it is within the power of the court, not only to change the amount of the allowance, but also to suspend any enforcement of the order until its further direction. That the circumstances of the present case justified the court in modifying the original decree appears from its finding that the monthly payment of $75 is not necessary to the plaintiff for her support or maintenance, but is necessary for the proper support of the defendant, and that the payment thereof works a hardship upon him. The sufficiency of the evidence to sustain this finding is not challenged by the appellant, and, indeed, the fact was itself practically admitted by her merely denying in her answer that her income is "far in excess" of the sum required or sufficient for her maintenance or support. The case of Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, is not inconsistent with this rule. In that case there was noth-

ing in either the complaint or the judgment about alimony. The right of the wife to an allowance for her support had not been established in the decree. It would have been competent for her in her action for divorce to ask for such allowance from the defendant, but by her choosing to waive such demand she could not assert her claim for alimony after she had ceased to be his wife. The court held that section 139 clearly contemplates that the right to alimony "shall have been presented and litigated in the action for divorce and established by the judgment, and that when the right to alimony has been thus established the amount may be changed by a modification of the order." In the present case the right of the plaintiff to alimony was established by the decree in her action for divorce, and section 139 gives to the court the authority to modify it.

3. The chief ground urged in support of the appeal is that the provision for alimony in the decree was inserted therein by reason of an agreement between the parties that the defendant should pay to the plaintiff for her support the sum of $75 per month during her lifetime, and that the finding of the court that such agreement was not made is contrary to the evidence. The burden of establishing such agreement was upon the plaintiff, and in her affidavit in reply to the defendant's application, after stating his agreement to pay $75 per month for her support, she stated that he agreed that such payment "should continue for all time during the life of the plaintiff." She presented, however, no evidence in support of this averment. Upon her oral examination at the hearing she stated that she had nothing to do with the making of the agreement and did not personally deal with either the defendant or any attorney in his behalf. The defendant testified in direct terms that he never agreed to pay any amount of money to her during her life, or authorized any other person to make such agreement, and that he never heard or was informed that the plaintiff made such claim until her affidavit was read at the hearing of this motion. Mr. Lloyd, who was one of the attorneys for the plaintiff in the action for divorce, and who conducted the negotiations on her behalf on this subject, testified that in the only interview with him of which he had any recollection the defendant never made any statement that he would pay the allowance to the plaintiff during her life, and that the defendant never used that language; that his negotiations on the subject were with Mr. Whitney, the defendant's attorney, and with the plaintiff; that prior to the signing of the decree he had several discussions with Mr. Whitney; and that these conversations "led to the agreement in writing which is the decree itself." Mr. Whitney testified that he agreed only to what is in the decree, that he and Lloyd came to an understanding that the plaintiff was to have $75 a month as permanent alimony, and that the decree embodied all that they agreed on. Mr. Lloyd also testified that on behalf of the plaintiff he demanded at the commencement of the negotiations an allowance of $150 per month, that Mr. Whitney protested against it and said that the defendant could not pay it, and that the plaintiff finally acquiesced in $75. He also testified that Mr. Whitney never said in substance or effect that the allowance should continue during her lifetime; that he said to Mr. Whitney: "If I reduce it down to $75, this is the end of the thing, and it remains that way to be put in here as permanent alimony, and I put it in the decree as permanent alimony, fixed and ended between them." He also stated that the decree, together with the quitclaims and the assignment of the insurance policy by the plaintiff, embody the whole agreement between her and the defendant. The decree was thereupon prepared by Mr. Lloyd, with the above provision for alimony therein, and submitted to Mr. Whitney, who said to him that it was satisfactory; and they thereafter went into court, and, upon stating that it had been agreed upon between them, it was signed by the judge. Before it was presented to the judge, it was submitted to the defendant by his attorney, and, upon his inquiring the meaning of the words "permanent alimony," Mr. Whitney stated to him that it was the same as any other alimony, and might be changed by the court, either by diminishing or abolishing or increasing the amount, to which the defendant replied, "On that understanding it is all right." The plaintiff, on the other hand, on asking her attorney the meaning of the same, was told that it meant for as long as she lived. It thus very clearly appears that there was no agreement between the parties, either by themselves or through their attorneys, that the defendant should pay alimony to the plaintiff throughout her lifetime; and it does not appear that there was any mutual understanding by the parties that by the use of the term "permanent alimony" such an agreement was implied, or that the term was inserted in the provision with any agreement or understanding between them that it should have any meaning other than its legal significance. As it does not appear that the attorneys, or either of them, at any time in their negotiations stated that the payment was to continue during her life, it cannot be contended that there was any oral stipulation between them of which the terms were so agreed upon that it can be enforced. See Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. It is equally clear that no agreement of this nature on the part of either the parties or their attorneys was at any time brought to the notice or knowledge of the court, and it is not to be assumed that the court intended to incorporate an agreement into its order unless it is shown that the terms of that

agreement were made known to it before the decree was signed. The decree is the act of the court, and any agreement between the parties with reference to its provisions that was not made known to the court will have no weight in construing the intention of the court. Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9, is inapplicable. In that case the parties had made and signed a written stipulation that the wife should be awarded the greater portion of the property, and be charged with the maintenance and education of the infant children at her own expense, and that she should not have any alimony or allowance from her husband; and the decree was entered in accordance with the terms of this stipulation. The authority given the court by section 139 to modify its decree respecting alimony was not involved; the only question presented being the right of the wife under section 138 to its modification in respect to the maintenance and education of the children. The refusal by the superior court to grant the wife's application for a modification of this provision in the decree was affirmed by the Supreme Court, upon the ground that it was to be assumed that the property was awarded to her for the very purpose of maintaining and educating the children, and that it did not appear that they were not being properly maintained and educated. In Wilson v. Wilson, 45 Cal. 399, it was held that a prior or contemporaneous parol agreement between the parties, the effect of which would be to materially vary the terms of the decree and change the rights of the parties thereunder, could not be shown.

4. The decree of the court is therefore not to be construed as having been based upon any agreement, but is to be assumed as having been made upon its own consideration of the relative situation of the parties—the faculties of the husband and the needs of the wife; and its effect is to be determined in accordance with the legal significance of its language under the statutory power given to the court by section 139, and, in determining the extent of this power it is to be borne in mind that, if the decree had provided that the payment of alimony to the plaintiff should continue "during her life," its modification by the court is expressly authorized by that section. The term "permanent" is not the equivalent of "perpetual," or "unending," or "lifelong," or "unchangeable"; and in using the term "permanent alimony" in the decree the court simply designated the character of the alimony which it awarded, rather than the amount to be paid, or the time during which the payment should continue. Alimony which is awarded by a final decree of divorce is designated as "permanent," in distinction from that which is awarded during the pendency of the action, which is designated as "temporary." Bishop on M., D. & S. § 1386; 2 Am. & Eng. Cyc. of Law (2d Ed.) 92; Anderson's Law Dict. q. v.; Abbott, Law Dict.; Bouvier, Law Dict. "Permanent alimony is alimony awarded on or after the determination of the suit. It is permanent only as distinguished from temporary, for it may be increased or diminished." Stewart in M. & D. § 360. That the designation of the amount of alimony awarded to the wife in a decree of divorce as "permanent" does not preclude the court from a subsequent modification of the provision has been many times declared by the Supreme Court. In Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266, the court awarded the wife $50 per month "as permanent alimony," which was afterwards reduced to $25 per month. In discussing the subject the court said: "The court is to fix the measure of the compensation by 'having regard to the circumstances of the parties respectively'; these circumstances furnishing the best means for determining such amount. As these circumstances may differ at different times 'the court may from time to time modify its orders in that respect.'" In Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037, where a certain amount had been awarded the wife as permanent alimony in the decree of divorce, the court said: "It will always be within the power and discretion of the court to modify the allowance of alimony in the future, if just cause appear for such modification." See, also, Ex parte Hart, 94 Cal. 254, 29 Pac. 774.

5. The failure of the court to find, in accordance with the averments of the plaintiff, that the transfers of property by her were made in consideration of an agreement on the part of the defendant that the payment by him to her of $75 per month as alimony should continue for all time during her life, was in legal effect a finding that they were not made upon that consideration (Thompson v. McKay, 41 Cal. 221; Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66); and its finding that a part of the consideration therefor was that the decree should contain the clause above quoted is in accordance with the testimony of witnesses that the only agreement between the parties was that the decree should provide that the plaintiff should have $75 per month as permanent alimony.

6. In its conclusion of law from the facts found by it the court found that "the defendant is entitled to the order of the court, modifying the said decree and exempting the defendant from the payment of any allowance to the plaintiff until the further order of the court," and directed that "a proper order be entered accordingly." In the order which was subsequently entered thereon it is ordered and adjudged that the decree 'be had and the same is hereby modified by annulling that portion of said decree which is in the words and figures following [reciting the above quoted provision], and it

is hereby ordered and adjudged that the said portion of said decree be, and the same is, hereby annulled accordingly. And it is hereby ordered and adjudged that until the further order of the court the defendant hereby be, and he hereby is, wholly relieved and exempted from paying any sum whatever to the plaintiff as alimony or as allowance for her support." In thus "annulling" that portion of the decree the court exceeded its jurisdiction. The decree which was rendered in 1896 was a determination of the rights of the parties, and had become final, except as the power was reserved to the court by section 139 to modify "from time to time" that portion directing the payment of alimony. By that decree the court adjudged that the plaintiff was entitled to alimony from the defendant; but the effect of an order annulling this portion of the decree would be to vacate and set aside that portion of the court's adjudication, and leave the decree as if the court had omitted to make any provision for her support, and the parties would thereupon be in the position presented in Howell v. Howell, supra; whereas, the only authority given to the court by section 139 is to modify this portion of the decree "from time to time" as the court may deem just in view of any changed circumstances of the parties. The closing paragraph of the order by which the court orders that the defendant be "wholly released and exempted" from the payment of alimony "until the further order of the court" is inconsistent with the provision of the order annulling that portion of the decree which provides for the payment of alimony, but is in accordance with the provisions of section 139, and in direct harmony with the findings of the court.

7. The appellant has assigned as error many of the rulings of the court upon the admission of evidence at the hearing; but we are of the opinion that the appellant suffered no prejudice thereby, and that the conclusion of the court was in no respect affected by its rulings on such objections.

The cause is therefore remanded to the superior court, and that court is directed to modify its order by eliminating therefrom all the provisions purporting to annul any portion of the original decree of December 19, 1896, and, as so modified, the said order shall stand affirmed. Each party to pay its costs incurred upon this appeal.

We concur: HALL, J.; COOPER, J.

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7 Cal. Unrep. 275

CROCKER et al. v. GARLAND.

(Court of Appeal, Second District, California. July 9, 1906.)

1. New Trial—Findings—Evidence.

Where, in an action against a broker for fraud in the sale of plaintiff's land, the findings, which were in favor of the defendant, were either in express conflict with the allegations of defendant's answer or were in conflict with the testimony, and there was also evidence opposed to the general finding, it was proper for the court to grant plaintiff a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 135–143.]

2. Appeal—New Trial—Review.

The discretion of the trial court in granting a new trial for insufficiency of the evidence will not be disturbed, except in cases of manifest abuse.

3. Pleading—Variance.

Where an objection to the sufficiency of the complaint to entitle plaintiffs to the profit made by defendant on a sale of certain property presented at most a mere question of variance, the court was authorized to disregard the same by Code Civ. Proc. § 469.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Henry J. Crocker and others against William M. Garland. From an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

Clarence A. Miller and George J. Denis, for appellant. Hunsaker & Britt, Mastick, Van Fleet & Mastick, and Edward F. Treadwell, for respondents.

SMITH, J. This is an appeal from an order granting the plaintiffs' motion for a new trial.

The suit was brought by the plaintiffs for damages for fraud of the defendant, committed by him while acting as their agent for the sale of the land described in the complaint. The nominal purchaser was one Schweppe, with whom the defendant as plaintiffs' agent had made a contract of sale August 21, 1901, for the sum of $25,000, and to whom a deed of conveyance, executed to him as grantee by the plaintiffs and placed in escrow for delivery on receipt of the purchase money, was delivered on the 16th day of October. Schweppe had executed a prior unrecorded deed of the land to one Hinman; but the land was shortly afterwards reconveyed to him, and by him conveyed to one Earl by deed of date November 12, 1891. It is alleged in the complaint that Schweppe was not the real purchaser; that he was an intimate associate and blood relation of the defendant and Hinman, who was his father-in-law, and by agreement with the defendant permitted him to use their names in the transaction, but that in truth they had no interest in the purchase, but took the deeds referred to for the use and benefit of the defendant; and that the defendant fraudulently represented to the plaintiffs that Schweppe was the real purchaser, which was believed by them. The answer of the defendant alleges, in effect, that the real purchaser of the property was the said Hinman, and that the deed was taken by Schweppe in trust for him and as his agent; that neither he nor any one except Hinman had any beneficial interest in such sale; that the entire purchase money of $25,000 was paid by Hinman; that the defendant had no interest whatever in the said sale of the said property or any portion thereof; that the plaintiffs knew and had reason to believe that Schweppe was not in truth or in fact the real purchaser of the land, but knew that the real purchaser was some person living "at or near Dunkirk, the residence of Hinman"; and that Hinman was known to them as the real purchaser from and after October 14th. The sale to Earl, it appears from the defendant's evidence, included a lot adjoining the plaintiffs', standing in the name of Schweppe, but belonging to the defendant, who had paid therefor the sum of $14,000. The aggregate purchase money received for the two lots was $60,000, of which $30,000 was paid to Hinman and the balance retained by the defendant.

The case was tried by a jury, who rendered a general verdict for the defendant, with special findings on certain questions submitted to them, among which were the following: (1) That the defendant did not conceal from plaintiffs the name of the real purchaser of the property; (2) that prior to the closing of the sale the defendant had no agreement with Hinman to the effect that the defendant should have the profits which might be made upon a resale of the property over and above the sum of $5,000; (3) that the real purchaser of plaintiffs' property under the deed was Schweppe; and (4) that the plaintiffs, prior to the closing of the sale, did discover who was the real person to whom the property was being sold. On the motion for a new trial, these findings, as well as the general verdict, were attacked on the ground of insufficiency of the evidence to sustain them; and the motion for new trial was granted on the grounds, so far as the sufficiency of the evidence is concerned, (1) that the evidence was insufficient to support the special findings enumerated, and (2) that by reason of the insufficiency of the evidence to sustain the special findings, it was insufficient also to sustain the general verdict; and the question is whether, on the record before us, these rulings of the court can be sustained.

With regard to the special findings, the first and third of the findings enumerated are in conflict with the express allegations of the answer; the fourth, if it can be construed as referring to Hinman, is without any evidence to sustain it; and the second is in direct conflict with the testimony of the defendant, who admits that he did have such agreement with Hinman prior to the closing of the sale. It is clear, therefore, that as to these findings, the ruling of the court cannot be disturbed. With regard to the general finding, it may be inferred from the special findings that it was based on the assumed fact that Schweppe was the real purchaser; and upon this, indeed, is based the principal argument of the appellant on this appeal, which is, in effect, that the functions of the defendant as agent of the plaintiffs ceased upon the execution of the contract made by him with Schweppe on August 21st. But this argument assumes, not only that the contract was thus made to Schweppe as the bona fide purchaser, but that Schweppe continued to be ready and willing to perform the contract, and that in fact the deed was made to him as the real purchaser. But not only is this in conflict with the repeated and explicit allegations of the answer, but the evidence at least tends to show that the contract was in fact abandoned by Schweppe almost immediately after it was made, and that the defendant, after that, proceeded as the agent, not of Schweppe, but of the plaintiffs, availing himself of the contract with Schweppe merely for the purpose of gaining time to effect the sale at the price specified. The evidence may, indeed, be susceptible of a different construction; but, if it could be assumed that the issue was before the jury, a finding of the jury to the effect stated, approved by the court, would have been conclusive, and equally the action of the court in granting a new trial would be within its discretion. Here not only is the evidence bearing upon the question inconclusive, but the actual fact found by the jury and relied upon by the appellant is in conflict with the allegations of the answer. We do not doubt, therefore, that it was within the discretion of the lower court to set aside the general verdict on this ground. Nor upon a review of the evidence can we say, as a matter of law, that the court was not justified in granting a new trial on other grounds. We are of the opinion, therefore, that the order of the lower court must be affirmed, not only upon the special grounds above stated, but on the general ground that the discretion of the lower court in granting a new trial for insufficiency of the evidence will not be disturbed, except in cases of manifest abuse.

An objection is made by the appellant to the sufficiency of the complaint to entitle the plaintiffs to the profit made by the defendant by the sale of the property to Earl. But this, at most, was a mere question of variance, which it was within the right of the court to disregard (Code Civ. Proc. § 469 et seq.), and which in fact it did disregard in its instructions.

Other objections are urged to the instructions; but, as the case is presented to us, we do not deem it necessary to consider them.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 58

OATMAN et al. v. EDDY et al.

(Court of Appeal, Second District, California. July 6, 1906.)

FRAUDS, STATUTE OF — SALES OF GOODS — WRITTEN CONTRACTS—MODIFICATION—PERFORMANCE.

Civ. Code, § 1698, provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise. *Held* that, where a written contract is modified by parol, the statute is complied with by the subsequent execution of the contract as modified.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 283, 284.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by E. J. Oatman and others against R. A. Eddy and others. From an order denying plaintiffs' motions for a new trial, they appeal. Affirmed.

Purington & Adair, for appellants. Collier & Carnahan, for respondents.

SMITH, J. The suit was brought to recover the price of plaintiffs' orange crop, alleged to have been sold under a contract between plaintiffs and defendants, of date November 26, 1900, set out below. It was found by the court that the plaintiffs were indebted to the defendants in the sum of $1,509.05, as the balance due them for advances to plaintiffs over the receipts from sales and interest; and judgment was entered accordingly. The plaintiffs appeal from an order denying their motion for a new trial.

The contract referred to above is as follows: "Riverside, Cal., November 26, 1900. In consideration of the Highgrove Fruit Company having this day advanced us the sum of three thousand ($3,000) dollars, on our present orange crop at Highgrove, the receipt of which is hereby acknowledged, we have agreed for the handling of same through said Highgrove Fruit Company on the following terms and conditions: We agree to pick and deliver our crop at Highgrove Fruit Company's packing house, fruit to be delivered at times mutually agreed upon. Highgrove Fruit Company agree to sell all fancy and choice grades oranges, at the ruling f. o. b. price at the time of shipment. Highgrove Fruit Company to receive for their services for handling and selling said crop fifty (50c) cents per box. Highgrove Fruit Company further agree to render account sales at time of shipment. Also agree to advance two thousand ($2,000) dollars on December 10th, 1900." There was sold under this contract, during the year 1900, 888 boxes of oranges, about which there is no dispute, and during the month of January and the first part of February, there was sold 2,094 boxes, about which there is no dispute, except that it is claimed by the appellants that the amount found by the court to have been received by the defendants was too little by $86.55; and on this point the finding seems to be sustained by the evidence. The principal, and, indeed, the only serious, question, therefore, is as to the oranges sold subsequent to the 25th day of March, 1901, amounting to 4,068 boxes. As to these it is found by the court: That prior to the 25th day of March, 1901, the original agreement was modified by an oral agreement between the parties, made at the request of the plaintiffs, and afterwards fully executed, by the terms of which it was agreed "that said remaining oranges should be shipped east and sold at auction in the cities of New York and Boston"; that the oranges were sold at auction pursuant to this agreement, "and were not sold at ruling f. o. b. prices at Highgrove," as stipulated in the original agreement; and that defendants received therefrom as net proceeds the sum of $1,326.34, and no more. This finding seems to be fully supported by the evidence; and, if we understand it rightly, the position of appellants is that a contract in writing can be altered only by a contract in writing, or by an oral agreement executed at the time of its inception. Civ. Code, § 1698. But we do not understand this to be the law, and are of the opinion that the provisions of the statute are complied with by the subsequent execution of the contract. We are also of the opinion that the modified contract took the place of the original contract, and that it was correctly construed by the court.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 90

JOHNSTON v. SUPERIOR COURT OF SACRAMENTO COUNTY.

(Court of Appeal, Third District, California. July 9, 1906.)

PROHIBITION—GROUNDS FOR RELIEF—ADMISSION OF EVIDENCE.

Writ of prohibition will not lie to prevent a court, in a proceeding for appointment of an administrator, of which it has jurisdiction, admitting evidence on the issue of kinship, that deceased, to whom a petitioner for letters of administration was married, had not, at the time of the marriage ceremony, mental competency to contract; this at most being error, for which appeal furnishes adequate remedy.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 4–19.]

Petition by Josephine A. C. Johnston for writ of prohibition to the superior court of Sacramento county, P. J. Shields, Judge. Writ denied.

C. M. Beckwith and A. L. Shinn, for petitioner. White & Miller, for respondent.

McLAUGHLIN, J. Petitioner and one Frank A. Edinger are rival applicants for letters of administration of the estate of William Johnston, deceased. The petition of Edinger was first filed, and it is therein alleged that the sole heirs at law of said deceased are two daughters and one son, all of whom have signed and filed a written request that he be appointed administrator. The petitioner, however, in her answer to Edinger's petition, and in her application for letters, alleges that she is the surviving wife of decedent, having been married to him about two months prior to his death. Edinger, in his answer to her petition for letters of administration, denies that petitioner was ever married to decedent, or is one of his heirs at law, and further denies that she is a competent or proper person to have charge of his estate. The denials are specific, and are followed by affirmative allegations to the effect that petitioner, since 1893, has been, and now is, the lawful wife of one J. West Goodwin, and that decedent for more than one year prior to his death was mentally incompetent, and being entirely without understanding or capacity to comprehend or enter into any contract was incapable of entering into the marriage relation with petitioner. Upon the issues thus made the cause came on for hearing before the respondent court, and petitioner seeks, through the medium of the writ here applied for, to restrain the trial court from hearing, determining, or receiving evidence relating to the competency of decedent to enter into the marriage contract with the petitioner.

It is well settled that the writ of prohibition will not issue to arrest the proceedings of an inferior tribunal, unless such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103; Works on Courts and Jurisdiction, § 81, and cases cited; Maurer v. Mitchell, 53 Cal. 292; White v. Superior Court, 110 Cal. 58, 42 Pac. 471. That the respondent court has jurisdiction of the probate proceeding and contest is admitted, and if it has such jurisdiction it certainly has power to hear and determine every question relating to the respective claims of the applicants for letters of administration. This petitioner seems to concede, but contends that the court cannot go behind the ordinary proof and authentication of marriage to inquire into and pass upon the mental competency of the decedent at the time the marriage ceremony was performed, and many authorities are cited in the able and exhaustive arguments on this point. We think, however, that it would be improper for us to discuss or attempt to decide the interesting question thus presented, for even if the soundness of petitioner's contention in this behalf be conceded, we are thoroughly convinced that prohibition cannot be invoked for the purpose of regulating the course of a trial, or obviating the effect of rulings made by a court engaged in trying issues over which it has undoubted jurisdiction. That the respondent court has jurisdiction to determine which of the contending applicants is entitled to letters of administration must be conceded. This being true, then certainly the vital, essential, and controlling question to be inquired into is the number of surviving heirs at law and the relationship of each to the decedent, for in no other way could the court determine which of the applicants was entitled to preference under section 1365, Code Civ. Proc. The questions of heirship and degree of kinship are necessarily involved in every contest between relatives for letters of administration, and if, in such contests, the trial court erroneously holds that particular facts are relevant and pertinent to the main inquiry, either as a matter of pleading or proof such ruling amounts to no more than a mere error reviewable and correctible through the ordinary remedy of appeal. Agassiz v. Superior Court, 90 Cal. 102, 27 Pac. 49; Mines d'Or v. Superior Court, 91 Cal. 102, 27 Pac. 532; Murphy v. Superior Court, 84 Cal. 596, 24 Pac. 310; Maurer v. Mitchell, 53 Cal. 292; Bandy v. Ransom, 54 Cal. 88; High on Extraordinary Legal Remedies, §§ 767, 767b, 770, 772; Works on Courts and their Jurisdiction, § 81; and "The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal"; Jacobs v. Superior Court, 133 Cal. 366, 65 Pac. 826, 85 Am. St. Rep. 204.

One of the pertinent questions involved in the contest between petitioner and Edinger is the relationship of the former to the decedent. If she was decedent's wife at the time of his death, and is otherwise competent, then she is entitled to letters, and if she was not his wife then she is a mere intermeddler. This specific question was before the court for trial and solution, and if the court erred in refusing to strike out that portion of Edinger's answer relating to the mental incompetency of the decedent at the time of the alleged marriage, and is likely to make similar rulings in passing upon the admissibility of evidence relating to such incompetency, we can see no reason for holding that these particular errors of law cannot be as readily and adequately dealt with on appeal as other errors committed during the course of the hearing. The court having jurisdiction to make the rulings, the fact that it may have ruled erroneously does not oust it of jurisdiction. Such errors can be reviewed at the same time and in the same manner as ordinary errors in ordinary cases, and the fact that petitioner elected to base her objections on jurisdictional grounds cannot change the well-settled rule regulating the review and correction of errors of law occurring during the course of a trial. The writ of prohibition will not be issued except in cases of extreme necessity, and it certainly cannot be used for the purpose of regulating the issues in a pending cause and confining them to a particular scope, or to test the correctness of rulings on motions to strike out the whole or any part of a pleading filed in a cause over which the court has complete and unquestioned jurisdiction. To tolerate such a practice would be subversive of the purpose of the writ which is to restrain inferior tribunals and bodies from inflicting wrong under the guise of jurisdiction or authority which has no potential existence. It would invite intolerable delay and annoyance in every case where a jurisdictional question might, perchance, be incidentally involved, and make this prerogative writ the medium through which appellate courts could exercise supervisory control over inferior tribunals acting within the scope of their legitimate powers. We are not unmindful of cases holding that prohibition will issue even where an appeal lies, if the delay incident to an appeal will result in irreparable injury or great and useless expense for which petitioner cannot be compensated. But in the case at bar none of these conditions are shown. The court has jurisdiction of the persons of the contending applicants for letters, and of the subject-matter of the contest, and even grossly erroneous rulings during the progress of the hearing cannot oust it of jurisdiction nor vest this court with arbitrary power to interfere with and direct the course of such proceedings. The contest must proceed even if the objectionable defense be eliminated, for the propriety and relevancy of other questions raised by Edinger's answer stand unchallenged. The delay incident to such contest, and a probable or possible appeal from the order the court may make at its close, cannot be avoided, and there is no apparent reason for holding that this case falls within the exception to the general rule forbidding interference by prohibition unless urgent necessity demands such course.

The writ is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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4 Cal. App. 18

JONES et al. v. DEARDORFF et al.

(Court of Appeal, Third District, California. June 23, 1906.)

1. Appeal—Record—Evidence—Admission—Review.

A specification of error to the admission of a deed in evidence cannot be reviewed where the record fails to show the ground of objection made when the deed was offered, and it is not inadmissible for every purpose.

2. Easements — Waterway — Irrigation Ditch.

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute easements which may attach to other lands as incidents or appurtenances.

3. Same—Appurtenant Easement—Deeds—Construction.

A deed providing that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use thereon, unless by the consent of the grantor, created an easement which, by use became appurtenant to such section, and was not a mere easement in gross personal to the grantee.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 8–12.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Mrs. A. B. Jones and another against John Deardorff and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. J. Hudson, for appellant. E. T. Cosper, for respondent.

CHIPMAN, P. J. Action to quiet title. It is alleged in the complaint that plaintiff Mrs. Jones is the owner, as her separate estate, of section 4, township 19 S., range 22 E., in Kings county, and also of all water ditches passing across said land, except what is called the "Settlers Ditch"; that defendants claim some interest or estate in said premises, namely, the right to run water over said land in ditches now existing on said land, but that said claim is without right, etc.

Defendants in their answer deny that plaintiff Mrs. Jones is or ever was the owner of the water ditch mentioned in the complaint; allege that in 1897 one Mary Kirkendall was the owner of said land and at the same time one Mary Deardorff, wife of Samuel Deardorff, was the owner of the north half of section 8 in said township and range, and that defendant, together with one Oscar Deardorff, are now the owners thereof; that said Mary Kirkendall conveyed in said year by deed a right of way for a lateral ditch through her said land from the said Settlers ditch, for the benefit of said land in said section 8, which deed was duly acknowledged and recorded; that immediately thereafter said Samuel and Mary Deardorff constructed a ditch along the right of way so deeded, and that "ever thereafter until about the first of January, 1904, they and their successors and grantees of said land in said section 8 maintained and used said ditch in conveying water to and upon said land"; that said deed provided that said ditch should be used to convey water to the lands in both said sections. A prescriptive right to said right of way is also pleaded; defendants also pleaded the statute of limitations. By way of cross-complaint defendants set forth the facts as above stated in their answer; alleged that large and valuable crops of alfalfa and pasturage are produced on said section by defendants by means of said ditch and that the water carried through said ditch is essential to the growing of said crops; alleged that in January, 1904, plaintiffs against the will of defendants wrongfully placed obstructions in said lateral ditch and diverted defendants' water therefrom to their irreparable damage; and they pray, among other things, for an injunction restraining plaintiffs from further interference in the said ditch.

Answering defendants' cross-complaint, plaintiffs deny most of its allegations; allege that the said deed executed by Mary Kirkendall contained the following provision, to wit: "The said water ditch is not to be used by S. F. Deardorff except for conveying of water to the N. ½ of Sec. 8, said township and range, for use therein without the consent of myself, nor for conveying water to any other person without my consent" and that "such consent was never obtained from Mrs. Deardorff or her grantee that the water running in said lateral ditch should be used by any other person other than S. F. Deardorff. That the said S. F. Deardorff died on or about August, 1901"; allege that on December 4, 1896, said Mary Deardorff executed a trust deed on said lands owned by her (said section 4) and that her said deed to S. F. Deardorff was made subsequently, namely, on August 7, 1897; that she defaulted in the payment of the money secured by said trust deed; that the land was thereafter, to wit, on August 17, 1898, sold pursuant to the trust deed and was thereafter conveyed to said Mrs. A. B. Jones, one of plaintiffs herein, who is now the sole owner thereof.

The court found the facts generally as alleged by defendants; that the said land in section 4 was owned in fee simple absolute by plaintiff Mrs. Jones; that in August, 1897, Mary Deardorff, wife of Samuel, was the owner of said land in section 8, "which land was worked, managed, rented, and looked after by the husband of said owner, the said Samuel F. Deardorff. That while in the management of said land of the said Mary Deardorff as aforesaid, and for the purpose of making the same appurtenant to the said" land in section 8, "the said Samuel F. Deardorff purchased of one Mary E. Kirkendall a right of way for a water ditch over and across" the said land in section 4, "and took the conveyance thereof in his own name for the use and benefit of the said" land in section 8, "then owned by the said Mary Deardorff, and for the use and benefit of the said Mary Deardorff and her grantees." The court found that Mary Kirkendall was, on August 7, 1897, the owner of the land in section 4, subject to the deed of trust as alleged by plaintiffs and that "on said date executed to Samuel Deardorff a conveyance of said right of way so purchased by him as aforesaid, which conveyance was, and is in words and figures following, to wit: "I, Mary E. Kirkendall, of the county of Kings, state of California, do grant unto Samuel F. Deardorff, of the same county and state, a right of way for a water ditch over and across (describing land in section 4) subject to the following reservation and limitations; the said water ditch (describing its dimensions) is not to be used by said S. F. Deardorff, except for the conveying of water to (land in section 8) for use thereon, without the consent of myself or grantee, nor for conveying water to any other person without my consent. The said Samuel F. Deardorff is to keep said water ditch in good order and to use the same so as to do no injury or damage to the adjacent land. I reserve the right to run sufficient water in said ditch at any time to irrigate my own lands situate in and being a part of said quarter section." The court found that immediately after said conveyance was executed the said Samuel Deardorff and his wife, Mary, constructed a ditch along the right of way so conveyed and that they and their grantees have ever since maintained and kept in good order the said ditch, and the said Samuel and Mary Deardorff and their successors in interest have ever since used and still use said water ditch for said purposes without injury to the adjacent lands; and that plaintiff Mrs. Jones and her predecessors in interest have also used said ditch for the purpose of irrigating said land in section 4; that defendants and Oscar Deardorff are the owners of the land in section 8, and that the water from said ditch is necessary for the production of crops on their said land, and that defendant John Deardorff owns water running through said Settlers ditch. The court also found that plaintiffs have wrongfully obstructed said lateral ditch; also that the deed of the land in said section 4, to said plaintiff Mrs. Jones, coming through the Sacramento Bank by the trustees' sale under said deed of trust, conveyed the land to her, "expressly reserving in its conveyance of said land all water ditches and roads theretofore conveyed." The court found against defendants' alleged prescriptive right and against the alleged bar of the state of limitations. In its conclusions of law the court found: That defendants are the owners of the ditch in question and the right to maintain and keep the same in order and jointly with plaintiff Mrs. Jones to run water through the same and that defendants are entitled to a decree quieting the title in said ditch and to an injunction perpetually restraining plaintiffs from interfering therewith. Judgment was accordingly entered from which and from the order denying their motion for a new trial plaintiffs appeal.

It is claimed that the court erred in admitting the deed to Samuel Deardorff. The record fails to show the ground of the objection made when the deed was offered in evidence, and hence the specification raises no question for it cannot be said to have been inadmissible for every purpose. In making objection to evidence the ground must be stated in order that the court may determine whether the ruling of the lower court was correct or otherwise. It is claimed also that the evidence is insufficient to support the following findings: (a) that defendants have a right to maintain a ditch over the land in section 4; (b) that when Samuel Deardorff took a deed for the water ditch across section 4 he did so that the same should become a permanent use or benefit to section 8, or that the ditch ever became appurtenant to said section. The legal proposition upon which appellants rely is: That the grant from Kirkendall to Samuel Deardorff was simply a grant in gross, and was limited as a right in the grantee, and was not intended by either party to become appurtenant to any land; that it was not in the nature of an easement, and hence not an estate of inheritance, but a simple right of way that died with the grantee.

By the terms of the deed to Deardorff, the ditch was not to be used by the grantee "except for the conveying of water to the north half of section 8 for use thereon," unless by the consent of the grantor, Mary Kirkendall. This was a negative form of expressing the right to use the ditch to convey water to said section. The consent of the grantor was necessary if water was to be conveyed elsewhere. The deed also provided that the ditch was not to be used, without grantor's consent, for conveying water to any other person than the grantee. It is apparently upon this clause that appellants rely to show that the grant was personal only to Samuel Deardorff—or a technical grant in gross. Whether the deed standing alone should be given the construction contended for it is not necessary to decide. Defendants were permitted to show without objection, and it appears by the record, that Mary Deardorff's husband was acting for her in the matter as her agent, and that he took the deed "for the use and benefit of said north half of said section 8"; that his wife, the said Mary, assisted in the construction of the ditch and that they constructed the ditch together conformably to the terms of the deed at a considerable expense to themselves; that the ditch was constructed immediately after the deed was received and that it has been used ever since by Deardorff and his successors in interest, "and they have since maintained and kept in good order the said ditch agreeably to said deed" and that "they (Deardorff and his wife) have since used said water ditch for conveying water to said" section 8 without "injury or damage to the adjacent land." The court found, and the finding is not challenged, that plaintiff Mrs. Jones and her predecessors used said ditch to convey water to their land in section 4. The testimony is not set forth in the transcript; appellants in preparing it have given what purports to be but the legal effect of the testimony. Nor does the bill of exceptions purport to contain all the evidence or the legal effect of it at all. Upon the record before us, however, we think the findings are supported and that the court drew just conclusions from the findings. Mary Deardorff died in 1901, and her husband died in 1902, and defendants succeeded to their interest in section 8 by decree of distribution, and "are now the owners thereof and irrigation thereof is necessary to its proper cultivation" and they "have been wont to run water through said ditch during all the irrigating seasons since the fall of 1902." The cause was tried in November, 1904. "The right of way" and "the right of receiving water from or discharging the same upon land," are among the burdens or servitudes which "may be attached to other land as incidents or appurtenances and are then called easements." Civ. Code, § 811. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit." Civ. Code, § 662. The grant in this case created an easement, and the evidence shows that it became appurtenant to defendants' land as the court found. Whether an easement in a given case is appurtenant or in gross is determined mainly by the nature of the right and of the intention of the parties creating it; but the courts favor the construction of grants of these rights as appurtenant rather than in gross, and if the right in question is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it would be held to be an easement appurtenant to the land, and not an easement in gross. 10 Am. & Eng. Ency. (2d Ed.) p. 405; Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874. The deed to plaintiff, Mrs. Jones, is not in the record, but it is stated in the transcript that her grantor, the Sacramento Bank, "reserved in its conveyance * * * all water ditches and roads theretofore conveyed," from which it may be inferred that the purchaser at the sale under the trust deed regarded his purchase as subject to the easement created for the benefit of defendants' land. The permission given to the Deardorffs, contemporaneously with the grant, to enter upon the land and construct the ditch, and its use by them and their successors in interest for so long a time, without objection, to convey water to section 8, where it was necessary to the proper enjoyment of the land, both by them and their successors in interest, would give rise to a strong inference that the original intention of the parties was that the ditch should become a servitude upon section 4 of which section 8 was the dominant tenement. "The estate of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Civ. Code, § 806.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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4 Cal. App. 31

PEOPLE v. TAYLOR.

(Court of Appeal, First District, California. June 27, 1906.)

1. Criminal Law—Statements of Defendant—Self-Serving Declarations.

Defendant shot deceased while standing on the bank of an irrigation ditch, and in a prosecution for the homicide a witness testified that he, with others, had searched the ditch at the point where the shooting occurred, and found a bullet in the bottom of the ditch which was of the same caliber as the one found in deceased's body; that the search for the bullet was because of a statement made by defendant to witness about having fired a shot into the water. *Held*, that defendant's statement, made to witness at the time defendant told him of having fired the first shot into the ditch, was a hearsay, self-serving declaration and inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 933.]

2. SAME—TRIAL—INSTRUCTIONS—OPINION OF COURT.

Where. in a prosecution for homicide, the judge charged that the jury, and not the judge, were the judges of the facts, and that he did not intend, by giving the instruction, to imply the existence or nonexistence of any fact in the case, an instruction that if the jury should find certain material matters as facts beyond a reasonable doubt, and believed from such facts that defendant wrongfully, unlawfully, and unnecessarily brought on the struggle, or became and was the aggressor, and did not attempt to abandon or withdraw from the altercation during which he killed deceased, he could not avail himself of the plea of self-defense, etc., was not objectionable as intimating the judge's opinion on the facts.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1731-1735, 1758.]

3. HOMICIDE—SELF-DEFENSE—IMMINENCE OF DANGER.

In order to justify a killing as committed in self-defense, the danger must have existed, or have reasonably appeared to exist, at the very time defendant fired the fatal shot; defendant's belief that the danger was about to become imminent, or that it would become imminent in the future, being insufficient.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 158-163.]

4. CRIMINAL LAW—INSTRUCTIONS—CHARACTER AND NATIONALITY OF PARTIES.

Where, in a prosecution for homicide, defendant's attorney in his argument many times referred to deceased as "this Armenian," and to the defendant as having a father and mother "in the good old state of Missouri," it was proper for the court to charge that the jury had nothing to do with the place of birth or the nationality of deceased, or the situation of the defendant or deceased with reference to their families.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1693, 1974-1977.]

5. SAME—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error for the court to refuse instructions requested by accused, the material portions of which are covered by the charge.

6. SAME—VERDICT—AMENDMENT.

Where, in a prosecution for homicide, the verdict as first rendered fixed defendant's term of imprisonment, the judge properly told the jury that it was informal, and instructed them to eliminate the portion fixing the punishment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2110, 2112.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

David F. Taylor was convicted of manslaughter, and he appeals. Affirmed.

James A. Burns, E. Klette, and S. J. Hinds, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. The defendant was charged in the information with having killed and murdered one Bedrosian on the 28th day of June, 1905. The jury returned a verdict of manslaughter, recommending the defendant to the mercy of the court, and he was sentenced to a term of six years in the state prison. This appeal is from the judgment and an order denying the defendant's motion for a new trial.

The homicide was the result of a dispute as to water rights from an irrigating ditch. The deceased and the defendant each had a right to take certain water from the same ditch, but the trouble arose as to the time at which the water should be taken by each. The defendant could not get water below at times when deceased put extra boards in the headgate and backed the water so that it would flow through a branch ditch onto the land of the deceased, and the deceased could not get the water to his land without putting in the extra boards. The defendant, from his own testimony, appears to have armed himself with a pistol on the morning of the homicide, as he was about to start to the point in the irrigating ditch where the boards had been placed by deceased. He made the declaration that he would have the water if it caused him trouble. When he reached the headgate he took out two boards, the longest one of which he pushed out so it would float away down the ditch. As he was leaving he saw deceased down the road, and went to meet him. Deceased appeared to be in a good humor, and proposed to defendant that they measure the water. They then went together to the ditch, the deceased to his small headgate, and defendant to the large headgate. After deceased put his hand down into the water as if to measure it, he went from the small headgate over to the large headgate, and told defendant that he did not have enough water, and that he was going to put in the boards. Defendant replied that it would be all right, but that deceased would have to take out the boards if defendant had to flood the ditch to make him do it. Defendant testified that deceased had a shovel in his hands, and swore at defendant, calling him names, raising his shovel and striking at defendant, hitting his hands. The defendant then describes the subsequent events as follows: "I drew my gun from my hip pocket. I had carried that pistol ever since the 6th of January. Had been in the custom of carrying a pistol. I carried it for sport. When I pulled the revolver from my pocket, I put it over in my left hand and fired a shot down into the water. I did that as I thought probably I would run a bluff on him. I did not shoot at him. Could have shot at him if I had wanted to. When I fired the pistol he kind of dodged down, just kind of pitched the shovel back that way like. He kind of raised up then, and wanted to know what I meant. I said: 'I mean I don't want any more trouble with you.' Then I pointed the pistol in his face that way, and told him to stand back. He just kind of stepped back, probably one step, but a little towards the fence, a little northeast. I thought the trouble was all over with, and he holloed to some one, called him 'Paul' or 'Izer,' or something of that kind. I stuck the pistol in my hip pocket. I thought I would go across the ditch and get my wheel. I jumped from the running board of the drop onto the bank. As I reached the ground he grabbed me. I whirled around facing him. I struck him a couple of times with my left hand. He caught me at that time so I couldn't use my right hand. I hit him on the breast or ribs. * * * While we were scuffling there, I took the gun out of my pocket with my left hand. I put it over in my right hand; passed it in front of him to my right hand or around his neck. I told him, if he did not let loose of me, I would shoot. * * * At the time the shot was fired Paul was coming through the fence. I didn't aim to fire the shot just at that instant, but I would have had to fire in a second or two. When the shot was fired Bedrosian let loose of me. I ran out in the road." Defendant admitted that in the preliminary examination he testified as follows: "I didn't think there was any necessity for defending myself with the gun. * * * The reason why I drew my gun the second time was that I thought I would run a bluff on him. I was not drawing the gun for the reason that I was afraid he was going to hurt me. I am not afraid of any one man. I was not afraid of him then. When I fired the first shot, I then raised the gun up towards him with my left hand. He dodged down and threw the shovel around that way, and says something or other—I couldn't say what. He seemed so excited; but it sort of tickled me, and I had a kind of grin. I couldn't help it." The witness Saunders testified that he heard a shot, and looked up and saw deceased have hold of defendant's arm; that he heard deceased say, "Don't shoot! don't shoot!" and that he heard a second shot, and looked and saw deceased just about to the ground, falling. The above is stated for the purpose of more clearly elucidating the points discussed. It is not claimed that the evidence is insufficient to sustain the verdict.

It is urged that the court erred in sustaining objections to questions asked by defendant's counsel in direct examination of the witness Tremper as to what statement defendant made to him at the time defendant told him of having fired the first shot into the water ditch. The court correctly sustained the objections. The witness had testified that he, with others, had searched the ditch at or about the point where the shooting took place, and found a bullet in the bottom of the ditch, which was a 38-caliber bullet similar to the one found in the body of deceased; that the searching for the bullet was because of the statement made by the defendant to the witness about having fired a shot into the water. Counsel say that the object in asking the question was to corroborate the defendant by showing that he made a statement of a material fact, which proved to be true by an examination of the ditch. The court certainly was very liberal to the defendant by allowing in evidence the portion of the statement made to the witness as to having fired into the ditch. It was not permissible to allow the witness, without any restrictions, to state all that defendant said to him. It was not part of the res gestæ, and was purely hearsay and a self-serving declaration. There was no claim made by the prosecution that the account or statement made by the defendant as to firing the bullet into the water was fabricated, and hence the rule cannot be invoked which, in some exceptional cases, allows statements made by a defendant at or about the time of the act to be received in evidence for the purpose of corroborating the statement or account he has given upon the stand. Where a defendant has given an account of a transaction, and the prosecution has attempted to impeach him by evidence as to a different account of the same transaction made to other parties, the law, in its spirit of fairness to the defendant, allows him to call other witnesses for the purpose of showing that other accounts or statements made by him immediately after the occurrence and while it was fresh in his mind are the same in substance as that given by him as a witness upon the stand. The question in such case is as to the credibility of the defendant or the witness. See People v. Doyell, 48 Cal. 85. In this case there was no such question to which the evidence sought to be elicited would have been admissible.

We have carefully examined the instruction complained of in which the court charged the jury that if they should find certain material matters as facts beyond a reasonable doubt, and that if the jury believed from such facts that defendant wrongfully, unlawfully, and unnecessarily brought on the struggle, or became and was the aggressor, and did not attempt to abandon or withdraw from the altercation, and during the altercation defendant killed deceased, that defendant could not avail himself of the plea of self-defense in case he did so create a real or apparent necessity for the killing, by his own unlawful acts. The objection urged to the instruction is that it "left the jury to infer that although they were the sole judges of the effect and value and weight of testimony, they were listening to a judge who really did have an opinion in regard to the guilt or innocence of the defendant." It is certainly reasonable to infer that the judge really did have an opinion as to the guilt or innocence of the defendant, but we can find no expression or intimation of such opinion in the instruction. Not only this, but the judge said to the jury: "I again charge you that you, and not I, are the judges of the facts in the case; and I do not intend by giving you these instructions to imply the existence or nonexistence of any fact in the case."

The claim is made that it was error for the court to charge the jury that "the danger to the defendant, if any, must have existed, or have reasonably appeared to exist, at the very time the defendant fired the fatal shot" in order to justify the killing. The portion of the instruction quoted must be read in connection with what is subsequently stated in the same instruction, to wit, "If you should believe from the evidence that at the time he did fire the fatal shot—if you find that he did so from the evidence—the defendant was at that time in no danger of suffering death or great bodily harm, and that the situation and surrounding circumstances were not such as to cause it to appear to the defendant as a reasonable person that, at the time, he was in danger of his life or of suffering great bodily injury, then I instruct you that, unless it did appear to the defendant as a reasonable man that he [the defendant] at the time of firing the fatal shot was in danger of suffering great bodily harm, then and under such circumstances the defendant could not justify the shooting and killing of the deceased upon the ground that the same was done in self defense." The instruction gives the rule as favorably to the defendant as the law would justify. If the criticism of appellant's attorney is correct, then the danger need not have existed at the time the fatal shot was fired. It certainly is not the law that a defendant can justify the taking of human life upon the belief that danger is about to become imminent, or that it will in the future become imminent. There must have been reasonable ground to apprehend a design to commit a felony, or to do great bodily harm, and imminent danger of such design being accomplished, and this at the time the fatal shot was fired.

It was not error for the court to charge the jury that they had nothing to do with the place of birth or the nationality of the deceased, or the situation of the defendant or the deceased with reference to their families. The attorney for the defendant in his argument to the jury had many times referred to deceased as "this Armenian," and to the defendant as having a father and mother in the "good old state of Missouri." The deceased, no matter what his nationality, was entitled to the equal protection of the laws, and defendant was not entitled to any special privileges because his father and mother lived in the state of Missouri. It would import a new principle into our criminal law if the place of birth or nationality of the parties concerned in the commission of a crime could be considered as material to the guilt or innocence of a defendant.

The defendant insists that the court erred in refusing to give requested instructions explaining the law of self-defense, and the right of a defendant to act upon appearances. We have examined the requested instructions which were refused and the instructions given, and we are of opinion that the material portions of the instructions refused were given elsewhere in the charge of the court. The instructions given by the court cover about 90 folios of the transcript and every phase of the case. While it may be said that they are unnecessarily voluminous, they show that the learned judge of the court below carefully guarded the rights of the defendant. To have repeated the substance of any of these instructions, even though in different words, could not have aided the jury, but would have tended to confuse them. The rights of the defendant were not only guarded, but the rulings on all doubtful questions were in his favor.

The claim that the verdict was obtained by means other than a fair expression of opinion of the jurors is entirely without merit. The verdict as first rendered fixed the term of imprisonment of the defendant. The judge properly told the jury that it was informal, and instructed them to eliminate the portion of it fixing the punishment. One of the jurors asked the judge to inform them the penalty that could be imposed under a verdict of manslaughter. The judge in reply stated that the punishment was a matter entirely for the court, but that it was not "a matter that was so arbitrary as to preclude a recommendation or anything of that sort, but the jury have no power to fix it." No objection was made to the remark of the judge, and no exception taken to it. The jury then retired, and afterwards brought in the verdict, accompanied with a recommendation of the defendant to the mercy of the court. At the request of the defendant the jury was polled, and the verdict was then recorded.

We find no error in the record, and the judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 764

DINNIGAN v. PETERSON.

(Court of Appeal, Second District, California. June 22, 1906.)

1. CARRIERS—INJURY TO PASSENGER—STAGECOACH—NEGLIGENCE—PRESUMPTIONS.

Where a stagecoach was overturned by striking a boulder, in turning back into the road after turning out, negligence of the driver is presumable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1294.]

2. SAME—CARE REQUIRED.

Where the driver of a coach approaches a place of particular danger to passengers, he is bound to warn them of the nature of the danger.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1193, 1196.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

It was not contributory negligence for a passenger in a stagecoach to jump out when it began to tip over.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1352.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Richard R. Dinnigan against N.

P. Peterson. Appeal by plaintiff from a judgment for defendant, and from an order denying a new trial. Reversed.

Bien & Jackson and Anderson & Kaye, for appellant. C. L. Claflin, for respondent.

ALLEN, J. Action for damages on account of personal injuries. Findings and judgment for defendant. Appeal by the plaintiff from said judgment, and from the order denying a new trial.

Plaintiff was a passenger for hire upon defendant's stagecoach, such stagecoach having capacity for nine, but was carrying only six passengers. The route being traversed was rough and mountainous. The stage was driven by a thoroughly competent and skilled man, and all of the appointments were in perfect condition. The stage thus driven was met by a 10-horse team upon this mountain road, and the driver of the stage undertook to pass the team by turning to the right. The evidence of Pritchard, the driver, is: "The place outside the road where I drove down was not bad looking from above. As far as I could see, it was a rocky ridge that went down and narrowed up. At the point where we turned in it hadn't been very bad only for the big loose boulders. Looking on down it got narrower and the hills broke off steep to the right, and the road was very abrupt on the left-hand side also until you got further down. The embankment was formed by throwing loose rocks out of the road. The rut where I turned in was about eight or ten inches deep and the bank had a gradual slope toward it a distance of eight or ten feet. The slope was not steep, but was gradual and easy. * * * The ridge becomes narrower as you go down until it pinches out."

The defendant, called in his own behalf, testified, and was asked whether it was possible, by the exercise of care on the driver's part, to have driven the coach into the road at that point without tipping over; his answer was: "I don't know of any way that he could prevent it." When asked if, by the exercise of the highest degree of care, by watching everything in the road, the driver could "have driven that coach in there without turning over," defendant answered: "Well, I don't think he could." To the further question, do you think any man could drive that coach in there where he turned off from the road without turning it over? defendant answered: "I don't think so." Again, he says: "Of course, I would try and be safe, but I might be turned over. I say I don't think it could be done with safety because I had as safe a man as ever drove on the road." And to the further question: "Then it was a matter of impossibility to have driven that coach around that cement wagon and gotten in again without turning over; that is a fact, is it not?" Answer: "It seems so." The driver further testified: "I knew that the ground at the side of the road was covered with loose stones and boulders as far down as I could see. * * * I discovered that fact at the time I drove down there, and knew it before. * * * A man might reach the road with an empty stage. He might do it one time in ten." While the witness Pritchard stated that "the place outside the road where I drove down was not bad looking from above," the entire description of the road over which he was compelled to drive in turning out indicates that it was an exceedingly bad and dangerous point at which to undertake to leave the road. It is admitted that no notice was given to the passengers of the dangerous character of this particular turnout. It further appears from the testimony that after driving past the team, in an effort to turn back into the road, the right fore wheel struck one of these boulders of which witness Pritchard speaks and upset the stage; that after the stage started to turn over plaintiff leaped therefrom, and was caught and injured.

The court finds that there was no negligence upon the part of the defendant, although it makes no specific finding as to the danger to be apprehended at the point where the driver undertook to turn out of the road, and pass the cement team. The court does find, however, and there is testimony in its support, that the place where he undertook to turn back into the road after having passed the cement team was apparently a safe place.

It is insisted by the appellant that there is no evidence to support the finding that no negligence was attributable to the defendant. With this we are inclined to agree. The care which defendant, as a common carrier, owed to plaintiff was the utmost care. Treadwell v. Whittier, 80 Cal. 588, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. The passenger was injured by an instrumentality used by defendant in the prosecution of his business, and the presumption is that it occurred by the negligence of the coachman. We find nothing in the evidence tending to rebut this presumption. "Moreover, where the driver of a coach approaches a place of particular danger to passengers, he is bound to warn them of the nature of the danger, to the end that they may choose whether they will run the risk of it or not." Thompson's Carrier of Passengers, p. 240. We think that the general tenor of the authorities cited by the appellant sustains the position that it was negligence upon the part of the driver, in view of the rough character of the turn out, which he must of necessity traverse in order to pass this wagon, in not giving the passengers notice of the danger apparent, that an opportunity might be offered them to alight and avoid the same. His omission in this regard was negligence. No contributory negligence is shown. Assuming as we do that the driver drove his coach into a dangerous place and exposed the passengers to peril, the act of the plaintiff in attempting to jump from the coach was not contributory negligence. It is said by our Supreme Court in Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 Pac. 734, that "even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person." There is nothing in the evidence to indicate that the action of plaintiff in jumping from the stage contributed in any degree to its overturning, for the uncontradicted testimony is that the stage was overturning before he jumped.

In our opinion, the judgment and order should be reversed, and cause remanded for further proceedings; and it is so ordered.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 1

ROWE v. SOUTHERN CALIFORNIA RY. CO.

(Court of Appeal, Second District, California. June 23, 1906.)

1. Railroads—Crossing Accident—Injuries to Pedestrians — Willful Injury — Contributory Negligence.

Intestate approached a railroad crossing without paying any attention to his surroundings or to a train approaching at a speed of from five to six miles an hour. The engineer saw intestate before he came on the track and blew three or four quick blasts. He then called to deceased to "look out," and seeing that he paid no attention immediately turned on the whistle again and at the same time set the air brakes, but it was then impossible to prevent the collision, and intestate unheedingly stepped immediately before, and into, the cowcatcher, receiving injuries from which he subsequently died. After the brakes were set, the locomotive and train stopped in about 30 feet. *Held*, that the engineer was not guilty of gross or wanton negligence in failing to stop the train in time to avoid the injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1015, 1016.]

2. Same—Proximate Cause.

Intestate's contributory negligence, and not the negligence of the engineer in not bringing the train to a standstill when he first saw deceased, was the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1028.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Henrietta J. Rowe, as administratrix of the estate of Edwin Rowe, deceased, against the Southern California Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry M. Willis, for appellant. T. J. Norton and E. E. Millikin, for respondent.

GRAY, P. J. This action is brought by plaintiff to recover damages from defendant for the alleged negligent killing of plaintiff's husband by one of defendant's passenger trains at a street crossing in the city of San Bernardino. At the conclusion of plaintiff's evidence, defendant's motion for a nonsuit was granted. The plaintiff appeals from the judgment which followed.

The only question presented arises upon the order granting the nonsuit. It is contended by appellant that, while the negligence of the deceased must be admitted to have contributed to his death, yet the defendant's engineer had notice of the negligence of the deceased in time to have avoided the killing if he had used proper care and stopped the train. The facts of the case are in many respects similar to the facts in the case of Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, and may be briefly stated as follows: The deceased was approaching the defendant's track from the west on the sidewalk which traversed the south side of the street. The defendant's locomotive, with a train of cars attached, was approaching from the northwest, the same point to which the deceased was going, at an angle of about 45 degrees with the course deceased was traveling. The speed of the train was five or six miles an hour, and, as it was approaching the deceased partially from behind and to the left, it could not be seen readily by him unless he turned his head. This was in the evening, nearly dark. An oil lamp was burning in the headlight of the locomotive. The engineer, leaning out the window from the right-hand side of his cab, saw deceased passing along the south sidewalk, while the engineer was still north of the street. He observed that deceased was walking slowly and without any attention to his surroundings, and, for the purpose of attracting his attention, he blew three or four quick blasts upon his locomotive whistle. He then called to the deceased in a loud voice, "Look out there," and seeing that the deceased still paid no attention he immediately turned on the whistle again. at the same time setting the air brakes; but it was then impossible for the engineer to prevent a collision. The deceased unheedingly stepped immediately before or into the cowcatcher. Both his legs were broken between the ankles and knees, and he was thrown back from the track upon the same side from which he approached. A day or two later he died. After the brakes were set, the locomotive and train were brought to a stop in about 30 feet. The engine bell was kept ringing from the time the deceased was first seen by the engineer. The deceased held the office of constable in the township where he was killed. He was habitually given to spells of abstraction and absent-mindedness, and was partially deaf in the left ear (the one nearest the approaching locomotive). These physical defects were not known by the engineer.

The contributory negligence of deceased is conceded by appellant, and the complaint is framed and the trial proceeded on the theory that the recovery must be had, if at all, for the gross and wanton negligence of defendant's engineer. This gross and wanton negligence is alleged to consist in his not having stopped the train in time to avoid striking the deceased. We cannot agree with this. The engineer evinced no wanton desire to injure deceased, nor is there any evidence of a reckless disregard on his part of the safety of the deceased. The very contrary of this clearly appears from the undisputed evidence. He promptly resorted to, and industriously persisted in, all those means which are usually effective to call an absent-minded man to his senses, and this is all that the rule in such cases requires. When he sees that a person is walking into danger, he must use ordinary care to warn him of such danger and prevent the injury. The engineer had no notice that deceased was going to disregard all his warnings until he had given the warnings, and it was then too late to make the stopping of the train effective to avoid the killing. This was not the engineer's fault, but the fault of deceased arising from his physical defects which the engineer knew nothing about. The doctrine which makes a personal injury the fault of him who has the last clear opportunity to prevent it has coupled with it and in it the element of notice. And "under this rule a defendant is not liable because he ought to have known." Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651. Here the engineer had no notice and no reasonable ground to think that it was necessary to stop his train to avoid running over deceased, until it was too late to do so. After he discovered that he must stop his train or kill a man he had no clear opportunity to do it. Up to this time it would have been something beyond ordinary care for him to stop his train; it would have been extraordinary care. Trains are not ordinarily stopped, or even held stationary, to allow people on foot to pass in front of them. Another element of the rule with which we are here concerned is that circumstances must be such, and must appear to the party to be charged to be such, "that the deceased cannot, and the defendant can, prevent the injury." "This principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." Holmes v. South Pac. C. Ry. Co., 97 Cal. 169, 31 Pac. 834.

If we were to concede that the engineer was negligent in not bringing the train to a standstill when he first saw the decedent, still the plaintiff could not recover because of the fact that decedent was in no danger so long as he did not step upon the track. He brought himself into a position of immediate danger by so stepping upon the track, and this was the proximate and immediate cause of his injury, and the previous failure to stop the train had only a remote connection therewith. To be sure, if the train had been stopped in time, the injury would not have happened. This is so, however, not because the engineer would have thus refrained from injuring the deceased, but because he would have thus prevented the deceased from injuring himself by walking into the pilot of the moving locomotive. It is not a reasonable deduction from the conduct of the engineer to say that he did know, or should have known, from the conduct of the deceased, immediately on the sounding of the whistle the first time, that he was going to thereafter walk upon the track heedless of all further warning. It is fair, however, to say that the engineer never for a moment thought that deceased was going finally to ignore the several warnings given him during that short few seconds of time until it was too late to prevent striking him, and the instant that he realized that those warnings were ineffective he did his best to stop the train. This is all the law requires. Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68. Even under the dissenting opinion of the Chief Justice in the Green Case, and the principles therein laid down, the plaintiff herein should not recover, for it is plain that the dissent of the Chief Justice was largely influenced by the excessive speed of the train and the absence of all warning of its approach.

The appellant cites many cases from this and other states. Some of the latter support her position, but we think them in principle at variance with the decisions of our own Supreme Court. In this state no case has gone to the extent of sustaining a recovery where, as here, the injury was the immediate, if not the sole, result of the negligence of the party injured. The case of Esrey v. S. P. Co., 103 Cal. 544, 37 Pac. 500, is a fair illustration of the California cases on this question; but, in that case the injured party was not only in a place of danger to the knowledge of the brakeman, but unable to extricate herself at the time the signal was given to start the train. The strongest case cited by appellant is Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765. This, however, was a street car case, and, in the nature of things, there is a difference between that and a steam railway case. A street car is more readily brought to a standstill than a heavy train; besides, a street car must necessarily be frequently operated among great masses of people. The Supreme Court has recognized this distinction. Clark v. Bennett, 123 Cal. 278, 55 Pac. 908. Moreover, in the Lee Case it was shown that the car was going at a high and "unusual rate of speed and sounding no gong nor alarm bell"; and that the motorman's attention was called by a passenger to the dangerous position of plaintiff. For these reasons, the case is not analogous to the one before us.

Unless we are to hold that contributory

negligence is never a question of law, but always a question of fact for the jury, we must hold in this case, as a matter of law, that the injury was shown to be the direct and proximate result of the negligence of the deceased, and that the trial court was warranted in granting the nonsuit.

The judgment is affirmed.

I concur: ALLEN, J.

SMITH, J. I concur in the judgment of affirmance. It appears clearly from the evidence that if the defendant's engineer, at the time he hallooed at the plaintiff, had put on the brakes instead of hallooing, the accident would not have occurred. The evidence was also of such a character as would have justified the jury in finding that, at this point of time, the plaintiff was unaware of the approach of the train, and that the engineer knew of this fact, and that plaintiff was about to step in front of the engine. On this appeal, therefore, which is from a judgment of nonsuit, these facts must be assumed as established. The sole question in the case, then, is whether the engineer, being aware of the inevitability of the accident unless he stopped the train, was guilty of such negligence as to bring the case within the doctrine that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible. Esrey v. Southern Pacific Co., 103 Cal. 545, 37 Pac. 500.

The doctrine in question, as above and elsewhere expressed, is susceptible of two interpretations: The one is that the doctrine will apply only to cases where the negligence of the injured party is wholly antecedent to the negligence of the party causing the accident; and hence that, where the negligence of the injured party is continued up to the time of the accident, it will not apply if there be a physical possibility for him to escape. The other is that it will apply even to cases where the negligence of the injured party continues up to the time of the accident, if it be known to the other party that he is unaware of his danger and that the accident will inevitably occur. The former doctrine is asserted in the following, and some other cases: Holmes v. South Pac. C. Ry. Co., 97 Cal. 161, 31 Pac. 834; Everett v. Los Angeles Ry. Co., 115 Cal. 119, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; Green v. Los Angeles Terminal Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68. The latter is expressed in the opinion of the dissenting judges in Everett v. Los Angeles Ry. Co., 115 Cal. 111, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, and in Herbert v. Southern Pacific Co., 121 Cal. 232, 53 Pac. 651, and Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765. In Esrey v. Southern Pacific Co., supra, as in Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, the case was one in which, after the danger became imminent, there was a physical impossibility for the plaintiff to escape, but the language of the court seems to accord with the more liberal doctrine. The preponderance of authority would, therefore, seem to have been in favor of the more liberal application of the doctrine, prior to the decision in Green v. Los Angeles Terminal Ry. Co., but that case seems to be in conflict with this view, and upon its authority I feel constrained to concur in the conclusion of my associates.

I do not, however, concur altogether in the view that the doctrine of last opportunity can apply only where there is "gross and wanton negligence" on the part of the engineer, or "a reckless disregard on his part" of the safety of the deceased. This proposition is true only in a qualified sense. But the term "ordinary care" as applied to the engineer on a train in an emergency, means the ordinary care of competent men in that position, and cannot be regarded as anything less than great care (Henderson v. Los Angeles Traction Co. [Cal. Sup.] 89 Pac. 976); and, as has been expressed in several cases, the failure to exercise such care by a defendant may be regarded as amounting "to a degree of reckless conduct that may well be termed willful and wanton" (Esrey v. Southern Pacific Co., 103 Cal. 544, 545, 37 Pac. 500; Everett v. Los Angeles Ry. Co., 115 Cal. 114, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350).

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4 Cal. App. 12

BRETT v. BERGER.

(Court of Appeal, Third District. California. June 23, 1906.)

1. Landlord and Tenant—Duty to Repair.

At common law the burden of making repairs was on the tenant; the landlord being under no obligations so to do, unless by express agreement to that effect.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 536.]

2. Same — Contract to Repair — Construction.

Where a lease provided that, in the event of any repairs being necessary to the fences or buildings on the premises, the landlord should furnish all material necessary thereto, together with one man's labor, at his own cost and expense, and that the tenant should furnish all the additional labor necessary thereto at his own cost and expense, the landlord was only required to furnish materials for repairs and one man's labor when called on by the tenant to do so.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 548.]

3. Damages—Contract—Breach.

Where a landlord agreed to furnish materials and one man's labor necessary for subsequent repairs on fences and buildings, the lessee could not stand by and see his crops destroyed by his own stock after the landlord had refused to furnish material and labor on demand and seek compensation for the ensuing damage, but was bound to make the repairs and sue the landlord for the outlay in money.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 649.]

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by T. I. Brett against L. P. Berger. From a judgment for defendant, plaintiff appeals. Affirmed.

Bond & Haycock, for appellant. H. V. Kreling and Crawford & Crawford, for respondent.

CHIPMAN, P. J. Defendant had judgment on motion for nonsuit at the close of plaintiff's evidence. Plaintiff appeals from the judgment on bill of exceptions.

Plaintiff and defendant entered into a written lease whereby defendant let to plaintiff the premises called the "Mt. Carlo Ranche" for the term of five years commencing October 15, 1901, reserving to defendant the use of certain land and buildings thereon. The lease was for a cash rental of $350, payable in equal semiannual installments. Among other provisions of the lease was the following: "It is also understood and agreed between the aforesaid parties that in the event of any repairs being necessary to the fences or buildings on said premises and herein leased, that the party of the first part shall furnish all material necessary thereto, together with one man at his own cost and expense, and that said party of the second part shall furnish all the labor necessary thereto at his own cost and expense." The action is for alleged damage to plaintiff's crops during three different years of the term; namely, to his growing crops during the summer of 1902 by reason of plaintiff's hogs breaking through the fences by which they were inclosed; by certain hay stored in the barns on the premises during the winter of 1902–1903 being injured by rain beating through the alleged leaky roofs; by similar damage from plaintiff's hogs destroying his crops in 1904; by loss of time in pursuing his cattle and hogs because of their escaping from their inclosures through the dilapidated fences. Damages are claimed solely "by reason of defendant's breach of said covenant (above set forth) committed by the defendant in not furnishing material necessary to repair said barn and fences and in not furnishing a man therefor, as aforesaid." It is alleged in the complaint and was proved that plaintiff frequently informed defendant of the condition of the fences and roof of the barn and called upon him to furnish the material required for necessary repairs and the labor of one man to make needed repairs, but defendant neglected and refused to do so. There is no allegation and no proof that plaintiff demanded of defendant that he make the repairs or do more than to furnish the material and the labor of one man therefor. Plaintiff testified that he "did all he could to repair said fences, and used such material as he could find on the place in repairing them, and also used his own material therefor, but that he did not have sufficient material to put them in condition to protect his said crops and control his stock"; whether plaintiff made any effort to obtain material by purchase or otherwise with which to make the repairs or that he was financially unable to provide the necessary money, does not appear. It did appear, however, that there were more than six miles of fencing on the place which latter was divided into several fields and that much of the fence needed "extensive repairs to make it sufficient to control his stock and to protect his said crops, and that the necessary repairs would have cost a large sum of money." It also appeared that defendant had a 40-acre vineyard, reserved in the lease, and that defendant kept the fence around it in repair; plaintiff also testified that "he inspected the fences on said premises at the time he entered into the lease, and that said fences and other improvements were in a poor state of repair at that time, as poor, in fact, as they have been at any time since."

The motion for nonsuit was on the grounds: (1) That the complaint fails to state a cause of action. (2) That under the covenant sued upon, defendant is under no obligation to make any repairs and that the measure of damages, if any, is the reasonable value of the services of a man, and the cost of the material necessary for making repairs, and that no such damage has been alleged or proved; that under the terms of the lease, or the said covenant, plaintiff is not entitled to recover anything for the value of the crops destroyed or by reason of defendant's failure to make repairs to any improvements on the premises. Appellant concedes that the complaint does not state facts sufficient to constitute a cause of action if it be true, as held by the lower court, that plaintiff's only remedy, on the breach of the alleged covenant, was to procure the material and labor necessary to make the needed repairs, make them himself, and to recover the cost of the material and labor of one man; for, as is admitted, the complaint nowhere alleges and the proof fails to show that plaintiff made any repairs, or furnished any material or labor for making them. We are thus brought to consider what seems to us the sole inquiry in the case—namely: (1) Was defendant under any obligation to do more than furnish the material and the labor of one man; and (2) failing to do this was he liable for the damage to the crops as the pleadings stand?

Appellant's contention is: (1) That the covenant in question "is a covenant on the part of the landlord to repair"; and hence the tenant may make the repairs and recover the cost from the landlord; or, he may leave the premises unrepaired, and recover any damage he may have sustained from the landlord's fault therein. Respondent's contention is: That the lessor is not compelled to make repairs unless there is some express agreement thereto, and that in the present case the obligation of the lessor, as to repairs, is limited solely to the furnishing of the necessary material and the labor of one man; and, failing in this, and upon demand of the lessee, the latter had the right to supply both, make the repairs and charge the cost of the material and of this labor to the lessor; and that this is the measure and extent of the lessee's damages. We know of no statute in this state, and our attention has been called to none, except in relation to "a building intended for occupation of human beings" (§§ 1941, 1942, Civ. Code), which, in the absence of an agreement to the contrary, requires the lessor to put the premises "into condition fit for occupation" or "to repair subsequent dilapidations thereof." The common law has always thrown the burden of repairs upon the tenant, as being, in fact, as a bailee of the premises, and bound to restore them substantially as he received them; and the rule is that the tenant cannot compel the landlord to repair, unless he has bound himself by express agreement to that effect. Taylor on Landlord & Tenant (9th Ed.) § 327. The tenant cannot make repairs at the expense of the landlord, unless there be a special agreement between them authorizing him to do so. He takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent. Id. § 328; see Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835.

There being no statute changing the common-law rule in this state, in cases such as this one, and the common-law rule being against appellant's contention, the right of action in appellant must flow from the agreement alone. As there is no implied covenant, raised by law, that the landlord must make needed repairs, we do not think that the covenant in question should be given a construction not clearly deducible from its language. There is certainly no obligation cast upon the lessor to make repairs in any of the terms of the covenant. If any inference is to be drawn from the surrounding circumstances, at the time the contract was entered into, it is that as to the then condition of the fences and barns, it was known to the lessee and that condition must be presumed to have been accepted by him as satisfactory and that the repairs mentioned had reference to future requirements. It appeared by plaintiff's testimony that the condition of the fences and barns was the same, when the damage complained of accrued, as when the lease was entered into. If at this latter time immediate and extensive repairs had been contemplated, the parties would naturally have provided in the lease for making them. It seems to us that no argument is required to show that the lessor's obligation, by the terms of the lease, extended no further than to furnish materials for repairs and one man's labor, when called upon to do so; and this seems to have been the lessee's construction of the lease, for by his testimony it appears that the only demand made by him upon the lessor, was to do this and no more. When the lessor refused to comply with this demand, inasmuch as there was no duty put upon him to do more, the lessee's only course left was to purchase the material necessary to make the repairs, supply the labor of one man and he could then look to the lessor to pay for the outlay in money. We are clearly of opinion that the lessor could not stand by and see his crops destroyed by his own stock and expect the law to afford him compensation for ensuing damage. His damage and his only damage is to be measured by the material and labor which the lessor agreed to furnish. Plaintiff testified that "he did all he could to repair the fences." But he explained what he did and what he failed to do and hence what he testified to was but a conclusion. The cases cited by appellant to the effect that the lessee was not called upon to do that which the lessor had agreed to do, have no bearing on this case, as we do not think the lessor had agreed to make repairs.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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4 Cal. App. 8

SMITH v. HAMPSHIRE et al.

(Court of Appeal, Third District, California. June 23, 1906.)

1. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHT—IRRIGATION DITCHES.

Where plaintiff constructed an irrigation ditch across defendants' land, plaintiff could acquire a prescriptive right to use and maintain the ditch for the specific purpose of conveying a given quantity of water while defendants at the same time were using a portion of the same ditch to convey a separate distinct quantity of water to a given point where defendants' checks and side ditch were maintained, plaintiff's prescriptive right being limited to his use, measured by the quantity of his water carried through the ditch.

2. APPEAL — FINDINGS — CONFLICTING EVIDENCE—REVIEW.

Where the evidence on a particular issue is conflicting, and there is some evidence to support the finding made by the trial court, it cannot be disturbed on appeal, though the preponderance of the evidence is against it.

3. SAME—BRIEFS—DESIGNATION OF FOLIOS.

Where rulings on the admissibility of evidence are sought to be reviewed on appeal, appellant's brief should direct attention to the folios of the record where the rulings may be found.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3095.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Thomas Smith against Wyatt Hampshire and others. From a judgment for defendants, plaintiff appeals. Affirmed.

D. L. Phillips and J. F. Pryor, for appellant. Bradley & Farnsworth and W. R. McQuiddy, for respondents.

McLAUGHLIN, J. This action involves the respective rights of the parties to a water ditch and its use. It was alleged in the complaint that appellant owned the ditch with the right to its untrammeled use, and that respondents were hindering and obstructing him in the enjoyment of such rights. Title by adverse use and possession for the statutory period was specially pleaded and damages in the sum of $1,000 were claimed. The answer contained specific denials of these averments, set up the statute of limitations generally and by special plea of right to use the ditch and checks and side ditches connected therewith, acquired by adverse possession. The court found that respondents owned the land over which the ditch runs; that plaintiff in 1893 constructed the ditch across said land from a general ditch owned by the Lakeside Ditch Company (a corporation), and had used the same adversely to respondents, during the irrigating season, for 10 successive years, for the purpose of conveying a quantity of water to which he was entitled by reason of his ownership of 200 shares of the capital stock of said ditch company, to and upon his land for irrigating the same. It was further found that appellant, by long continued adverse use had acquired the right to enter upon said land and ditch for the purpose of cleaning out and repairing the latter, but that respondents had not interfered with this right, nor with the use of the ditch for the purpose of conveying the quantity of water above mentioned. Touching the rights of respondents, it was found that for more than 6 years before the commencement of this action, they had used a portion of said ditch jointly with appellant for the purpose of conveying a quantity of water, representing 70 shares in the ditch company, to a side ditch or open cut, where they at all times during the irrigating season of each year maintained checks to turn the said quantity of water into the side ditch for use in irrigating their land, and that such use of the ditch, side ditch and checks, was "open, notorious, peaceable, uninterrupted, continuous, exclusive, under a claim of right and adverse to the plaintiff and the whole world."

It is contended that this finding is utterly inconsistent with the finding as to appellant's prescriptive right, and that the conflict is so irreconcilable as to necessitate reversal. This raises the question whether appellant could acquire a prescriptive right to use and maintain the ditch for the specific purpose of conveying a given quantity of water over respondent's land, while respondents at the same time were using a portion of the same ditch for the purpose of conveying a separate distinct quantity to a given point where the checks and side ditch were maintained. We think that under the authorities in this state this question must be answered in the affirmative. Appellant's ripening prescriptive right was limited to his use, measured by the quantity of his water carried through the ditch, and if there was no hostile interference with that use, a permanent prescriptive right would accrue. This, the court found to be the fact, and as respondents have not appealed, this finding must be taken as importing absolute verity. The measure of appellant's right being thus fixed, respondents retained the right to their land, burdened only by the servitude growing out of appellant's easement acquired by prescription. Respondent's hostile, adverse use of the ditch for a purpose not in conflict with appellant's use, was a limitation of the latter right to the specific measured use apparently recognized. In other words, respondents could concede and recognize appellant's hostile claim of right to a given extent, but dispute and claim in hostility to the full measure of right asserted by the former. A ditch is no more than a right of way for the passage of water, and it was not essential that the use of the ditch, either by appellant or respondents, should be exclusive in order to confer the separate and distinct rights found and awarded by the court. This doctrine was announced by our Supreme Court in a well-considered case, where it was said: "Neither was the word 'exclusively' necessary to the answer. The ditch might have been used also as a waterway by plaintiff and others, and this would not prevent the use of the several defendants from ripening into a right by prescription, provided the latter use was in no way interfered with. Several parties could use and require a permanent and several right to use the same for waste water, just as several persons could use and acquire a private road." Abbott v. Pond, 142 Cal. 396, 76 Pac. 60, 61. Appellant asserts with earnestness and confidence that his right could not ripen if respondents were hostilely interfering with it. This is undoubtedly sound, but respondents, under the findings, did not interfere with appellant's use of the ditch, or right to keep it in repair, for the specific purpose of carrying his water over their land. They allowed it to flow on by the checks and side ditch without interference or diminution, hence the existence of appellant's prescriptive right. Had they turned his water out of, and their own into the ditch, this would have been a hostile interference with appellant's right which would have prevented it from ripening. But their acts were hostile merely to his asserted claim of exclusive right to use the ditch. They consisted only of going into the ditch appellant excavated, to erect and maintain dams during the irrigating season of each year, to turn their water which they, under hostile claim of right to do so, commingled with his water, through the side ditch, also maintained under an adverse claim of right. This limited, adverse, and hostile use conserved respondent's rights to so use the ditch and maintain its checks and side ditch. While respondents could not acquire a prescriptive right to a right of way over their own land, they could destroy appellant's claim of exclusive right by open, peaceable, notorious, and continuous adverse use, and thus establish their right (as against his asserted, exclusive claim) to use the ditch themselves for a limited purpose and commingle their water with his in so doing. The findings are, therefore, not conflicting.

It is said that the evidence is insufficient to sustain the finding in respondent's favor above mentioned. It may be said that the preponderance of evidence is against the finding, but as the evidence is conflicting, and there is some evidence to support the finding, it cannot be disturbed. "In support of the decision of the court below we must construe the testimony as favorably as possible for the defendants." Carteri v. Roberts, 140 Cal. 165, 73 Pac. 818, 819. While appellant undoubtedly ploughed through the sacks used as checks whenever he cleaned the ditch, there is no evidence to show that this was done at any time during the irrigating season when the respondents were using the same. Indeed, appellant recognized their right to maintain the checks and side ditch by suggesting a change of method in doing so. The respondents erected certain fences along and across the ditch and it is claimed by appellant that this constituted an unwarranted interference with his right. The court found against him on this point and we are not only convinced that the evidence sustains the finding, but feel certain that appellant gained a distinct advantage in this regard by having the burden of maintaining the ditch above the cross-fence saddled on the respondents. The other findings assailed are fully supported by the evidence.

Counsel for appellant in their briefs failed to direct attention to the folios where particular rulings on the admissibility of evidence might be found, but we have nevertheless traced and examined each ruling assailed, and found no prejudicial error.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

3 Cal. App. 768

GUIBERSON v. ARGABRITE, Auditor.

(Court of Appeal, Second District, California. June 22, 1906.)

1. Justices of the Peace — Approval of Bond—Presumption.

The approval of the bond of a justice of the peace by the judge of the superior court being the exercise of a judicial function, it will be presumed, when such a bond approved by him is offered in evidence to show that the justice qualified, that when presented to the judge it was, as required by statute, accompanied by an affidavit showing the sureties were freeholders and householders, so as to warrant his approval, though no such affidavit is shown; it not being required to be indorsed on the bond, or to be recorded.

2. Appeal—Presumption.

Though the township in which plaintiff was justice of the peace was formed after the taking of the census of 1900, by which only can its population be determined for the purpose of fixing his compensation for services as such justice, the finding of the court that the population was a certain amount will, in the absence of anything to the contrary, be presumed to have been based on such census, it not being impossible that it could be so determined.

Appeal from Superior Court, Ventura County; J. W. Taggart, Judge.

Application by J. W. Guiberson for writ of mandate to J. L. Argabrite, auditor of Ventura County. Judgment for defendant, plaintiff appeals. Reversed with directions.

Thos. O. Toland and M. J. Rogers, for appellant. Edward M. Selby, for respondent.

ALLEN, J. Application for writ of mandate. Judgment for defendant. Motion for new trial denied. Plaintiff appeals from such judgment and order.

Plaintiff makes this application for a writ of mandate to compel the auditor of Ventura county to issue his warrant upon the treasury of said county for $120 for plaintiff's salary as justice of the peace of Camulos township in criminal cases, for the six months beginning with April and ending with September, 1904. The auditor refused to issue such warrant upon the ground that Camulos township did not have a population of 500, according to the federal census of 1900, and upon the further ground that such justice has not qualified as such by filing an official bond in the form required by law, and that he did not perform the duties of such office. Upon the hearing of the case the court found that Camulos township, since September 6, 1901, has been a duly organized township with a population of more than 500 and less than 1,000; that said justice did not file his bond in the form required by law, and did not enter upon the discharge of the duties of his office, or continue in the discharge thereof, for the time mentioned in the application, and that no salary was due him.

The principal question argued in the original briefs was in relation to the sufficiency of the bond. The record shows a bond in due form of law, indorsed thereon an affidavit of justification by the sureties to the effect that the signers thereof were each property holders and residents within Ventura county. The bond also contained an indorsed approval by the judge of the superior court of the county, together with an indorsement of its filing and record in the recorder's office upon the date of its approval. This bond the court refused to accept in evidence, because it did not appear that the sureties had justified, for the reason that no affidavit was presented showing that the sureties were freeholders or householders, as the statute requires. The refusal to receive such bond in evidence was error, and the finding that no bond was filed has no support in the record. The statute requires that a bond presented to the superior court for approval shall be accompanied by an affidavit showing that the sureties are freeholders and householders. The affidavit is no part of the bond, is not required to be indorsed thereon, nor to be recorded. The statute, however, directs the character of evidence which should be received by the court, and that it should be in the nature of an affidavit presented to him. The approval by the judge was in the exercise of a judicial function (Miller v. Board, 25 Cal. 97), and it will be presumed that he had before him competent evidence warranting the approval, and that the evidence was of the character directed by the statute. We may not say that the affidavit indorsed was the only evidence in that regard, and that no affidavit accompanied the bond containing the things required by law. The approval of the judge was sufficient to entitle the instrument to be recorded and to be received in evidence, the same being in all other respects in due form of law. There is no evidence in support of the finding that the plaintiff did not enter upon and continue in the discharge of the duties of the office; on the contrary, the undisputed evidence is that he did perform such duties.

In a supplemental brief, it is insisted, upon the authority of Chinn v. Gunn (Cal. Sup.) 84 Pac. 669, that Camulos township, having been formed after the census of 1900, contains no population which may be ascertained by such census, and, therefore, is a township within the class and to which section 187, subsec. 13 of the Act of 1901, does not apply. See St. 1901, p. 755, c. 234. This section provides that townships in the class of counties to which Ventura belongs are classified by the population as shown by the federal census of 1900, and that townships having a population of over 500 and less than 1,000 shall be of the fourth class, and townships of less than 500 shall be of the fifth class; that the salary of a justice in criminal matters in townships of the fourth class shall be $20, and of the fifth class $10 per month. It is held by the Supreme Court in Chinn v. Gunn, supra, that this population can only be determined by the census of 1900. The finding of the court that the population is of a fixed amount, in the absence of anything to the contrary, will be assumed to have been based upon such census. The statement on motion for a new trial shows that such evidence as was pertinent to the specifications of error is all that such statement purports to contain. There is no specification in relation to the finding that the township has a fixed population. We do not know what evidence was before the court in its support. That the township was formed after the census of 1900 was taken does not of necessity demonstrate that the population within the new township may not be determined from such census. It may be true that Camulos township is composed of two or more townships which were existing at the date of the taking of the census, and the court was able to determine the population from such aggregate population. In addition to all of this, there is no specification of error in relation to such finding, and, for the purposes of this decision, such population must be accepted. The case is then presented of an official discharging duties in a township having a classification, with a fixed salary, for which services he has presented his claim. It was the duty of the court to have issued the mandate prayed for.

The judgment and order are reversed, and the cause remanded, with directions to the lower court to issue the writ.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 120

PEOPLE v. HEMPLE.

(Court of Appeal, Third District, California. July 18, 1906.)

1. EMBEZZLEMENT—ACTS OF AGENT—ELEMENTS OF OFFENSE.

Under Pen. Code, § 508, defining embezzlement by an agent or servant, it is necessary to prove that the accused was an agent, that the property came into his hands as the property of his employer, that he received it in the course of his employment, and that he appropriated it to his own use with intent to steal it.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 13.]

2. CRIMINAL LAW—BEST AND SECONDARY EVIDENCE—EMBEZZLEMENT.

In a prosecution for embezzlement by an agent of a theater company of money received on the sale of tickets, where the only method of determining how many tickets had been sold was by referring to the racks containing the tickets for sale, or to the stubs of the tickets received at the door, testimony of another agent who followed accused in selling tickets, from a memorandum as to what the stubs and unsold tickets showed, was inadmissible, the original evidence having been immediately destroyed.

3. SAME—HEARSAY.

Testimony from a memorandum as to the contents of a receipt from a theatrical company for its proportion of the receipts for a certain day, admitted in a prosecution for embezzlement, to show the total receipts by the theater company for the day, was hearsay.

4. EMBEZZLEMENT—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for embezzlement *held* insufficient to show that the defendant received the amount alleged to have been embezzled.

5. SAME—QUESTION FOR JURY.

Evidence, in a prosecution for embezzlement, *held* to present a question for the jury as to whether defendant fled to escape arrest.

6. CRIMINAL LAW—INSTRUCTIONS—MODIFICATION OF REQUEST.

Where the court was requested to instruct that to warrant a conviction the prosecution must prove "so clearly and conclusively to your minds," etc., or "so clearly and conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together," there was no error in striking out the phrases quoted and inserting in place of each the words "beyond all reasonable doubt."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1877, 1878.]

7. EMBEZZLEMENT—INSTRUCTIONS.

In a prosecution for embezzlement, where there was evidence that other persons had equal opportunities with defendant to have taken the money, it was error to refuse an instruction that the defendant was the only person on trial, and that if the evidence points as clearly to some other person as the one who committed the crime, as to the defendant, or if the jury entertain a reasonable doubt as to whether the defendant or some other person is the guilty party, the defendant should be acquitted.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

George Hemple was convicted of embezzlement. From the judgment, and from an order denying a new trial, he appeals. Reversed.

T. J. Butts, for appellant. U. S. Webb, Atty. Gen., for the People.

BUCKLES, J. The defendant was charged with embezzling $142.50, convicted, moved for a new trial, which was denied, and was then sentenced to five years' imprisonment. He appeals from the order denying a new trial and from the judgment.

The charging part of the information is as follows: "The said George Hemple was agent and servant to one C. P. Hall, and, being agent and servant as aforesaid, by virtue of his said employment as such agent and servant, there came into the care and control of the said George Hemple, for and on account of the said C. P. Hall, the sum of one hundred forty-two and fifty one-hundredths ($142.50) dollars, lawful money of the United States, and the said George Hemple aforesaid, so received and took into his control and care the said money for and on account of the said C. P. Hall, and afterwards, to wit, on the 5th day of December, 1902, at and in said county and state, the said George Hemple willfully, unlawfully, feloniously, and fraudulently did embezzle, convert, and appropriate the same to his own use, and not in the due and lawful execution of the said trust of him, the said George Hemple. * * *." The information is assailed on the ground that it is not charged therein that the defendant was the agent of Hall at the time of the alleged conversion.

It is charged that defendant received the money as the agent and servant of Hall and that he thereafter unlawfully, willfully, feloniously, and fraudulently did embezzle, convert, and appropriate the same to his own use and not to the due and lawful execution of the said trust. We think this language sufficiently charges the continuance of the trust up to and including the time of the alleged conversion. The allegation is that he received the money on December 5th, and converted it the same day. That he was in the possession of it, if at all, as the agent and servant of Hall, there could be no doubt. He is distinctly charged with having received the money for and on account of Hall and of having feloniously embezzled and converted it to his own use, and not in the due and lawful execution of his trust. The information was sufficient. People v. Johnson, 71 Cal. 384, 12 Pac. 261; People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

The facts are as follows: The defendant was in the employ of C. P. Hall in the theatrical business. His duties under such employment were to advertise coming attractions, prepare tickets for sale of seats, sell them, receive the money therefor, safely keep the same, and turn it over to Hall or his agent Henry on the night of the performance. On December 5, 1902, the "Florodora Company" gave a performance at the Yosemite Theater in Stockton. About a week prior to that time Henry had given defendant instructions about the sale of tickets and the prices to be charged for seats in different parts of the theater, and the defendant began the sale of these tickets at the box office of the theater about the 1st day of December, and continued selling up to shortly after noon on the 5th, when Henry arrived at the box office and took charge. There had been some controversy about the salary defendant was to have. He had been at work at this employment for at least two months and was demanding $75 per month, but had been paid only $50 per month for the two months he had worked up to December 1st. When he learned from Henry that Hall would not pay $75 per month, he left the box office, and never returned. He says he informed Henry as he left that he would work no more at the wages paid and did not care for that kind of work any more and that he was through, and he did quit and left Mr. Henry in charge at the box office. The defendant says he knew the different prices at which he was to sell the tickets and he did sell them at such prices—but no price is mentioned—and put the money for all the tickets he sold in the till, and, so far as he knew, it was all there when he left on the 5th, and that he never appropriated any of it. The testimony of defendant further shows that on the 5th of December, while the sale of tickets was on, he was at the same time engaged in a room across the hall from the box office in arranging the advertising, etc., and when there was a call for tickets he would go across to the box office, sell the tickets and then return to his work in the room across the hall. There were numerous other persons about there, but no evidence that any other person than defendant and Henry had access to the money drawer. There was a lock on the door to the box office, but no evidence tending to show whether it was kept locked when defendant was out, or not. When defendant did not return, Henry says he made a casual count of the money in the drawer, examined the tickets, and concluded the money was not all there. There was about $600 there. Henry continued the sale of tickets, and that night when the show was over he says he counted the money and compared the stubs of the tickets found in the box at the door with the money in the drawer, and found the money was short $142.50. The prices at which the different tickets were to be sold were not placed on the tickets or stubs.

Henry testified, over the objection of defendant, that at the time, December 5th, he made an entry in his account book of the tickets sold, from the stubs in the box, for the "Florodora Show," which he testified to be as follows:

10	seats at $2.00 each............	$ 20 00
325	seats at $1.50 each.............	487 50
193	seats at $1.00 each.............	193 00
48	Box seats at $1.00 each........	48 00
247	Balcony circle seats at $.75 each..	185 25
215	Gallery seats at $.50 each......	107 50
7	admissions at $.50 each........	3 50
	Making a total of.............	$1,044 75

The amount of money in the till or money drawer was then but $902.25. Different prices were indicated by different colored tickets. Both the unsold tickets and the stubs which Henry says he counted in the box at the door of the theater, he destroyed at the end of the performance when he had made the count. He also testified from an entry in a book that he paid the "Florodora Co." $835.80, 80 per cent. of $1,044.75.

The foregoing is the evidence, and the only evidence, so far as can be learned from the transcript, by which it was sought to show that defendant collected and had in his possession from the sale of those tickets the sum of $1,044.75, and the only evidence tending to show that he appropriated $142.50 of it. In order to make out a case of embezzlement of property by an agent, four things must concur, and each must be proven beyond a reasonable doubt: (1) That the defendant was such agent. This fact is admitted in this case. (2) That the property charged to have been embezzled must have come into the hands of the defendant as the property of his employer. (3) That he received it in the course of his employment; and (4) that he appropriated it to his own use with intent to steal it. Pen. Code, §§ 506, 508; Ex parte Hedley, 31 Cal. 108; People v. Gordon, 133 Cal. 538, 65 Pac. 746, 85 Am. St. Rep. 174; 10 Am. & Eng. Ency. of Law, 983 (2d Ed); Pullan v. State, 56 Am. Rep. 21. The money received for the sale of tickets was to be distributed as follows: 80 per cent. of the gross receipts to the Florodora Company and 20 per cent. of the gross receipts to be retained by Hall, and, until this division was made, the whole of the proceeds of the sale of tickets would be the property of Hall, and, therefore, if defendant received the money he is charged with embezzling, it was the property of Hall as charged so far as the purposes of this case are concerned. The first question then, is: Did defendant receive the $142.50? As has been seen there is no direct or positive evidence that he did, and we are simply left to infer he did because he sold tickets at the prices at which they were to be sold and put the money he received therefrom in the money drawer; that Henry found about $600 in the drawer when he took charge, and the evidence of Henry that when he counted the money when the ticket office closed there was $902.25 in the drawer and that when he counted the stubs he found there should have been $1,044.75 there. The tickets were sold at various prices for seats in different parts of the theater, so that to know the aggregate of money which should have been taken in it would be necessary to know just how many tickets of each kind were sold. This could be ascertained in only two ways: (1) To know just the number of tickets of each kind in the rack when the selling began and then count what remained after the selling closed; and (2) to count the stubs of each kind of ticket found in the box at the door of the theater and in each case taking into account passes issued. Henry testified that he concluded there was about $600 in the cash drawer when he commenced selling tickets the afternoon of the 5th, and no accurate count was made until the ticket selling had closed that evening. He then testified, over the objection of defendant, from a memorandum he says he made at the time, that counting the tickets unsold and the stubs in the box, there should have been $1,044.75 in the cash drawer when in fact there was but $902.25. He further says that immediately upon making the count and settling with the show people, he destroyed the stubs and the unsold tickets. Henry says he could not tell how much money was in the till that night when he came to settle with the show people without referring to his memorandum. Under all the circumstances shown in this case, we say it was error to permit Henry to testify from his memorandum. He and defendant were both the agents of Hall, both had sold tickets for that same show that day and all the money both received should have been in the drawer. Defendant testified that he put in the money drawer all the money he received from the sale of tickets, and the evidence shows he had previously borne a good reputation. Henry continued to sell tickets that afternoon, but he does not pretend to say he put all the money he received into the money drawer. Having destroyed the only evidence by which it could be ascertained how much money there should have been in the money drawer, if all the money to represent the tickets sold had gone into the money drawer, and he being equally liable with defendant for this money, he should not have been permitted to testify from the memorandum made by him even though made at the time, for, under the circumstances, it is no more nor less than a self-serving declaration. To further strengthen Henry's position that defendant stole the $142.50, he testifies, over defendant's objection, from what he says is the receipt of the Florodora Company's manager for $835.80, which would be 80 per cent. of $1,044.75, the amount which he says, from his memorandum, should have been in the money drawer, but the receipt was not put in evidence. The receipt of Henry Elsner, the manager of the Florodora Company, seems from the evidence to have consisted merely in signing his name in a book. This was the kind of evidence denominated "hearsay," and the most dangerous to a defendant in a criminal case, who is entitled to be confronted with the witnesses against him that he may cross-examine them. The prosecution deemed it important to show that the Florodora Company had received $835.80, which was 80 per cent. of $1,044.75, in order to support the statement in Henry's memorandum that that sum should have been in the money drawer. Henry Elsner, for aught that appears, might have been brought into court to have testified.

There is absolutely no evidence tending to show that the defendant ever received more money for the sale of tickets than he left with Henry, except what may be inferred from Henry's memorandum and from what he says is Henry Elsner's receipt, and the evidence based upon these two instruments should have been excluded. It is true that after the cross-examination of Henry and the prosecution took him for redirect examination, he testified that he destroyed the stubs and unsold tickets because it was the custom to do so, and that he did not know they would ever be needed. But if there was a shortage in the money he knew it and had also suspected defendant of stealing it. From these facts and the further fact that having the same opportunity of taking the money as defendant had, he would most naturally have saved the evidence by which the crime might have been fastened upon defendant. The errors here pointed out, we think, entitle the defendant to a new trial.

The following testimony was given for and against the theory that the defendant fled: Henry testified that when he came to the ticket office between 12 and 1 o'clock of December 5th, defendant was there and that defendant said nothing about quitting, but soon put on his coat, and went out. Not returning by the middle of the afternoon, he made inquiry for defendant, and got no information as to where he was. Then Henry counted the money and concluded the money was not all there. He telephoned for defendant and remained in the office till 6 o'clock. At that time the defendant had four or five days' wages due him at $50 per month. When Henry did not find the defendant after inquiring at the newspaper offices, his hotel, and his usual haunts, some time that afternoon he reported to the police. Defendant testified that when he left the ticket office the afternoon of December 5th, he went to his hotel, laid down a half hour, then walked around town, and finally took the afternoon train for San Francisco, and did not know he was wanted by any one, and never knew until his arrest that the officers were looking for him. He remained in San Francisco a few days, and went to Petaluma, where he remained for two months, and then went to Camp Meeker and remained in that vicinity—except a few times when he went to the city—until his arrest in July, 1905. During all this time he went by the name of George Hemple, met and talked with officers from San Francisco, and people from Stockton, and knew all the officers and constables about the places he frequented, knew the sheriff of Sonoma county, with whom he did business. That the reason he quit his employers in the unceremonious manner he did was that he had had words with Henry about his salary; that he wanted $75 a month and had been informed he would not get that, and had then told Henry he would quit, and thereupon left. There seems to have been no concealment or attempt on the part of the defendant to keep out of the way of the officers, and we do not think there was sufficient evidence of his fleeing from the place where the crime is alleged to have been committed, or that he attempted to conceal himself to prevent arrest. But as there was some evidence tending to show flight, the jury is left to determine the weight.

The court gave eight instructions of its own motion. Defendant assigns as error all of these. We have read these instructions over, and see no error in any of them. It is the duty of counsel to point out the specific instruction which he believes does not state the law, so that the appellate court may properly test the same.

The next error assigned is that the defendant requested two instructions, which the court modified and then gave. The first was as follows: "To warrant a conviction of the defendant the prosecution must prove *so clearly and conclusively to your minds*, not only that the defendant actually received the sum of $142.50 in cash over and above the sum left in the drawer at the theater, but that he thereafter feloniously, etc." The court cut out the words italicized in the above instruction, and inserted instead the words "beyond all reasonable doubt." In the other the language offered was as follows: "To warrant a conviction of the defendant, he must be proved to be guilty *so clearly and conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together*." The words italicized were stricken out and the following inserted in their stead: "beyond all reasonable doubt." In both of these instructions as the court modified the language, the jury was plainly informed that if the defendant was guilty the proof must satisfy their minds beyond all reasonable doubt of his guilt or he was entitled to a verdict of acquittal, and it seems to us the language tendered by the defendant could have no greater weight or significance. It amounts to but a choice of words in expressing the same thing. We see no error in this. However, the court should give an instruction requested by a defendant which clearly expresses the law, in the language asked.

The court refused the following instruction, which is assigned as error: "I instruct you the defendant George Hemple is the only person on trial before you for this alleged offense, and that if you find from a consideration of all the evidence that it points as clearly to some other person, as the person who committed the crime in question as it does to the defendant, or if, after a fair and full consideration of all the evidence, the jury entertain a reasonable doubt as to whether the said George Hemple or some other person is the guilty party, then it is your duty to acquit the defendant."

A defendant is entitled to have an instruction given when it announces the law, responsive to every element of his defense shown by the evidence. The defendant testified to circumstances and facts that stand undisputed which showed that other persons than himself had opportunities of—in one instance taking the money from the till, and, in another—committing the crime of embezzling the same. On the 5th day of December, while selling tickets at the ticket office, he was also engaged in doing other work in another room across the entrance from the ticket window. This evidence was offered for no other purpose than to show that while defendant was attending to other duties away from the drawer where the money was kept, others had at least the opportunity, however slight, of "tapping the till" and stealing the money. Then, again, the witness Henry who had testified to having discovered the shortage had the same opportunity to appropriate the $142.50 as did defendant. He was but an agent of Hall himself, and handling Hall's money. The defendant proved a good character, and had testified that he sold the tickets at the proper prices, and put all the money received in the money drawer and that so far as he knew, it was all there when Henry took charge. I think that under the facts appearing in this case, this instruction should have been given, and it was prejudicial error to have refused it.

There are many errors assigned relating to the rulings of the court upon the admissibility of evidence, but seeing no prejudicial error in any not referred to here, we will not set them forth.

The order and judgment are reversed.

I concur: CHIPMAN, P. J.

I concur in the judgment: McLAUGHLIN, J.

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4 Cal. App. 48

KOYER v. BENEDICT et al.

(Court of Appeal, Second District, California. July 3, 1906.)

1. Appeal—Necessary Parties.

On appeal from a judgment foreclosing a mortgage by a subsequent grantee of the property who contends that the mortgage was void, his codefendants, the mortgagors, who executed the notes for the mortgage debt and might become personally liable therefor if such contention were sustained, are adverse parties on whom notice of appeal must be served.

2. Same—Service of Notice.

Where it appears that the residence of necessary parties to an appeal is in the same place and was known to the appellants, notice of appeal cannot be served on them by mail, but service must be made at their residence, as required by Code Civ. Proc. § 1011, subsec. 2.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2151, 2162–2164.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by A. S. Koyer against Charles E. Benedict and others. Judgment for plaintiff, and defendant Stull appeals. Appeal dismissed.

Charles S. McKelvey and Gertrude Stull, for appellant. Will A. Harris and Harris & Harris, for respondent.

GRAY, P. J. This is an action upon a promissory note and to foreclose a mortgage given to secure said note. The mortgage and note were executed by Charles E. Benedict and his wife, Martha S. Benedict, to the plaintiff. Summons was duly served upon some 13 defendants, and the defendants so served seem to have defaulted, except the defendant Gertrude Stull, who answered the complaint; and, judgment having gone against her, she appeals from said judgment.

The plaintiff moves to dismiss the appeal upon the ground that no proper service of the notice of appeal was made upon the Benedicts. The Benedicts are interested in the result of the appeal herein, for the reason that if the judgment should be reversed, and the contention of the appellant that the mortgage is null and void be sustained on a new trial of the case, the Benedicts might be left personally liable on the note, with nothing to be derived from a foreclosure sale to satisfy any part of that liability. They were, therefore, adverse parties, and it was necessary that the Benedicts should have been duly served with the notice of appeal. Pending the hearing of the motion to dismiss the appeal, appellant obtained leave of this court to file affidavits showing said service. These affidavits were subsequently filed, and show that service of the notice was attempted to be made by mailing the same in Los Angeles, addressed to the Benedicts in Los Angeles, "at the corner of 20th and Barnard Park, * * * their said place of residence." It appears from this that the residence of the Benedicts was known to the parties making the service; therefore, the service could not be made by mail, but should have been made "by leaving the notice or other paper at his residence, between the hours of 8 in the morning and 6 in the evening, with some person of suitable age and discretion." Code Civ. Proc. § 1011, subsec. 2. The affidavits fail to show that the parties "reside or have their offices in different places," so as to bring the case under section 1012 of the Code of Civil Procedure. On the contrary, the affidavits show that both parties reside in Los Angeles.

The affidavit of W. J. Ford, as we understand it, relates to a former attempted appeal, which was not perfected and is not before us.

The appeal is dismissed.

We concur: SMITH, J.; ALLEN, J.

7 Cal. Unrep. 288

GRAHAM v. BRYANT.

(Court of Appeal, First District, California. July 24, 1906.)

APPEAL—FINDINGS—CONFLICTING EVIDENCE—REVIEW.

A verdict based on conflicting evidence and sustained by the trial court, will not be reversed.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by F. J. Graham against A. M. Bryant. From a judgment for defendant, plaintiff appeals. Affirmed.

George D. Collins and A. E. Ball for appellant. William Cannon, for respondent.

HARRISON, P. J. Action upon a promissory note. The cause was tried before a jury, and a verdict rendered in favor of the defendant. Plaintiff moved for a new trial upon the grounds that the verdict was not sustained by the evidence, and that certain errors of law were committed at the trial. The motion was denied, and from this order the plaintiff has appealed.

The signing of the note by the defendant was conceded, and the only issue presented to the jury was the want of consideration for making the same. Upon this issue there was a direct conflict of testimony between the defendant and the witness for the plaintiff with whom the defendant had the transaction in which the note was signed. It is unnecessary to recount this testimony, since the determination of the jury as to which of these witnesses was entitled to credit is conclusive. The jury were fully and clearly instructed as to the elements necessary to constitute a consideration for the note in view of the evidence before them, and no exception was taken to these instructions. The fact, moreover, that the trial court declined to set the verdict aside is an additional ground for us to hold that it was fully sustained by the evidence. The contract of the defendant in reference to the prosecution of her claim against the Adler estate was properly received in evidence as illustrative of the circumstances connected with her signing of the note sued upon. The exhibit shown to the witness for the plaintiff was offered solely for the purpose of affecting his credibility, and was admissible for that purpose.

The other errors relied upon do not require consideration.

The order is affirmed.

We concur: COOPER, J.; HALL, J.

4 Cal. App. 158

AHLERS v. BARRETT.

(Court of Appeal, First District, California. July 23, 1906.)

1. LANDLORD AND TENANT—UNLAWFUL DETAINER—EVIDENCE—FINDINGS.

In an action of unlawful detainer, evidence *held* insufficient to sustain findings that plaintiff was entitled to possession, and for the recovery of a specified sum as rent.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1248.]

2. APPEAL—ASSIGNMENTS OF ERROR—INSUFFICIENCY OF EVIDENCE—SPECIFCATIONS.

An assignment of error that there was "no" evidence to sustain, or tending to prove, the allegations of plaintiff's complaint, which the court found to be true, was not objectionable for failure to point out the respects in which the evidence was insufficient.

3. SAME.

A specification of error alleged that the evidence was insufficient to justify or support the decision and particularly finding No. 4, for the reason that there was no evidence that at the time of the commencement of the action there was due plaintiff from defendant for rent the sum of $150 or any other sum. Another specification recited that the evidence was insufficient to support the decision, and particularly finding No. 5, for the reason that there was no evidence that there was due or owing plaintiff from defendant for rent of the premises described, in addition to the sum named in finding No. 4, the sum of $300, or any other sum. *Held*, that such specifications were sufficient.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Henry Ahlers against Minnie E. Barrett. From a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, she appeals. Reversed.

George A. Clough, for appellant. George H. Perry and Frank McGowan, for respondent.

COOPER, J. Appeal from judgment, and order denying defendant's motion for a new trial.

The complaint alleges that about September 1, 1902, Eleanor Sudden and others by verbal lease let to defendant the premises known and designated as "103 Eighth street," in the city and county of San Francisco, up to, but not including, the 1st day of May, 1903, at the monthly rent of $25 per month, payable monthly; that defendant entered under the lease, and ever since has continued to hold and occupy the premises; that defendant holds over and continues in possession without the permission of plaintiff and contrary to the terms of the lease; that plaintiff, on the 30th day of September, 1903, notified the defendant in writing that the tenancy of said premises would expire November 1, 1903, but that defendant continued to hold possession notwithstanding demand in writing was made by plaintiff for the possession of the same; that more than three days has elapsed since said demand, and defendant has ever since failed and neglected to deliver up to plaintiff the possession of the said premises; that the monthly rents and profits of the premises is the sum of $25; that about the 1st day of May, 1903, the said Eleanor Sudden and others leased the said premises to plaintiff by a written lease for the term of three years from date, under, and by virtue of, which plaintiff became, and still is, entitled to the possession of the said premises. There is no allegation in the complaint that the defendant has ever failed to pay the rent. Although it is alleged in the complaint that the verbal lease to defendant expired May 1, 1903, it is also alleged that the plaintiff notified defendant that her tenancy would expire November 1, 1903. The defendant in her answer denies the material allegations of the complaint; denies that on the 1st day of May, or at any other time, the said Eleanor Sudden and others executed or delivered to plaintiff any lease of said premises for a term of three years or for any term; denies that by virtue of any written lease the plaintiff is, or ever has been, entitled to the possession of the said premises; denies that the term for which the premises were leased to her has expired; and alleges affirmatively that she entered into possession of the premises under a written lease from said Eleanor Sudden and others, which lease is still in force and effect, and under which she is still entitled to the possession of the premises. The pleadings were verified. The court found that all allegations of the answer are untrue; that the amount of rent due from defendant to plaintiff at the time the action was commenced was $150; and that the amount that had accrued after the action was commenced was the sum of $300, which said latter sum should be trebled. Judgment was accordingly entered for plaintiff for the possession of the premises and for $1,050 and costs of suit. Defendant claims that the evidence is insufficient to support the findings, and the claim must be sustained. The only evidence offered in behalf of plaintiff was his own testimony to the effect that he knows the defendant, and that she lives on the premises described. The defendant testified that she was occupying the premises, and had been so occupying them since 1900; that a paper shown to her was the contract under which she went into possession of the premises. This is all the evidence in the case. The plaintiff showed no title or right of possession in himself. He showed no lease between himself and defendant, or anything to show that the relation of landlord and tenant ever existed between them. He did not attempt to prove that defendant was wrongfully occupying the premises, or that she had made default in the payment of rent. When defendant offered in evidence the writing under which she went into possession, the plaintiff objected to it, and the court sustained the objection. We are at a loss to comprehend the theory upon which the plaintiff submitted the case, or upon which the court made the findings.

Plaintiff contends that the evidence cannot be considered here because the specifications of insufficiency are not sufficient in law. The specifications are sufficient under the liberal rule now followed here. The first one states that there is no evidence to sustain, or tending to prove, the allegations of the plaintiff's complaint, which allegations the court found to be true. If there is no evidence, that is about all that could be said about it. It is not necessary to point out the respects wherein no evidence is insufficient to sustain a finding. It is specified that "the evidence is insufficient to justify or support the decision, and particularly finding 4, for the reason that there was no evidence produced at the trial to prove, or tending to prove, that at the time of the commencement of the action there was due from defendant to plaintiff for rent of the premises described in the amended complaint, the sum of $150, or any other sum." It is further specified that "the evidence is insufficient to justify or support the decision, and particularly finding 5, for the reason that there was no evidence offered at the trial proving, or tending to prove, that there is now due or owing plaintiff from defendant for rent of the premises described in the amended complaint, in addition to the sum named in finding 4, the sum of $300, or any other sum." There are 10 specifications in all, and they certainly called the attention of the plaintiff to the fact that defendant intended to claim that the evidence was insufficient as to the material findings. They were in the nature of a notice to plaintiff which must be regarded with liberality. American Type, etc., Co. v. Packer, 130 Cal. 459, 62 Pac. 744; Standard Quicksilver Co. v. Habishaw, 132 Cal. 124, 64 Pac. 113; Swift v. Occidental Mining, etc., Co., 141 Cal. 168, 74 Pac. 700; Bell v. Staack, 141 Cal. 186, 74 Pac. 774.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

4 Cal. App. 38

PEOPLE v. THORNBURGH.

(Court of Appeal, First District, California. June 27, 1906.)

1. FORGERY—ELEMENTS OF OFFENSE—NATURE OF INSTRUMENT.

A check drawn payable to the maker or order and not indorsed cannot be the subject of forgery, and where the forgery of the indorsement therein is relied upon to constitute the offense, under Pen. Code, § 470, it must be so charged in the information.

2. SAME—SUFFICIENCY OF INFORMATION.

An information charging the forgery of "a certain instrument in writing" which is set out and shown to be a check payable to the maker or order and with his name indorsed thereon does not charge the forgery of the indorsement, which is not a part of the check. but creates a separate contract, nor does it charge a public offense.

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Information for forgery against Herbert T. Thornburgh. Defendant was convicted, and appeals. Reversed.

Wm. S. Barnes and H. H. McCloskey, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of forgery, and the case is before this court on his appeal from an order denying his motion for a new trial, and from the judgment.

The point was made, both upon demurrer and upon motion in arrest of judgment, that the information does not charge a public offense, and this is now the principal point relied upon for a reversal of the judgment. The information charges that defendant "did then and there willfully, unlawfully, feloniously and fraudulently, and with intent then and there to damage, prejudice and defraud one, Ignatz Beck, make and forge a certain instrument in writing, check, draft, order and writing obligatory, in the words and figures following, to wit: 'San Francisco, April 15th, 1905. No. ———. The Crocker Woolworth National Bank of San Francisco. Pay to self or order $10.00 ten dollars. Clearing House No. 21. C. A. Baxter.' Indorsed 'C. A. Baxter.'" And then follows a charge in apt language of uttering the same instrument to Beck.

It is urged that because the instrument set forth in the information appears upon its face to be payable to the maker thereof no one could be defrauded thereby; that the defendant is not charged with forging the indorsement of the name of the maker and payee on the back of the instrument, which makes the instrument in legal effect payable to bearer, but is charged with forging the face of the instrument only. The check set forth in the information, without the indorsement, is not such an instrument as could be the means of defrauding any one. It purports to be an order signed by C. A. Baxter for the payment of money to C. A. Baxter. If the order should be complied with and the money called for paid to Baxter, he certainly would not be defrauded; neither would the payer be defrauded, for, by accepting payment, Baxter would at once be estopped from disputing the genuineness of the signature. So, too, if Baxter indorsed the check, he would be liable on the check as fully as though he signed it. "An order to pay money to one's self cannot be the subject of forgery until the maker indorses it." Com. v. Dallinger, 118 Mass. 439.

This brings us to a consideration of the words following the check set forth in the information, to wit, "Indorsed 'C. A. Baxter.'" In the case of People v. Cole, 130 Cal. 13, 62 Pac. 274, the defendant E. J. Cole was charged with the forgery and utterance of a check which was set forth in the information as follows: "'Sacramento, Cal. Aug. 31, 1899. National Bank of D. O. Mills & Co. Pay to E. J. Cole or order, Ten dollars ($10.00). [Signed] E. J. Cole.' Indorsed on back 'S. B. Smith.'" In discussing the question as to whether or not the information charged a public offense against Cole, the court, after determining that the instrument on its face (without the indorsement) was not a subject of forgery, said: "It is claimed that the indorsement of 'S. B. Smith' was forged. If so, the information should have so stated. It shows that the check was indorsed 'S. B. Smith,' and we must presume that S. B. Smith indorsed it as stated in the information. It is not even hinted that the indorsement was forged or made without the authority of Smith. * * * The information shows the check to bear the indorsement 'S. B. Smith,' but the indorsement is no part of the check. The contract of the indorser is a different and distinct contract from that of the maker. His liability is only conditional and dependent upon circumstances that may never transpire." The cause was remanded, with directions to the lower court to sustain the demurrer.

Applying the doctrine of the Cole Case to the information now before us, we must hold that defendant is not charged with forging the indorsement, but on the contrary we must presume that the indorsement was in fact made by Baxter on the instrument set forth. If this were so, Baxter at once became liable on the instrument set forth as fully as though he had in fact drawn and signed it, and no one could be defrauded thereby. It must be remembered that our statute makes it a crime to forge certain instruments with intent to defraud, and also to forge an indorsement to certain instruments with such intent. Pen. Code, § 470. Where the prosecution relies upon the forgery of the indorsement to make out the crime, it is a very simple matter to expressly charge a forgery of the indorsement.

For the foregoing reasons, and upon the

authority of People v. Cole, supra, the judgment and order are reversed, with directions to the trial court to sustain the demurrer.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 192

DONNELLAN v. WOOD, CURTIS & CO.

(Court of Appeal, Third District, California. July 31, 1906.)

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION—TERMINATION.

A lease of reclaimed land at $10 per acre provided that if, by reason of flood or imperfect reclamation, any part of the land should be submerged or overflowed, so as to be impossible of cultivation prior to June 1st in any year, during the term of the lease, the lessee should not be bound to pay rent for the parts so submerged, and that the lease was subject to cancellation by the lessee by giving notice at any time during the term, should the reclamation not be sufficient to permit the cultivation and farming thereof at seasonable times of the year. On February 26, 1904, the premises were submerged, so that it was impossible to cultivate the land prior to the month of June, and on May 10, 1904, the lessee canceled the lease by notice, and in an action for rent prior to the date of cancellation it was proved that the cultivation prior to February was merely by way of preparation for seeding, and was profitless. *Held* that, the premises having been overflowed prior to June 1st, the lessee was not liable for rent for the first half of the year, payable April 1, 1904.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 777–779.]

2. APPEAL—JUDGMENT FOR PLAINTIFF—PREJUDICE.

Where defendant did not appeal from the judgment in favor of plaintiff for $20, such judgment will not be reviewed on plaintiff's appeal; she not being injured thereby.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4052–4062.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Marion J. Donnellan against Wood, Curtis & Co. From a judgment in favor of plaintiff for less than the relief demanded, she appeals. Affirmed.

A. L. Shinn, for appellant. J. Frank Brown, for respondent.

CHIPMAN, P. J. Action for rent of farming land under the terms of a written lease made by plaintiff to defendant. The land leased (about 531 acres) was situated in reclamation district No. 673, in the county of Sacramento. The lease was entered into October 29, 1902, and was for the term of five years commencing January 1, 1903. The rental was $10 per acre, and was to be paid in equal semiannual installments on April 1st and September 1st during the term. The lease contained, among other provisions, the following: "(5) It is further understood and agreed that if by reason of flood or imperfect reclamation any part of the leased premises shall be submerged or overflowed to such an extent as to render it impossible to cultivate the same prior to the month of June in any year during the term of this lease, the party of the second part shall not be obliged to pay rental for the part or parts that may become submerged or overflowed. (6) It is further agreed that the party of the second part may at its option, cancel this lease by giving notice in writing to the party of the first part, or her duly accredited agent, at any time during the term of this lease, should the reclamation of the leased premises be not sufficient to permit the cultivation and farming thereof at seasonable times of the year." The defense made in the answer was that on February 26, 1904, the premises were overflowed and submerged to such extent as to render all the land impossible of cultivation prior to the month of June, or "to permit of the cultivation and farming thereof at seasonable times of the year"; that under the terms of the lease defendant did, "on the 10th day of May, 1904, cancel said lease by then and there giving plaintiff notice in writing, * * * and that thereafter, on the 11th day of May, 1904, plaintiff signified her concurrence in the cancellation thereof in writing, and then and there signified her intention to and did treat said lease as terminated of said 10th day of May, 1904." There was evidence sufficient to show these allegations to be true, and the court so found. The record contains the following admissions: "That the lease was canceled by the defendant with the consent of the plaintiff and on the 10th day of May, 1094, according to its terms, and that plaintiff took possession of the leased premises on said day; that the reclamation of the premises * * * was not sufficient to permit the cultivation and farming thereof at seasonable times of the year; that the leased premises were flooded on the 1st day of June, 1904." In his letter, replying to defendant's notice of cancellation, plaintiff wrote: "While not admitting that the condition which justified you to cancel the lease existed, I nevertheless concur in the cancellation of the lease, and consider the same terminated of the date of your communication, namely, May 10, 1904, and I hereby demand of you payment of the rent due for said premises up to and including May 10, 1904, amounting to $3,145.85." The complaint was filed May 19, 1904, and the cause was tried in December, 1904.

After the cause was submitted the court of its own motion set the submission aside, "and asked the defendant to introduce evidence as to the use of the premises by the defendant after the 1st day of January, 1904, and the value of such use." Thereupon defendant asked and obtained leave to amend its answer by alleging that the premises were rented for farming purposes, and that from January 1st to February 26, 1904, "defendant farmed and cultivated said premises, but that no rents, revenues, or profits were derived by defendant therefrom; that said premises were not susceptible of farming or cultivation for profit during said time, and that the use thereof was of no benefit to defendant; that from said 26th day of February to May 10, 1904, said premises could not be farmed, cultivated, nor used for any purpose." The amendment was objected to by plaintiff, as also was all evidence thereafter submitted on the question of use and value of use from January 1st to February 26th as not within the issues. It appeared by the evidence that the cultivation given the land prior to February was by way of preparing it for seeding later on in the season, and that all the labor thus bestowed was profitless.

The court found that defendant had used the barns, for the storage of hay, from January 1 to May 10, 1904, which defendant had sold but had not delivered, and which was destroyed by the overflow of the premises, and for "the value of the use of said premises to defendant for the storage of said hay" the court awarded plaintiff judgment for $20, but denied any recovery for the stipulated rental payable April 1, 1904. The court was of the opinion that the defendant might have rested its defense upon the fact that it was wholly deprived of the beneficial use of the leased premises up to April 1st, but the learned judge preferred, as he stated in his opinion, to place his decision upon the provisions of section 1935 of the Civil Code, which provides: "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him." Appellant contends that this section has no application to the leasing of real property, and that the rights of the parties rest alone on the terms of the lease. The question is an important one and ably argued; but, as we do not find it necessary to resort to the statute, we prefer to express no opinion upon the view taken by the trial judge.

Appellant states the question thus: Does the cancellation of the lease, made after rent has become due under the terms of the lease, relate back so as to cancel the obligations that have arisen between the parties before such cancellation? Answering the question in the negative, appellant advances the following propositions, which fairly present the points made in the argument: That the parties through the lease contracted definitely with reference to the time of payment, the condition for revocation, and specially provided conditions upon which rent should not be paid; that an action might have been maintained for rent due under the terms of this lease on the 2d day of April, 1904; that the defendant made it impossible to consider the conditions on the 1st day of June by terminating the contract, and therefore deprived itself of the benefit of that provision in the lease; that, having expressly stipulated that rent should be apportioned with reference to the condition of the land on a certain date, such stipulation excludes an apportionment because of a previous termination of the tenancy; that the surrender of a lease does not operate as a discharge of rent already due; that the right of cancellation under the lease does not declare what the effect of the cancellation shall be, and hence the effect is to leave the parties in the position occupied by them at the time of cancellation with reference to mutual liability. Appellant states the rights of defendant as follows: An election either to hold the lease, pay the amount due on the 1st day of April, 1904, and claim its deduction on the 1st day of June, if the conditions warranted it, or else cancel the lease "according to its terms," and pay whatever was due at the time of cancellation. It may be conceded that some of appellant's propositions are sound and well supported by the authorities cited. For example, it is doubtless the rule generally that the surrender of a lease does not operate a discharge of rent already due. But, after all, the case must rest, as we view it, upon a proper construction of the lease, guided, of course, by recognized rules of law in arriving at such construction. It required no evidence to show, what is patent on the face of the lease, that the parties contracted with reference to the possible overflow of the land, thus rendering it unsuitable for occupation or cultivation. Hence liability to pay rent was made to depend upon the fact that this contingency did not happen, and the right to cancel the lease also depended on the happening of this contingency. There might have been a sudden and transitory submergence of the land by water, prior to June 1st, that would have passed away in time to enable the lessee to cultivate the land. But in order to fix a time beyond which the parties regarded it as impossible to cultivate the land for any given year, the limit was fixed to a time "prior to the month of June"; that is, if the land was overflowed and remained so on May 31st "to such extent as to render it impossible to cultivate the same," the lessee "shall not be obliged to pay rental for the part or parts that may become submerged or overflowed." But that by no means implies that defendant was liable for rent on April 1st, regardless of the then condition of overflow. We cannot agree with plaintiff that he had a right of action and could have recovered for rent on April 2d, admitting, as he does, that at that time the land was so overflowed as to make its cultivation impossible. We think the very terms of the lease preclude such view of the case. It would violate the paramount object, manifestly in the minds of both parties, which was that there should be no payment of rental required if the land was rendered unsuitable for cultivation by reason of overflow. Any other construction would work gross injustice, and this the law will never tolerate unless the parties have, by their contract, so tied the hands of the courts as to make them powerless to administer justice, which is not the situation here.

Appellant would obviate the manifest inequity of holding defendant to the payment of the April installment, notwithstanding that the land was then submerged by several feet of water, as the evidence shows, by giving to defendant the right to recover back the rent on June 1st "if the conditions warranted it." The terms of the lease neither require nor admit of such construction. Cases cited where rented buildings were burned after rent had accrued do not seem to us to be in point, for here the possible use of the land was destroyed some time before April 1st, to wit, February 26th, and this condition continued not only to April 1st, but after June 1st. The water was so deep that it destroyed the hay stored in the barns, and the dwelling was inhabitable in the second story only. The land had ceased to be a farm, and had become a lake. But defendant had agreed to pay rent for land at a stated rate per acre. The risks of overflow were taken by plaintiff, and there would be an utter failure of consideration where the land had become impossible of cultivation from the cause stipulated against. We cannot agree with appellant as to the consequences flowing from the cancellation of the lease. It is true that it does not directly point out the effect of the cancellation, but reading the two clauses together, numbered 5 and 6, and considering the cause for which cancellation is allowable, it is quite evident that, if the cause existed, the lessee had the right not only to cancel, but to be acquitted of the promise to pay rent. Appellant says the effect was "to leave the parties in the position occupied by them at the time of cancellation with reference to mutual liability." What was that position? Simply this: If the premises were "overflowed to such extent as to render it impossible to cultivate the same, * * * the party of the second part shall not be obliged to pay rental."

On May 10th the flood of February was still on, and the parties, with this fact in their minds, mutually agreed that the lease might be and it was canceled. Plaintiff's consent was not necessary to the exercise of defendant's right, but he did consent, and, although demanding rent, it was not made a condition to his consent, and would have availed nothing if it had been. He went into possession and the contract was at an end. We have held that defendant was not liable for rent on April 1st, and, as the premises were overflowed and that was the cause of the cancellation, the "position of the parties" on May 10th was that of mutual nonliability, rather than that of liability of either to the other. It must have been obvious to both parties on May 10th that cultivation of the land "at seasonable times of the year" had become impossible, and such was the fact, as clearly appeared and was admitted. What would have been the liability of defendant had he canceled the lease on May 10th, and had the water subsided, and the land become susceptible of cultivation, "prior to the month of June," we need not consider, for no such event happened. The land was still under water on June 1st. We are unable to discover any legal or equitable ground upon which plaintiff could hope to recover under the lease, in view of the facts and circumstances. So far as the judgment for $20 is concerned, defendant has not appealed, and plaintiff is not injured thereby, although he objected to the evidence on which it rests and stoutly contends that the theory of the law supporting it is erroneous.

Some point is made, but we think not well founded, as to the lack of evidence to sustain certain findings.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

4 Cal. App. 180

BULLY HILL COPPER MINING & SMELTING CO. v. BRUSON et al.

(Court of Appeal, Third District, California. July 28, 1906. Rehearing Denied by Supreme Court, Sept. 26, 1906.)

1. APPEAL—ASSIGNMENTS NOT DISCUSSED IN BRIEF.

Assignments of error not discussed in appellant's brief will be taken as waived.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256–4261.]

2. EASEMENTS — WAY OF NECESSITY — RELATION OF PARTIES.

That there may be a way of necessity the relation of grantor and grantee must have existed between the parties, or persons in their lines of title; and it is not enough that the land was once part of the public domain, and hence owned by a common grantor.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 50–54.]

3. SAME—ABSENCE OF OTHER WAY.

That defendants may have a way of necessity over plaintiff's land it is necessary that there be no other way to reach their lands; and it is not enough that it is the only way by which a wagon can reach them, if a way can be constructed over defendants' lands.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 50–54.]

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by the Bully Hill Copper Mining & Smelting Company against W. C. Bruson and others. From an adverse order, defendants appeal. Affirmed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

C. B. Sessions and Guy Shoup, for appellants. Reid and Dozier, for respondent.

McLAUGHLIN, J. This action involves the right of defendant to use a wagon road about three miles in length, extending from plaintiff's mines and buildings to the main road near Copper City, Shasta county. Plaintiff insists that the road is a private thoroughfare, while defendants insist that it is a public road. It crosses lands owned by plaintiff and other private owners, and public lands of the United States, and at one point passes over land owned by defendant, Shasta Electric Golden Copper Company. In 1877 or 1878 a tramway was constructed for the purpose of conveying ore from mines now owned by plaintiff to a mill near Copper City. In course of time the tramway was abandoned as such, and the ties and rails of which it was constructed were torn up and sold. From 1894 to 1896 the grade, theretofore used for the tramway, was at times freely used by persons having occasion to use the same, but the grade and bridges were so destroyed that it could only be used in places, and no part of it was used by the public generally for any purpose. In 1896 one Sallee, plaintiff's predecessor in interest, widened the grade into a wagon road and constructed the same for his own use and benefit as an appurtenance to said mines, and not for the public use or benefit, and whatever rights he acquired passed to plaintiff as appurtenant to the mines, which were thereafter conveyed to it. The public was not at any time invited, permitted, or allowed to use the road, nor was any person who had occasion to use it invited or given permission to do so. It was not freely, openly, notoriously, or continuously used as a public highway with the consent of plaintiff or its predecessors, but was used by plaintiff and its predecessors in interest for their own convenience and the convenience of their employés.

In October, 1904, defendants Camp and Brown, as lessees of the Shasta Electric Golden Copper Company, commenced the construction of a hotel on land owned by their lessor, near where this road crossed said land, and for the purpose of enabling four and six horse teams to go along said road and bring lumber and supplies to them said defendants widened said road in places and built a bridge and culvert thereon. As soon as plaintiff had knowledge of such work, its agent notified defendants that the road was a private thoroughfare, and later erected a gate across the road at a point on plaintiff's land in order to prevent defendants from using the road and cutting it up with heavy teaming. The only manner in which defendants can reach said hotel or the mines owned by said Shasta Electric Golden Copper Company from any public road by team or wagon is by going over said road. The road was constructed and used by plaintiff and its predecessors for years before the patent to lands owned by the Shasta Electric Golden Copper Company was issued, and the right of plaintiff to use it at any time or for any purpose is admitted. It clearly appears that plaintiff and its predecessors had not only used the road for their own convenience, but that they claimed and exercised the right to control or prevent its use by others. The municipal authorities neither constructed the road nor purchased it from those who did, and the overwhelming preponderance of the evidence shows that it was never directly or indirectly dedicated to the use of the public.

The appellants assign many errors and specify many particulars in which the evidence fails to support the findings in the statement of the case found in the transcript; but, as they do not mention or discuss any of these points in their brief, they must be taken as waived. Bell v. S. P. R. R., 144 Cal. 572, 77 Pac. 1124; Humphrey v. Pope (Cal. App.) 82 Pac. 223. In fact, the brief filed in behalf of appellants is virtually an abandonment of their original position and contention as disclosed by the pleadings. There is no word in the brief touching the public or private character of the road; the sole burden of the argument being that appellants are entitled to use it as a way of necessity. This argument is pregnant with the admission that the road is private, because it necessarily assumes that plaintiff's admitted and acknowledged right must yield to the necessities of defendants. There are many reasons why the contention of appellants in this behalf cannot be sustained. To begin with, no such defense was set up in the answer, and no such issues were tried by the court. But, waiving this, the facts essential to the existence of a way of necessity were not established by the evidence or found by the court. "The right of way from necessity must be in fact what the term naturally imports and cannot exist except in cases of strict necessity. It will not exist when a man can get to his property over his own land. That the way over his own land is too steep or too narrow or that other and like difficulties exist does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

There is nothing in this record to show that the relation of grantor and grantee ever existed between the plaintiff and any of the defendants. The mere fact that all of the land was originally part of the public domain and hence owned by a common grantor cannot confer the peculiar right out of which a way from necessity arises. If, however, it be fully conceded that all other basic facts essential to a way from necessity existed, the vital fact that there is no other way to reach the lands or property of defendants is lacking. True, the court found "that the only manner by which a wagon or team can reach said hotel and said mines of the Shasta Electric Golden Copper Company from any public road is by passing over the roadway hereinbefore described," but this is far from saying that another road to the mines and buildings cannot be constructed over said defendant's lands. Of course, it is very convenient to use a road already constructed in order to reach land along its route, but a way of necessity cannot exist unless there is "no other way." For aught that appears from this record, the defendants might easily construct a road on their own land which would enable wagons and teams to reach their hotel and mines. In the absence of evidence or findings to the contrary, the contention that appellants are entitled to use this road as a way from necessity cannot be sustained.

The order is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

BULLY HILL COPPER MINING & SMELTING CO. v. BRUSON et al.

(Court of Appeal, Third District, California. July 28, 1906. Rehearing Denied by Supreme Court Sept. 26, 1906.)

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by Bully Hill Copper Mining & Smelting Company against W. C. Bruson and others. Judgment for plaintiff. Defendants appeal. Affirmed.

C. B. Sessions and Guy Shoup, for appellants. Reed & Dozier, for respondent.

McLAUGHLIN, J. On the authority of Bully Hill Copper Mining & Smelting Company v. W. C. Bruson et al. (No. 276, this day decided in this court) 87 Pac. 237, the judgment is hereby affirmed.

We concur: BUCKLES, J.; CHIPMAN, J.

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4 Cal. App. 142

PEOPLE v. CRANE.

(Court of Appeal, First District, California. July 19, 1906.)

1. Information—Demurrer.

Where, on demurrer to an information because the facts stated therein did not constitute a public offense, and because it did not state the particular circumstances of the offense, no suggestion was made that any circumstances connected with the offense other than those stated were "necessary to constitute a complete offense," as required by Pen. Code, § 952, the demurrer was properly overruled.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 490-495.]

2. Forgery — Information — Description of Instruments.

Where an information for forgery of a check described it as containing the word "(Signed)" before the name of the drawer, and charged that the entire instrument so set out was false and forged, the information should be construed as alleging that the word "(Signed)" was a portion of the original instrument, and hence the information did not show that the instrument set out therein was a mere copy, which could not have damaged the person receiving it.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 66-76.]

3. Same—Variance—Materiality.

In a prosecution for forgery of a check, the instrument set out in the declaration contained the word "(Signed)" before the name of the drawer. The check offered in evidence was identical in form with that set out in the information, except that the word "(Signed)" was not written thereon. *Held*, that such word was immaterial to the instrument, and that the variance was therefore harmless.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, § 93.]

4. Same—Evidence.

In a prosecution for forgery of a check alleged to have been signed by H. as trustee of an estate, evidence as to whether H. had an account in the drawee bank during the month in which the check was drawn was admissible.

5. Same—Materiality.

Evidence as to whether H., as trustee, had drawn checks payable to defendant was immaterial.

6. Criminal Law—Appeal—Evidence—Prejudice.

In a prosecution for forgery of a check, evidence that the person who purported to be drawer of the forged check had at different times paid defendant his salary in checks was not prejudicial to defendant.

7. Same—Instructions—Duty of Jury.

It was not error in a criminal case for the court to charge that the jury should accept the law as given to them by court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1797, 1798.]

8. Same—Definition of Offense—Reading Statute.

In a prosecution for forgery, it was not error for the court, in instructing the jury on the law applicable to the case, to read to them Pen. Code, § 470, defining forgery.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1811, 1812.]

9. Forgery — Instructions — Uttering Forged Instrument.

In a prosecution for forgery, an instruction that the uttering of a forged instrument by defendant as true and genuine with knowledge that it was a forgery and with intent to defraud would constitute forgery as fully as a forgery of the instrument itself, was proper.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 51-53, 128.]

Appeal from Superior Court, Alameda County.

Arthur Crane was convicted of forgery, and he appeals. Affirmed.

W. Lair Hill, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. The information herein filed against the appellant charges him with having willfully and feloniously uttered and passed to Charles E. Noyes a certain false, forged, and counterfeit check as the true and genuine check of the purported maker thereof, knowing the same to be false, forged, and counterfeit, with the intent to defraud the said Noyes, "which said check is in the words and figures as follows, to wit: 'Central Bank. Savings and Commercial. No. 90. Oakland, Cal., June 3rd, 1905. Pay to Arthur Crane or bearer $18 eighteen dollars. [Signed] D. J. Hall, Trustee Hutchinson Estate,' and which was indorsed on the back thereof as follows: 'Arthur Crane.'" Upon the trial thereof the defendant was convicted of the crime of forgery, and has appealed from the judgment thereon and from an order denying a new trial.

1. The defendant demurred to the information on the ground that the facts stated therein do not constitute a public offense, and that it does not state the particular circumstances of the alleged offense charged. No suggestion is made that any circumstances connected with the offense other than those stated are "necessary to constitute a complete offense"; and, unless such is the fact, the information is not demurrable under the provisions of section 952 (2), Pen. Code.

It is urged, however, by the appellant that, as the information states that the instrument charged to have been uttered by him and passed to Noyes had the word "Signed" prefixed to the name of D. J. Hall, it appears upon its face that it was not the true and genuine check of Hall, but only a copy of the check purporting to have been made by him, and therefore that Noyes could not have been damaged or prejudiced by receiving it. It is without question a very unusual mode of drawing a check for the maker thereof to prefix his signature with the word "Signed"; but as it cannot be said that a check could not be drawn in this form, or that if so drawn such prefix would in any respect qualify the liability of the drawer, it cannot be assumed, as a matter of law, that the prefix did not purport to have been written by him before its delivery. Under the charge in the information that the entire instrument as set forth therein was false and forged, and that the defendant passed the same well knowing that it was false and forged, it must be held that the word "Signed" was included in the information as being a portion of the written instrument which the defendant is charged with having passed as the true and genuine check of Hall. The demurrer was therefore properly overruled.

2. At the trial the prosecution offered in evidence in support of the charge a check identical in form with that set forth in the information, except that the word "Signed" was not written thereon. The defendant objected to its introduction upon the ground that it was not the same instrument which is charged in the information to have been uttered by him. The court overruled this objection, and allowed the check to be read to the jury, to which ruling the defendant excepted. There was no error in this ruling. The rule which in early days prevailed in prosecutions for forgery, that the instrument set forth in the indictment must be an exact copy of that offered in support of the charge, has been in modern days relaxed to the extent that, unless the variance is such that the defendant may have been prejudiced in making his defense, or exposed to the danger of being again put in jeopardy for the same offense, it will be held to be immaterial. See People v. Phillips, 70 Cal. 61, 11 Pac. 493. The requirement that the instrument offered in evidence must conform to that laid in the indictment has reference to its identity and the manner in which it is described. If its identity is so apparent that a conviction or acquittal of the defendant would be a bar to any further prosecution for the same offense, the variance will be insufficient to justify its exclusion. The presence or absence of unimportant words which do not affect the sense of the instrument, or change its identity in any material respect, will not constitute a material variance.

In Wilson v. People, 5 Parker, Cr. R. (N. Y.) 178, upon a trial for the forgery of a promissory note, the note offered in evidence had upon its face the words "Countersigned and registered in the Bank Department," with the signature of the register, A. D. Ward, which were not upon the copy set forth in the indictment. The variance was held immaterial on the ground that those words formed no part of the note. In Alexander v. State, 28 Tex. App. 186, 12 S. W. 595, the instrument set forth in the indictment was as follows, viz.: "Mrs. A. C. Neal. Please send me my diploma by this young man (meaning T. S. Alexander). (Signed) W. W. Wolfe." The instrument offered in evidence did not contain the words included in the parentheses; but the court held that those words, inserted by way of inuendo, did not constitute a material variance. In Cross v. People, 47 Ill. 152, 95 Am. Dec. 474, the defendant was indicted for the forgery of a check purporting to have been made by C. H. Beckwith. The check offered in evidence was signed "C. H. Beckwith" with the word "Randolph" underneath. The variance was held to be immaterial upon the ground that the word Randolph did not explain itself, and might be a check word, or the name of the street in which Beckwith did business. In Trask v. People, 151 Ill. 523, 38 N. E. 248, the indictment for the forgery of a draft set forth a copy of the instrument purporting to have been drawn upon "C. C. Burt & Co., 115 Broadway." The instrument offered in evidence purported to have been drawn upon "C. C. Burt & Co., Broadway, New York." The court held the variance to be immaterial, upon the ground that those words were only a mere description of the drawee's residence, and not a part of the instrument. See, also, People v. Cummings, 57 Cal. 88; Paige v. People, 6 Parker, Cr. R. (N. Y.) 683; Lang-dale v. People, 100 Ill. 263; Sutton v. Commonwealth, 97 Ky. 308, 30 S. W. 661; Smith v. State, 29 Fla. 408, 10 South. 894. This subject was quite fully discussed in People v. Phillips, 70 Cal. 61, 11 Pac. 493, and in People v. Terrill, 132 Cal. 497, 64 Pac. 894, and many authorities are there cited in support of the proposition. In People v. Phillips, the court say: "We think the true rule is that, if the variance does not change the sense in any way, it is not material"; and again: "When in the indictment a word found in the instrument proved is omitted from the instrument as recited, or when a word is inserted in the instrument described which is not in the instrument proved, and the change in no manner or for any purpose alters the signification, the variance is unimportant." The identity of the check in question with that laid in the indictment is so apparent that the court was fully justified in receiving it in evidence. If the word "Signed" had been in fact written as a prefix to the name of Hall in the instrument which was passed by the defendant, it would not have changed the character of the instrument, or in any respect varied its legal import or the apparent obligation of the maker.

3. The several objections of the defendant to the evidence as it was offered, on the ground that the indictment stated no offense, require no further consideration. The objection to the question asked of the witness D. J. Hall, whether he had an account in the Central Bank of Oakland during the month of June, 1905, on the ground that it was "incompetent," was properly overruled. The question asked of the same witness, whether he, as trustee of the Hutchinson estate, had drawn a check payable to the defendant, was immaterial, and should have been sustained by the court; but it is very evident that the answer of the witness, that he had at different times paid him his salary in checks, could in no respect have been prejudicial to the defendant, especially in view of the testimony that the defendant, after his arrest, admitted that the check offered in evidence was forged by him.

4. It was not error to inform the jury that they were to accept the law as given to them by the court, or, in instructing them upon the law applicable to the case, to read to them the provisions of section 470, Pen. Code, defining forgery. It was proper that they should be instructed that the uttering of a forged instrument by the defendant as true and genuine, with the knowledge that it was a forgery and with the intent to defraud, would constitute the crime of forgery as fully as would a forgery itself of the instrument.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 43

CITY OF LOS ANGELES v. GLASSELL et al.

(Court of Appeal, Second District, California. June 30, 1906.)

1. Municipal Corporations — Actions to Recover Taxes—Pleading and Evidence.

St. 1880, p. 136, c. 123, relating to actions by counties and cities for the collection of taxes, prescribing the form of complaint, etc., is constitutional, and where the complaint in an action by a city, whose charter provides that "the mode and manner of collecting such municipal taxes and enforcing such tax lien and the proceedings thereafter shall substantially be the same as the mode and manner at the time prescribed by the law for the collection of state and county taxes in said county," conforms to the requirements of such statute, it is sufficient, and under said provisions, also, the tax roll is made prima facie evidence of plaintiffs' right to recover.

2. Same.

In an action by a city against executors to recover taxes assessed and levied on personal property of the estate, which it is alleged defendants, as such executors, had in their possession and control in said city on the day when the same became assessable, it is not necessary to allege that the testator died in such city.

3. Taxation — Overvaluation of Property —Remedy of Owner.

The remedy for an overvaluation of property in assessment is by appeal to the board of equalization, failing in which the owner is concluded, and cannot set up such overvaluation as a defense pro tanto to an action to recover the taxes.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1199.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the city of Los Angeles against Hugh Glassell and Andrew Glassell, executors. Judgment for plaintiff, and defendants appeal. Affirmed.

McNutt & Hannon, for appellants. W. B. Mathews and Hartley Shaw, for respondent.

WILBUR, Special Judge. This is an action brought by the city of Los Angeles, a municipal corporation, for the recovery of $1,335.18, taxes, with penalties, levied by said municipality upon the property of Andrew Glassell, deceased. The superior court gave judgment for the full amount claimed, and the defendants appeal from the judgment and from an order denying a motion for a new trial.

The complaint is very brief. After alleging the death of Andrew Glassell on January 28, 1901, in the city of Los Angeles, the appointment, on February 19, 1901, of the defendants as executors of his last will, and their qualification as such, it is further alleged: "That said Hugh Glassell and Andrew Glassell, as executors of the last will and testament of said Andrew Glassell, deceased, are indebted to the plaintiff in the sum of $1,335.18, with 10 per cent. penalty added thereto for nonpayment thereof, and interest thereon at the rate of 2 per cent. per month from December 1, 1901, which said taxes were duly assessed and levied by said city of Los Angeles for the fiscal year 1901–02, upon personal property which then and there belonged to and was part of the estate of said Andrew Glassell, deceased, and which said defendants, as such executors, had in their possession and control in said city of Los Angeles at 12 o'clock, noon, on the first Monday in March, 1901. That said personal property so assessed consisted of solvent credits in the amount of $101,605, bonds in the amount of $5,000, and money in the amount of $210." The defendants deny the allegations of the complaint, and allege that they were nonresidents of the city of Los Angeles on the first Monday in March, 1901, admit the ownership of the bonds and money described in the complaint, but deny the ownership of the solvent credits. The finding of the court in regard to solvent credits was that the defendants as executors had in their possession and control in the city of Los Angeles, solvent credits amounting to the sum of $71,756, and no more, at 12 o'clock m., on the first Monday in March, 1901.

Three questions are raised upon the appeal: First, whether the complaint states a cause of action; second, whether the production of the assessment book in evidence was sufficient prima facie proof of all facts essential to recovery; and, third, whether or not a recovery should be had for the full amount of taxes when the solvent credits actually owned were of less value than the amount assessed.

First. It is contended by the appellants that the complaint fails to state a cause of action for the reason that all of the proceedings leading up to the levy of the tax are not alleged in detail, that it is not alleged in the complaint that the property taxed was within the city of Los Angeles, and that no authority is alleged on the part of the city council for the bringing of this action, as is required by the provisions of section 64 of the ordinance of the city regulating the levy and collection of taxes. The respondent claims that the complaint is in the form prescribed by statute as the form of complaint in actions for the recovery of taxes. St. 1880, p. 136, c. 123. The constitutionality of this statute, however, is attacked by appellants upon the authority of People v. Central Pacific R. R. Co., 83 Cal. 393, 23 Pac. 303, in which a similar statute was held unconstitutional. This case was overruled and discredited to such an extent by the Supreme Court in the later case of People v. Central Pacific R. R. Co., 105 Cal. 576, 38 Pac. 905, that it can hardly be considered as an authority upon the question involved in this case, particularly as the earlier decision was brought about in part by an effort to harmonize conflicting provisions in the Code of Civil Procedure and the Political Code, while the construction of the statute in question, enacted subsequent to the Codes, and in form an independent statute, is not embarrassed by that consideration. The complaint at bar, however, in addition to the allegations required by the statutory form of complaint, contains a description of the property assessed, and an allegation that said taxes were "duly assessed and levied * * * upon personal property which then and there belonged to and was part of the estate of Andrew Glassell, * * * which said defendants, as such executors, had in their possession and control in said city of Los Angeles at 12 o'clock, noon, on the first Monday in March, 1901." In San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66, a similar complaint was held sufficient as against a general demurrer. On the authority of that case, it must be held that the complaint at bar sufficiently states a cause of action. It is claimed that, as the complaint fails to state that Andrew Glassell, deceased, died in the city of Los Angeles, it fails to show that the property was within the jurisdiction of the said city, as the personal property of a decedent is taxable at his place of death. But the complaint does show that the defendants had the property taxed in their possession and control in the city of Los Angeles at 12 o'clock, noon, on the first Monday in March. This is the ultimate fact to prove which it may have been necessary to show in evidence that the said decedent died in said city.

The ordinance of the city of Los Angeles with reference to the levy and collection of taxes was introduced in evidence in the court below. Section 64 thereof provides for the collection by suit of taxes amounting to $300 or more. This section corresponds in its language to section 3899 of the Political Code, and was evidently intended as an adaptation of that section to the proper city officials. It has been held that the remedy given by the statute of 1880, above mentioned, is independent and distinct from the remedy provided by section 3899 of the Political Code. Los Angeles v. Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329. If, therefore, the above-mentioned statute of 1880 applies to actions brought by the city of Los Angeles, a similar determination must be reached. This statute by its terms applies only to counties and cities and counties. The charter of the city of Los Angeles, however, contains the following provision: "The mode and manner of collecting such municipal taxes and enforcing such tax lien, and the proceedings thereafter, shall substantially be the same as the mode and manner at the time prescribed by the law for the collection of state and county taxes in said county." This provision is sufficient to authorize the bringing of the suit in question in the same manner as such suit might be maintained by a county.

Second. The sufficiency of the proof in this case is questioned in many particulars, but the respondent relies upon the assessment roll introduced in evidence as sufficient prima facie proof of its right to recover. It is provided in the statute of 1880 (page 136, c. 123), above referred to, that the assessment roll "shall be prima facie evidence of the plaintiff's right to recover." A similar provision is contained in the Political Code (section 3789). These provisions, we think, are made applicable by the provision of the charter of the city of Los Angeles above quoted to actions for the recovery of the municipal taxes.

Third. The plaintiff sued for taxes upon $101,605, solvent credits. The court found the solvent credits subject to taxation to be $71,756, and no more. The question presented, therefore, is whether the remedy of the taxpayer is by an appeal to the board of equalization for a reduction of the amount of assessment, failing in which he is liable for the full amount, or whether he can raise this question as a defense to an action to recover the tax. The determination of the board of equalization with reference to all matters upon which they are competent as a board to pass, and within their jurisdiction as such board, is final and conclusive, and where a remedy is given by an application to this board, that is ordinarily the only remedy, and a failure to follow that remedy concludes the property holder. In People v. Dunn, 59 Cal. 340, it was held by the Supreme Court that while money could not be assessed at more than its face value, solvent credits might properly be assessed at a higher valuation than the face of the obligation. It would therefore follow that the case at bar presents a case of overvaluation rather than of the assessment of nonexisting property, and that the remedy was an appeal to the board of equalization, failing in which the party cannot now complain. Columbia Savings Bank v. Los Angeles, 137 Cal. 467, 70 Pac. 308; Henne v. Los Angeles County, 129 Cal. 297, 61 Pac. 1081.

The views hereinbefore expressed render immaterial the question as to the admissibility of the inventory, and other questions raised with reference to the introduction of evidence. They, therefore, need not be considered.

The judgment and order denying a new trial are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 131

CURTIN et al. v. KROHN et al.

(Court of Appeal, Third District, California. July 18, 1906. Rehearing Denied by Supreme Court September 13, 1906.)

1. Trusts—Enforcement—Refusal of Trustee to Foreclose Trust Deed—Action.

Where the makers of a note executed an instrument, denominated a trust deed, conveying certain realty and notes secured by mortgage to a trustee, creating a distinct and continuing obligation by the makers to reimburse the plaintiffs for all sums expended as sureties on the official bond of one of the makers, and allowing plaintiffs to pay off incumbrances and protect by suit the title to the property, and by which the trustee obligated himself, if possible, to obtain notes secured by mortgage from other sureties, which were to be held in trust for plaintiffs, the plaintiffs, on the trustee's refusal to execute the trust, could maintain a suit in equity to have the respective rights of the parties adjusted and the property sold.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 497, 554.]

2. Same—Nature of Action—Pleading.

In such case the use of the formula, "barred and foreclosed of and from the equity of redemption," in the prayer of the complaint and in the judgment, does not conclusively establish the nature of the action nor impair the validity of the judgment.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Bill by C. Curtin and others against L. W. Krohn and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Raleigh E. Rhodes, for appellants. G. J. Hely, for respondents.

McLAUGHLIN, J. The recitals in the complaint show that on June 3, 1898, the defendants L. W., W. J., H. A., and Louisa Krohn were indebted to the plaintiffs in the sum of $7,000, and to secure the payment of the same executed their promissory note to the defendant Commercial Bank of Madera, reciting therein that said bank was a trustee, and was to pay all moneys paid on the trust note to the plaintiffs in certain designated proportions. At the same time and place the promisors executed an instrument, denominated a trust deed, conveying certain realty, and notes secured by mortgage, to the said bank under conditions, and for purposes therein specifically mentioned. In this instrument the Krohns are designated parties of the first part, the bank, party of the second part, and plaintiffs, parties of the third part. It contains a succinct history of the circumstances under which the indebtedness of the Krohns to plaintiffs accrued, specifically fixes the sums due to each of the plaintiffs, and the proportion in which payments made on the note are to be distributed to them. It distinctly provides that the parties of the first part shall be, and remain, liable to the parties of the third part until the latter are fully compensated for all money paid or advanced by them as sureties on the official bond of L. W. Krohn as tax collector of Madera county. In this connection it was agreed that the second party, if possible, would secure notes from other sureties on said bond; that the third parties would have an interest in any notes so obtained; and the collection thereof and application of payments made thereon is provided for in detail. The performance of assessment work on certain mines, and the distribution of gross profits therefrom, is also provided for. There was also an attempt to regulate the rights of one Kate A. Burke, who held a mortgage on a portion of the property, but was not a party to the agreement. Provision was made for the reconveyance of the property in case of payment, for its sale and the execution of deeds in case of default, for the application of proceeds of any sale, and the return of any surplus to the parties of the first part. The third parties were specially authorized to pay, without notice, and according to their best judgment, all liens and incumbrances on the property, except taxes, and, in their discretion, to contest the payment of the same, and prosecute and defend suits to protect the title to the property. All payments and expenditures thus made were to be deemed secured by the instrument above mentioned. The granting clause in the instrument reads as follows: "That said parties of the first part, in consideration of the aforesaid indebtedness to the parties of the third part, and of one dollar to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note, and of any sum or sums of money with interest thereon, that may be paid or advanced by, or may otherwise be due to the parties of the third part under the provisions of this instrument, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to its successors and assigns, the pieces and parcels of land situate in the county of Madera, state of California, described as follows, to wit."

The parties of the first part having failed to pay the whole or any part of the indebtedness evidenced by the note, according to the terms thereof, the plaintiffs, in writing, demanded that the trustee proceed to sell the premises as provided in the instrument in question, and the second party, in writing, expressly refused to comply with such demand. Thereupon this action was brought by plaintiffs against the first and second parties named in the instrument, and numerous other parties who claimed some interest in the premises. Many of the defendants failed to appear, and their default was duly entered, but L. W., W. J., H. A., J. J., F. W., Louisa, Dora, Theckla, and John C. Krohn appeared, and, by motion to strike out the allegations of the complaint and demurrer, raised the point that the court had no jurisdiction of the parties or of the subject-matter of the action, and the further point that the complaint did not state facts sufficient to constitute a cause of action. The motion and demurrer were overruled, and the court entered judgment, decreeing that the sum of $10,221.60 was due to plaintiffs upon the debt and deed of trust set forth in the complaint, and directing that the property described in said deed of trust be sold, and the proceeds be applied to the payment of the debt due to plaintiffs, and that a judgment for any deficiency be docketed against the parties of the first part named in said instrument. From the judgment so entered, the Krohns, who appeared by motion and demurrer, appeal.

Appellants base their demand for reversal on the single ground that an action to foreclose a trust deed cannot be maintained. If it be conceded that Kraft v. Bryan, 140 Cal. 80, 73 Pac. 745, and Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651, cited in support of this contention, go to the extent of holding that an action to foreclose a trust deed can never be maintained under any state of facts, still we think that these authorities, and the legal principles upon which they rest, cannot be applied here.

To begin with, the instrument under consideration is something more than a trust deed. It defines the rights of the first and third parties in detail, and creates a distinct and continuing obligation on the part of the former to reimburse the latter for all sums expended, as sureties on the official bond of L. W. Krohn or as a result of their suretyship. It allows the third parties to pay off liens and incumbrances, and defend or prosecute suits, to protect the title to the property, according to their own judgment, without consulting anybody, or rendering any account of disbursements, made in this behalf, to the trustee. The trustee obligated himself, if possible, to obtain notes, secured by mortgage, from other sureties, which notes, if obtained, were to be held in trust for plaintiffs, all payments thereon to be applied in payment of the trust note. The conveyance expressly included certain notes and mortgages held by the Krohns against various parties, and all payments made to the trustee thereon were likewise to be applied on the trust note. We cannot imagine how the rights and obligations of the respective parties to such an instrument could be ascertained, adjusted, and conserved without resort to an action of some kind in some judicial form. Indeed, an accounting by the trustee and the third parties, for sums received by the former or expended by the latter, was indispensable, and a sale might have been enjoined until such accounting was had. More v. Calkins, 85 Cal. 188, 24 Pac. 729. The instrument on its face shows that doubt and uncertainty would exist in the absence of such an accounting, and that complications, involving the power of the trustee to sell the land, must result from its very terms, if notes and mortgages from the other sureties were obtained, and the amounts due on the various mortgages assigned by the instrument were paid or unpaid. Under these circumstances a proceeding in equity was necessary to a satisfactory adjustment of the matters involved. Waiving these considerations, however, this case cannot be classed or treated as an action to foreclose a trust deed. Such an action could only be brought by the trustee, while this action is brought by the beneficiaries against trusters, trustee, and others. The trustee having refused to comply with the demand that he execute the trust, the beneficiaries were forced to appeal to a court of equity, and in doing so they, very properly laid all of the facts before the court, and asked for the "usual decree or such decree or order as the court may see fit to make." The court, under such circumstances, would, upon well-established principles, take jurisdiction of the whole subject-matter of litigation, and also decree a sale of the real estate proper. Kraft v. De Forest, 53 Cal. 659; Am. & Eng. Ency. of Law, vol. 28, p. 839; Washburn on Real Property, vol. 2, p. 523; Jones on Mortgages, § 1773. Equity will not permit litigation by piecemeal, but will determine the whole controversy where all the facts and parties are before it. Watson v. Sutro, 86 Cal. 529, 24 Pac. 172, 25 Pac. 64; Booker v. Aitken, 140 Cal. 473, 74 Pac. 11; More v. Calkins, supra. The granting clause clearly shows that the conveyance was made as security only, and it is well settled in this state that trust deeds in the nature of a mortgage convey only a defeasible estate having none of the incidents of ownership except that the trustees are deemed to have such an estate as will enable them to convey. Sacramento Bank v. Alcorn, 121 Cal. 383, 53 Pac. 813. They are in effect mortgages with power to sell. Hodgkins v. Wright, 127 Cal. 692, 60 Pac. 431; Pomeroy, Eq. Jur. 995. Hence, there was no reason in law or logic why the court could not act directly, without forcing the trustee to sell and convey the premises. Under the circumstances, the plaintiffs could maintain an action to have the accounts and respective rights of the parties adjusted and the property sold, and the court could order the sale to be made by its own commissioner. More v. Calkins, 85 Cal. 190, 24 Pac. 729. Under the terms of the instrument, the court could direct a judgment for any deficiency to be entered in favor of the plaintiffs against the four trusters, and its powers as a court of equity extended to a final adjustment of the rights of the parties, to the end that further litigation might be avoided.

A trustee may always apply to a court of equity for aid or directions, and such courts are likewise open to any of the other parties when a dispute as to the existence, character, or terms of a trust arises. And where an accounting is necessary or a question as to the amount due exists, or where a doubt arises as to whether the instrument creating a lien is a mortgage or deed of trust, recourse to a court is the safest, if not the only, course to pursue. Banta v. Wise, 135 Cal. 279, 67 Pac. 129; Godfrey v. Munroe, 101 Cal. 227, 35 Pac. 761; More v. Calkins, 85 Cal. 188, 24 Pac. 729. "Trust deeds to secure payment of a debt are an anomaly in our system, and are admittedly inconsistent with the policy of this state in regard to mortgages." This being the case, it would indeed be a harsh rule that would exclude any of the parties to such an instrument from the courts; hence, "it has only been held that such deeds are not mortgages which require foreclosure." Hodgkins v. Wright, supra. But if it be admitted that the rule absolutely forbids foreclosure of trust deeds, the mere use of the formula "barred and foreclosed of and from all equity of redemption," in the prayer of the complaint and judgment, does not conclusively or otherwise establish the nature of the action nor impair the validity of the judgment. Such formula cannot injure any of the parties, and the rule "superfluity does not vitiate" must be applied. "The law regards form less than substance," and looking at the substantial rights of the parties as disclosed by the instrument, and the subsequent conduct of the trustee, we think the judgment should be, and it is hereby, affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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4 Cal. App. 114

ELIZALDE v. MURPHY et al.

(Court of Appeal, Second District, California. July 18, 1906.)

1. Administrators—Advancement to Widow—Account.

Where an administrator anticipates distribution and advanced funds to the widow, such advancement was not a proper subject for inclusion in the administrator's final account, he being only entitled to reimbursement from the widow's distributive share on final distribution.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1219–1228, 2067.]

2. Same—Attorney's Fees—Expenses—Extraordinary Services.

That an administrator made no claim in prior accounts for an allowance of attorney's fees, expenses, and for extraordinary services, did not constitute an absolute waiver thereof.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2068.]

3. Same—Bonds—Rights of Sureties.

In an action on an administrator's bond, his sureties are not entitled to credit for attorney's fees, expenses, and for extraordinary services to which the administrator never made claim in the probate court, the sureties' right to subrogation with reference to such claims, if any, being enforceable only by petition in the probate court.

4. Same—Administrator's Duty—Extent.

The measure of an administrator's duty is to act with fidelity and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow on his own affairs of a like nature.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 360, 397.]

5. Same—Collection of Assets.

Where the maker of a note received by an administrator was at all times insolvent, and the administrator placed the note in the hands of a collector without being able to realize anything thereon, he was not guilty of negligence because of his mere failure to sue thereon.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 394.]

Appeal from Superior Court, Santa Barbara County; B. T. Williams, Judge pro tem.

Action by Elisa P. Elizalde, as administratrix of the estate of Marcos A. Elizalde, deceased, against P. W. Murphy and others. From a judgment for plaintiff for less than the relief demanded, she appeals. Reversed.

McD. R. Venable and B. F. Thomas, for appellant. W. A. Richardson, W. H. Spencer, and Wm. Shipsey, for respondents.

ALLEN, J. Action upon an administrator's bond. Judgment for plaintiff for a lesser amount than claimed in the complaint. Plaintiff appeals from the order denying a new trial.

It is made to appear in the record that one Graves was appointed administrator of the estate of Elizalde on the 20th day of January, 1894, and executed a bond at the date of such appointment, and certain subsequent bonds, as required by the order of the court; that on May 28, 1898, said administrator filed his second annual account, which was duly allowed, from which it appears that on said date he held in his possession $5,133.50 belonging to said estate; that the administrator died July 15, 1900, without rendering any further account; that after the filing of his said account the administrator received $562 in addition. Upon a trial of this action, the court below found the administrator had received, and was chargeable with, $5,696, and credited him with certain payments not disputed, together with other payments the subject of controversy upon this appeal—one of $940 advanced to the widow as part of her distributive share, and $550 for expenses and attorney's fees to one Leme, and for expenses and extraordinary services of the administrator.

Appellant's contention is that these credits last mentioned were not proper matters to be credited by the court in this action, and no credit therefor should be allowed at the instance of the sureties. With this we agree. In so far as the advance to the widow is concerned, it was not even proper subject of the final account. Estate of Willey, 140 Cal. 240, 73 Pac. 998; Estate of Rose, 80 Cal. 179, 22 Pac. 86. The only rights of an administrator who anticipates the distribution to the widow or heirs and pays in advance of such distribution, is when distribution is ordered to have such payments retired therefrom and receive a credit on account thereof from the distributive share so to be charged. Estate of Willey, supra. It does not even appear that any sum will be due the widow upon final distribution; and it is not material what property may have heretofore been distributed to her, against which the administrator in making the advancements made no claim. Whatever may be the rights of subrogation to which defendants are entitled, the same can only be worked out upon the final decree of distribution. We are of opinion, also, that the allowance of attorney's fees, expenses, and for extraordinary services are matters which can only be adjudicated in the probate court in the final or some subsequent account. The mere fact that the administrator made no such claim when filing his previous accounts should not be taken as an absolute waiver. But the reimbursement to which an administrator is entitled on account of such payments or such services is a right personal to himself, and one which he may waive; and until it is asserted, either by the administrator or by his personal representatives, in an account and upon a petition presented to the probate court, they are not proper subjects of adjudication, and were we to say that this right of the principal on the bond to assert the claim is one to which sureties might be subrogated, yet it must follow that such sureties would be restricted in the enforcement of such subrogated rights to the mode prescribed for their enforcement by the principal. In re Moore, 96 Cal. 526, 31 Pac. 584; In re Levinson, 108 Cal. 456, 41 Pac. 483, 42 Pac. 479. And matters which are the subject of account are exclusively within the jurisdiction of the probate court. Toland v. Earl, 129 Cal. 152, 61 Pac. 914, 79 Am. St. Rep. 100; Estate of Freud, 134 Cal. 336, 66 Pac. 476.

Further objection is made by appellant to the refusal of the court to charge the administrator with the inventoried amount of a note of one Dargie. The court found that there was no negligence upon the part of the administrator in his failure to realize upon this asset. "It is true that when an administrator receives a note, and the maker thereof is solvent, but afterwards becomes insolvent, the burden of proof is on him to show that with due diligence he could not have collected it." In re Moore, 96 Cal. 526, 31 Pac. 584. The measure of an administrator's duty is to act with fidelity and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. In re Moore, supra. There is evidence in the record tending to show that, notwithstanding the return in the inventory, Dargie was at all times insolvent. There is evidence tending to show that the note was placed in the hands of a collector and that nothing could be realized thereon. This being true, were it even to be assumed that the taking of a new note with the insolvent wife as surety was not warranted, yet no loss upon the estate would be entailed. The mere failure to sue does not establish negligence. It is only the failure to proceed when a reasonable prospect of collection is apparent which should be said to be negligence. There being evidence tending to support the verdict of the trial court that there was no negligence upon the part of the administrator, we are not inclined to disturb the same. We find no other errors in the record.

The order is reversed, and cause remanded for further proceedings.

I concur: GRAY, P. J.

SMITH, J. (concurring). I concur in the order of reversal, and also in much of the reasoning of the opinion of Mr. Justice Allen. But the reversal should, I think, be placed on the broader principle, established by the decisions of the Supreme Court, that a suit cannot be maintained against the sureties on an administrator's bond until there has been a settlement of his account, either in the probate proceedings under section 1629 of the Code of Civil Procedure, or by a bill in equity brought for that purpose. Graff v. Mesmer, 52 Cal. 636; Chaquette v. Ortet, 60 Cal. 594; Weihe v. Statham, 67 Cal. 84, 7 Pac. 143; Reither v. Murdock, 135 Cal. 197, 67 Pac. 784; Cook v. Ceas, 143 Cal. 225, 77 Pac. 65. In such a bill brought against the administrator the sureties may, perhaps, be joined (Chaquette v. Ortet, supra); and I can see no objection to this course. But in the present case the administratrix of the deceased Graves was not made a party; and, indeed, the demand of the defendants by proper supplemental pleadings to bring her in as a defendant was denied by the court. This error may be cured by a proper order requiring her to be brought in as a defendant (Code Civ. Proc. § 389); but the question will still remain whether the court will then have jurisdiction of the case. This question, under the existing Constitution and some of the older authorities, is not altogether clear. Generally speaking, the matter of accounts of administrators, like other matters of probate jurisdiction, belongs exclusively to the probate court. Hope v. Jones, 24 Cal. 93; Gurnee v. Maloney, 38 Cal. 87, 88, 99 Am. Dec. 352; Weihe v. Statham, 67 Cal. 84, 7 Pac. 143; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458. This is admittedly the case with regard to administrators generally; and by the express provision of the law an administrator whose authority has ceased, if he is still alive, may be cited to account (Code Civ. Proc. § 1629), and I can see no reason to suppose that it was intended to exclude the administrator of a deceased administrator from the provisions of this section. The language of the section, in describing the case provided for, applies equally to a deceased administrator as to any other; and there is nothing in its provisions to indicate an intention not to include his administrator, except in the use of the word "he," in the expression "he may be cited," etc. His case, I think, comes within the reason, and, therefore, presumably, within the intention of the law. I would have no difficulty, therefore, were the question a new one, in thus construing the provisions of the section. But under the old law there was a similar provision with reference to the probate court (Probate Act [St. 1850, p. 397, c. 129], § 230); and it was held, in effect, that the probate court did not have such authority, and that the account of a deceased administrator could be settled only by a suit in the district court sitting as a court of equity (Bush v. Lindsey, 44 Cal. 121; Wetzler v. Fitch, 52 Cal. 638; Chaquette v. Ortet, 60 Cal. 594; In re Allgier, 65 Cal. 228, 3 Pac. 849); and the rule has since been applied, in at least one case, to the superior court in the exercise of its probate jurisdiction. Estate of Curtiss, 65 Cal. 572, 4 Pac. 578. But with regard to the question of jurisdiction, there is a manifest difference between the old probate court and the superior court sitting in probate. The former had such jurisdiction only as was conferred upon it by the Legislature (Const. of 1849, art. 6, § 8), while under the present Constitution the superior court has jurisdiction "of all matters of probate" (Const. art. 6, § 5); and it has also such equitable jurisdiction as may be necessary to the exercise of its proper functions. Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458; Heydenfeldt v. Superior Court, 117 Cal. 348, 49 Pac. 210; Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; Estate of Freud, 131 Cal. 673, 63 Pac. 1080, 82 Am. St. Rep. 407; More v. More, 133 Cal. 494, 65 Pac. 1044, 85 Am. St. Rep. 166. It would seem, therefore, that, with this extensive jurisdiction, the court must have the power to require an accounting from the administrator of a deceased administrator, either under the provisions of section 1629 and in the mode there prescribed, or by virtue of its general constitutional jurisdiction and in such mode as the necessity of the case may require; and that its jurisdiction in this regard should be held exclusive. I assume, therefore, upon the authority of the decisions cited, that it is within the power of the court in the administration of an estate to adopt as the mode of procedure the form of a bill in equity; and to this no objection can be urged when the suit, as in this case, is in the court charged with the administration of the estate; but in such case, the equity suit must be regarded as merely ancillary to the administration and as a part of the proceedings therein. The court will, therefore, in the present case, upon making the proper parties, have as full jurisdiction to pass on all the questions presented to it as it would have in an ordinary proceeding in the matter of the estate. It will, therefore, not only have jurisdiction of the several questions relating to allowances for extraordinary services, etc., but also to the alleged payment of $940 to Mrs. Victoria Elizalde, who for this purpose should be made a party—as was demanded by the defendants in the case below. As to this, the action of the court should be in conformity with the course pursued in the matter of the Estate of Moore, 96 Cal. 527, 530, 31 Pac. 584, the authority of which case has not been affected by the later decision in Estate of Willey, 140 Cal. 241, 73 Pac. 998. I am of the opinion, also, that the credit claimed by the defendants for administrator's fees should be passed upon, as well as every other question that may arise between the pending estate and the estate of the deceased administrator that could be determined in an ordinary proceeding for the settlement of an administrator's account.

4 Cal. App. 169

BERGEROW v. PARKER, Auditor.

(Court of Appeal, First District, California. July 24, 1906.)

1. Pleading—Application for Judgment—Amendment.

Plaintiff filed a verified complaint for mandamus against defendant, and defendant filed an unverified answer, whereupon plaintiff moved for judgment on the pleadings. *Held*, that plaintiff's motion was in the nature of a demurrer to the answer, and it appearing that the defect could be obviated by amendment, it was within the court's discretion to deny plaintiff's motion and permit defendant to amend.

2. Officers—Disqualification—Arrest for Felony.

Where a constable was arrested for a felony, but the charge was subsequently dismissed without any hearing, neither the arrest nor his incarceration operated as a disqualification so as to create a vacancy in his office.

3. Same—Statutes—Construction.

Pol. Code, § 996, subd. 7, provides that an office becomes vacant by the ceasing of the incumbent to discharge the duties of the office for a period of three consecutive months, except when prevented by sickness or when absent from the state by permission of the Legislature. *Held*, that such section contemplated a "voluntary" abandonment or nonuser of the office for three consecutive months, and that an involuntary failure on the part of an incumbent to perform the duties of his office, caused by his incarceration for a felony during the statutory period, did not operate as an abandonment of the office within such section.

4. Same—Right to Salary.

Where plaintiff held the legal title to the office of constable of a town, he was entitled to receive the salary which attached as an incident to the office.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, §§ 132–141.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action for mandamus by Frederick Bergerow against W. F. Parker, as auditor of Santa Clara county. From a judgment for defendant, plaintiff appeals. Reversed.

B. A. Herrington and George W. Waldorf, for appellant. James H. Campbell, for respondent.

HARRISON, P. J. The appellant was on June 30, 1900, a resident of the township of Alviso, in the county of Santa Clara, and eligible to the position of constable of that township, and was on said day regularly appointed by the board of supervisors of the county of Santa Clara constable of that township to fill a vacancy then and theretofore existing in said office, and on the same day qualified for said position by filing an approved bond and taking the oath of office as required by law, and entered upon the discharge of his duties as such constable. He was arrested July 15, 1900, upon a charge of murder, and was held and prosecuted upon said charge, and confined in the county jail at San Jose continuously from that date until July 26, 1902. On the last-named day, on motion of the district attorney of said county, the said charge was dismissed by the superior court, and the appellant was released from confinement, and immediately returned to Alviso township, and continuously resided there and performed the duties of constable of said township until August 16, 1902, on which day he ceased to be a resident of the county. He never resigned his position or voluntarily ceased the performance of any of the duties of his office, nor did the board of supervisors of the county, or any body with authority so to do, at any time between his appointment and August 16, 1902, declare said office vacant, or take any action therefor or for ousting him therefrom. The defendant is the auditor of the county of Santa Clara, and prior to the commencement of this action the appellant demanded of him that he draw a warrant in his favor upon the treasurer of the county for his salary as such constable at the rate of $25 a month from April 1, 1901, to August 15, 1902, as provided by the county government act of 1901, amounting to $412.50. Upon the refusal of the defendant to comply with his demand he applied to the superior court of said county for a writ of mandate, commanding him so to do. The application was submitted to the court upon an agreed statement of the foregoing facts, and the court found therefrom that the appellant ceased to be qualified to fill and discharge the duties of said office on the 15th day of July, 1900, and that the office became vacant on October 15, 1900, and on that day the plaintiff ceased to be such constable, and was not such constable at any time between April 1, 1901, and August 15, 1902, and held that he "was not and is not entitled to any compensation whatever as constable of said Alviso township for any period subsequent to October 15, 1900." The appellant moved for a new trial, which was denied, and from this order the present appeal has been taken.

1. The complaint was verified, and the defendant filed an answer thereto without verifying the same. Thereafter the plaintiff, upon proper motion therefor, moved the court for judgment upon the pleadings as prayed for in his complaint, upon the ground that the answer on file constituted no defense to his cause of action. At the hearing of the motion the court denied the same, and granted the defendant leave to serve and file an amended answer, to which ruling the plaintiff

excepted, and now assigns such ruling as error. The defendant thereupon filed an amended answer properly verified, upon which the application was subsequently heard and judgment rendered in his favor. A motion by the plaintiff for judgment upon the pleadings is in the nature of a demurrer to the answer (Taylor v. Palmer, 31 Cal. 240); and if, upon the hearing of the motion, it is made to appear to the court that the defect in the answer is owing to any oversight or misprision on the part of the defendant, or that the defect can be so remedied as to present an issue to be tried and determined, it is within its discretion to permit an amendment that will obviate such defect (Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936). The discretion of the court is at all times properly exercised by allowing parties to so frame their pleadings that the controversy between them may be determined upon its merits; and the rule is equally applicable whether the objection arises by reason of the failure to verify a pleading, or in the mode in which the defense has been pleaded. Whenever such defect is pointed out, and the defendant satisfies the court of his ability to obviate it, the court should grant him leave therefor (Kelley v. Kreiss, 68 Cal. 210, 9 Pac. 129; Guidery v. Green, 95 Cal. 630, 30 Pac. 786).

2. The finding that the appellant ceased to be qualified to discharge the duties of his office on July 15, 1900, has no support in the facts upon which the cause was submitted. His arrest and confinement on that day upon a charge of felony did not of itself operate as a disqualification, and would not have the effect to create a vacancy in the office until his conviction upon such charge. As he was never tried upon the charge, and consequently never convicted of the felony, and the charge was subsequently dismissed by the court without any hearing thereon, it must be assumed for the purposes of this case that he was innocent of the offense for which he was arrested. The ground upon which the respondent chiefly relies in support of the judgment is the finding of the court that "the office became vacant and said plaintiff ceased to be such constable on the 15th day of October, 1900, and was not such constable at any time between the 1st day of April, 1901, and the 15th day of August, 1902." It is, however, one of the agreed facts that from the time of the dismissal of the charge against him June 26, 1902, until the 16th day of August, 1902, he performed the duties of constable of that township. His performance of the duties of the office during this period of time, in the absence of any contrary showing, must be assumed to have been by virtue of his right thereto. Whether the duties of the office were performed by any one in his behalf or at all during the period of his confinement in the county jail is not stated in the agreed facts, and is not found by the court; but it is stated therein that the board of supervisors did not at any time after his original appointment to the office take any action declaring said office vacant, or ousting the plaintiff from said office, and that the plaintiff never resigned his position or voluntarily ceased to perform any of the duties of the office. It may therefore be assumed that there was no other incumbent of the office during the period of his confinement. To the extent, therefore, that the court finds that the appellant was not constable during the period between his discharge June 26, 1902, and August 16, 1902, the finding is not sustained by the agreed statement of facts. The finding of the court that "the office became vacant and the plaintiff ceased to be such constable on the 15th day of October, 1900" is based upon the provision of section 996 (7) of the Political Code, that an office becomes vacant by the "ceasing of the incumbent to discharge the duties of the office for the period of three consecutive months except when prevented by sickness, or when absent from the state by permission of the Legislature"; and it is urged that inasmuch as the appellant was continuously held in confinement at San Jose for a period of more than three consecutive months from the date of his arrest, he of necessity ceased to discharge the duties of his office during that period, and therefore at the expiration of three months from his arrest his office ipso facto became vacant. We are of the opinion, however, that this is not a proper construction to be given to this provision of the section, but that, in order to create a vacancy in the office, the cessation to discharge its duties for the designated period must be the voluntary act of the incumbent. The section provides for many of the contingencies upon which a vacancy will be created, and it will be noted that with the exception of the death of the incumbent each of these contingencies contemplates some proceeding against him, in which he will have an opportunity to controvert the ground on which the vacancy is claimed, or some act initiated by himself and voluntarily carried into effect. It is in harmony with the other provisions of the section that, in order to create a vacancy in the office, the cessation to discharge its duties for the period of three consecutive months must have been voluntary on his part, and we hold that such construction must be given to the provision. The provision is to be likened to a case of nonuser or abandonment of the office which, in the absence of any statutory provision, would be a ground for declaring a forfeiture of the office. The period during which such abandonment or nonuser must continue is fixed by the Code at three consecutive months, but as the term "abandonment" of itself implies a volition on the part of the incumbent against whom it is charged, such volition is essential to a cessation to discharge its duties before the penalty can be invoked. At common law a

willful refusal to perform the duties of an office was required in order to work a forfeiture. People v. Hartwell, 67 Cal. 11, 6 Pac. 873.

The present case does not involve the right of the appellant to the office as was presented in People v. Brite, 55 Cal. 79, or the right of the board of supervisors to appoint another in his place, or of such appointee to discharge its duties, as was the case in People ex rel. Fleming v. Shorb, 100 Cal. 537, 35 Pac. 163, 38 Am. St. Rep. 310. Where the office appears to be without any incumbent authorized to discharge its duties, the interest of the public in having it filled so that its duties can be discharged authorizes the proper power to appoint some one for that purpose; but, as was said in People v. Fleming, though it may make an appointment in such cases upon any evidence which is satisfactory to it, "the incumbent of the office is not thereby concluded as to the fact of the occurrence of such event. He may always have his day in court before it can be conclusively adjudged against him that the office was vacant at the time the appointment was made." In the present case the board of supervisors did not appoint anyone to discharge the duties of the office, and after the liberation of the defendant he discharged its duties. The question herein involved is the right of the appellant to the salary which by law is attached to the office, and upon that question the rule is well established in this state that "the right to receive the salary is an incident which attaches itself to the legal title to the office." Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, where many cases are cited in support thereof. In Ward v. Marshall the plaintiff was convicted of willful misconduct in office, and upon his appeal to the Supreme Court the judgment against him was reversed. Upon his conviction in the superior court the board of supervisors appointed another to the office, by whom its duties were discharged and to whom the salary was paid. It was held that, notwithstanding such appointment and payment, Ward was entitled to the salary accruing during the time that he was suspended from the performance of the duties of his office by the erroneous judgment of the superior court. If such be the right of an officer while his place is occupied by an appointee, much less can his right to the salary be disputed where no such appointment is made and he, upon returning from his absence, resumes the office and enters upon his functions without any objection. Ward's right to the salary was sustained upon the ground that "he was without fault on his part and against his consent released from the performance of the duties of the office for the period named." The agreed facts herein not only fail to show that there was any fault upon the part of the appellant, or that there was any voluntary cessation on his part in the discharge of the duties of his office, but instead thereof clearly show that he was prevented from their discharge during the period of his confinement by the direct act of those in whose behalf the defendant herein has presented the aforesaid defense, viz.: the people of the state. We have no hesitation in declaring that such defense is not available against the claim of the appellant; that his title to the office was not impaired by any conduct on his part, and that he is entitled to the salary affixed thereto by law.

The order is reversed.

We concur: COOPER, J.; HALL, J.

4 Cal. App. 176

CRAIG v. DOWIE.

(Court of Appeal, First District, California. July 25, 1906.)

1. Money Paid—Action to Recover—Complaint.

A complaint, alleging that between certain dates plaintiff, at defendant's special instance and request, furnished and paid out to and for the use and benefit of defendant the sum of $2,727.36, which defendant then and there agreed to repay to plaintiff on demand, with legal interest; that, though requested, defendant had not paid such sum, or any part thereof, except $962.46; and that there was owing to plaintiff $1,764.90, with legal interest, etc.—stated a sufficient cause of action.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Paid, §§ 24, 25.]

2. Same—Promise to Pay—Evidence.

In an action for money paid, evidence *held* to sustain a finding that defendant, in consideration of advancements made by plaintiff and another, agreed to repay such portion thereof as should not be repaid from the proceeds of a mission conducted by defendant.

3. Judgment—Remitting Excess.

Where, prior to the taking of an appeal, plaintiff served on defendant and filed in the trial court a document remitting from the judgment certain amounts erroneously included therein, and requesting the clerk to credit on the judgment as of the date of the entry an amount equal to such errors, the errors were cured.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 610, 616.]

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Hugh Craig against John Alexander Dowie. From a judgment for plaintiff, defendant appeals. Affirmed.

Gray & Leet, for appellant. Craig & Craig, for respondent.

HALL, J. This is an appeal from a judgment against defendant for the sum of $1,764.90, together with interest thereon from the 11th day of December, 1888, and costs of suit. The appeal was taken within 60 days from the entry of the judgment.

The first point presented is as to the sufficiency of the complaint as against a general and special demurrer. The complaint alleges: "That between the 9th day of October and the 11th day of December, both inclusive, A. D. 1888, at the city and county of San Francisco, state of California, plaintiff, at the special instance and request of the defendant, furnished, paid, and laid out to and for the use and benefit of defendant the sum of two thousand seven hundred and twenty-seven and thirty-six hundredths ($2,727.36) dollars, which defendant then and there agreed to repay to plaintiff at said city and county of San Francisco on demand, together with legal interest. That, though requested thereto by plaintiff, defendant has not paid the same nor any part thereof, except the sum of nine hundred and sixty-two and forty-six hundredths ($962.46) dollars, and there is now due and owing to plaintiff from defendant therefor the sum of one thousand seven hundred and sixty-four and ninety hundredths ($1,764.90) dollars, with legal interest thereon from the 11th day of December, 1888." The complaint in this case does not differ in any material respect from the complaint in Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998, which was held to be good as against a general and special demurrer in all respects similar to the demurrer in this case. We therefore hold that no error was committed by the court in overruling the demurrer.

The court made findings following the language of the complaint, and the point principally urged for a reversal of the judgment is that the evidence is insufficient to support the findings. It appears that in 1888 the defendant Dowie was engaged in conducting "missions," teaching and expounding certain doctrines and beliefs held by himself. The expenditures sued for in this action were made by plaintiff in connection with a "mission" held at the Grand Opera House in the city and county of San Francisco in that year by defendant, and the vital matter in dispute between plaintiff and defendant is as to whether the expenditures were made by plaintiff as a voluntary offering on his part toward advancing the doctrines taught by Dowie, or were made by plaintiff at the request of Dowie on his promise to repay the same. The testimony given by plaintiff, which is corroborated by witnesses Cadman and Thomas, fully sustains his theory of the transaction. Plaintiff testified that the defendant urged him to advance the money for the expenses of the "mission" at the Opera House, and that "he undertook to make good any deficiency; that he would pay back to me any money that I advanced which did not come back from the collections which were taken at the mission. The collections that were taken at the mission were to be applied to pay back my advances." In regard to the same matter the witness Cadman said (referring to a conference between plaintiff, defendant, and the witness): "He [Dowie] said that he felt that he ought to have a bigger place to hold his meetings, and that if he could get a big mission started he could make a success of it, but that he had not the means to do it with, and he wanted to have the money advanced until the mission was started, and he felt confident that the mission would pay for itself. He said and always said that he would make good any deficiencies, but he felt sure there would be no deficiencies, and it was simply a matter of form to put this money up to pay these expenses until the mission could get on its feet, and that he would make the shortage good if there were any, but he felt sure there would not be any." The testimony of the witness Thomas was corroborative of the foregoing. As against this, appellant urges upon our attention expressions in letters, and conduct on the part of plaintiff, which he claims are inconsistent with the existence on his part of any claim to be reimbursed for his expenditures for the Grand Opera House mission. But all these matters concern the weight of the evidence and the credibility of the witnesses. The trial court having found the facts upon a conflict of evidence, we may not interfere.

Among the items going to make up the amount found by the court to have been expended by plaintiff for defendant are two items for interest paid to a bank for overdrafts, amounting to $30.08. When plaintiff agreed to make the necessary advances to carry on the mission he opened a special account at the bank for the expenditures in connection with the mission, and arranged for an overdraft, agreeing at the closing of the mission to give the bank a check for any deficiency there might be. Plaintiff testified that defendant understood perfectly the method adopted by plaintiff in opening the account with the bank and the matter of the overdraft, and though the testimony, perhaps, is not as clear as it might be that defendant consented to and approved of the payment of this interest on his account, we are not prepared to say that the court was not justified in so holding and charging him with it. The court allowed interest on the demand of plaintiff from December 11, 1888, while the evidence showed that demand was not made for payment of the deficiency before December 31, 1888. The interest for the period between December 11 and December 31, 1888, it is conceded amounts to $8.33, and respondent concedes should not have been allowed to plaintiff. Further, it appeared in the evidence of plaintiff that Cadman (who had agreed to advance one-half of the expenses of the mission until defendant should repay the same) had paid to plaintiff interest on the amount that he, Cadman, had agreed to advance to the amount of $80.48, and respondent concedes that defendant should have received a credit therefor. It was agreed and stipulated by the parties in this court, and the same matter is set forth in respondent's brief, that two weeks before the taking of the appeal in this matter plaintiff served on defendant and filed in the trial court a document, executed by plaintiff, reciting the facts of such errors, and remitting from the judgment, and requesting the clerk to credit upon the judgment as of the date of the entry thereof, the sum of $80.48 and the sum of $8.33. We think that justice will be subserved and the law not violated by recognizing this action of plaintiff as curing the error of the trial court.

The judgment is affirmed, with directions to the trial court to cause a partial satisfaction thereof to the amount of $88.81 to be entered thereon as of date of the 11th day of March, 1905, in accordance with the request of plaintiff filed in said court April 19, 1905.

We concur: HARRISON, P. J.; COOPER, J.

4 Cal. App. 60

SEFTON v. ROACH.

(Court of Appeal, Second District, California. July 6, 1906.)

TENANCY IN COMMON—AGREEMENTS BETWEEN CO-TENANTS—SHARES ON PARTITION.

A contract between two equal owners in common of land that, in case of its sale within a fixed time at a stated price, one of the parties shall first receive a certain sum from the proceeds, the remainder to be equally divided, does not entitle such party to more than an equal share of the land on its partition after the term of the contract has expired.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by J. W. Sefton against Viola M. Roach as executrix and personally. From the judgment, defendant appeals. Affirmed.

Puterbaugh & Puterbaugh, for appellant. Stearns & Sweet, for respondent.

SMITH, J. The suit is for partition of the land described in the complaint, and by an interlocutory decree there was awarded to plaintiff and to defendant, as successors in interest of Henry Roach, deceased, to each an undivided one-half of the land. The defendant appeals from the judgment, and from an order denying her motion for a new trial.

It appears from the findings and the stipulation of facts appearing in the bill of exceptions that, August 8, 1891, the land in question was vested in the plaintiff, who on that day conveyed to Henry Roach an undivided one-half interest therein; and on the same day a contract in writing was executed between Sefton and Roach, wherein, after reciting that the parties "are the owners one-half each" of the property in controversy, occurs the following: "Now, therefore, for the purpose of managing and disposing of said property, it is hereby agreed between the parties hereto, that the said property shall not be sold for less than $30,000 prior to the 1st day of January, 1892, and that thereafter the price of said property is to be advanced $2,000 each and every six months until $40,000 is reached, and thereafter such advance shall be made as may be agreed upon between the parties hereto. It is further agreed, that whenever a sale is effected within the figures above mentioned, then both parties hereto are to execute to the purchaser a deed conveying all their interest in said land. That neither party is to sell or dispose of his interest in said property without the consent of the other, and to act and exercise the highest good faith the one towards the other in the management and control of said property. * * * It is further agreed, that upon the sale of said property there shall be paid to the said Henry Roach out of the first proceeds the sum of $2,000, and that thereafter all sums received from the sale of said lands shall be divided equally between the parties hereto, share and share alike."

It is claimed by the appellant that under, and by virtue of, this agreement Roach "acquired and became vested of a first and prior interest in and to [the land in controversy] to the extent of two thousand dollars over and above an undivided one-half interest therein, and that in equity and good conscience there should first be allotted and set apart to these defendants sufficient of said above described lands, at their present marketable cash value, to equal the full sum of said two thousand dollars." But we can see no grounds for this contention. The agreement, though of the same date, follows the conveyance, and the interests of the parties in the land are expressly stated to be respectively, "one-half." So far as the legal title is concerned, therefore, there can be no question. The claim of the defendant is, therefore, to an equitable title, and we can conceive of no principle upon which this can be based other than that of specific performance. But the agreement is not that Roach should be paid $2,000 out of the proceeds of sale absolutely, but that he should be paid that sum out of the proceeds if sold at the prices mentioned in the contract. Upon familiar principles, therefore, the contract was not susceptible of specific performance subsequent to the year following the date at which the price of the land, according to the terms of the contract, was to be $40,000, which would be June 1, 1894; nor prior to that date, except upon the event of a purchaser being found at the price specified. Thereafter there was no provision for a sale, except upon agreement of the parties as to price; and, indeed, until thus renewed, there was no longer a contract between the parties.

We are of the opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 137

PEOPLE v. LOWRIE.

(Court of Appeal, First District, California. July 19, 1906. Rehearing Denied by Supreme Court Sept. 17, 1906.)

1. Criminal Law—Trial—Reception of Motion to Strike Out—Testimony from Private Record—Evidence.

In prosecution for burglary a witness who was employed by a railroad company as ticket clerk examined certain tickets and testified that one of them was sold by him after 7 o'clock on the evening of April 27, 1905. On cross-examination he testified that he made the statement from the fact that the records of the office showed that a certain number of tickets were used on that evening and that he was the only person there to sell tickets. It appeared that the records were not kept by the witness, whereupon the testimony concerning the records was stricken. *Held*, that the balance of the testimony was admissible, there being nothing to show that the witness had testified as to that from a record not made by himself.

2. Same—Discretion of Court.

Where, in a prosecution for burglary, it was material to show certain sales of railroad tickets, it was not error for the court to admit what purported to be a record kept by the railroad company of the numbers of the daily sales of tickets, prior to its connection being proved, on the statement of the district attorney that he intended to establish that the record was a book of original entries by the testimony of the witness who made the entries.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1611.]

3. Same—Opinion.

In a prosecution for burglary, a question whether there was any way that witness could tell or estimate the time that a certain railroad ticket was sold, from the ticket, of the witness' own knowledge, was not objectionable as calling for the witness' opinion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1035–1055.]

4. Burglary—Stolen Property—Evidence.

Where, in a prosecution for burglary, the state claimed that the works of two watches were part of the property stolen by the person who committed the burglary, evidence of the finding of the works of two watches in a suit case in defendant's room was admissible to prove guilt.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 91.]

5. Same—Exculpatory Circumstances.

In a prosecution for burglary, evidence that a witness examined defendant's room and that she did not find burglar's tools or implements, files, or keys therein was inadmissible to show innocence.

6. Witness' Refreshing Memory—Duplicate Entries.

Where, after a railroad ticket agent's report of daily sales of tickets was made out, a letter press copy thereof was taken from the original, such copy or duplicate might be properly used by the agent who made the original to refresh his memory, to enable him to testify as to ticket sales on a particular date.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 874.]

7. Criminal Law—Appeal—Record—Objections to Evidence—Review.

Where the record on appeal in a criminal case did not show the contents of a letter which was excluded, nor its substance, nor by whom it was written, it would be presumed that the ruling was correct.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3029.]

8. Burglary—Degrees—Evidence.

Where, in a prosecution for burglary, it was shown that, when the family of F. awoke, at 5:30 a. m., they found that the house had been entered during the night and various articles stolen therefrom, the evidence was sufficient to justify a verdict that the entry constituted burglary in the first degree, which depended on the time it was committed.

Appeal from Superior Court, Alameda County.

C. D. Lowrie was convicted of burglary, and he appeals. Affirmed.

W. T. Hume, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant was convicted of the crime of burglary in the first degree, and sentenced to imprisonment in the state prison for the term of 15 years. This appeal is from the judgment and an order denying the defendant's motion for a new trial. We have carefully examined the evidence, and find it sufficient to support the verdict; and hence it is not necessary to discuss it in detail, nor the questions raised as to its sufficiency.

Defendant assigns as error the refusal of the court to strike out the direct testimony of the witness Bailey, who was employed on the 27th day of April, 1905, by the Southern Pacific Railroad Company at the local ferry office as ticket clerk. Bailey, while on the stand, examined a number of tickets shown to him, and testified that a ticket shown to him was sold by him after 7 o'clock on the evening of April 27, 1905, at the ferry ticket office in San Francisco, at the foot of Market street. On cross-examination he testified that he made the statement from the fact that the records of the office showed that certain numbers of tickets were used on that evening, and that he was the only person there to sell tickets. The defendant did not object to the testimony when offered, but moved to strike it out on the ground that the same was incompetent and not the best evidence, which motion was denied, and is the ruling complained of. Without passing upon the question as to whether or not the ruling was erroneous, it is sufficient to say that, after further examination, when it was discovered that the records in the office as to tickets sold were not kept by the witness Bailey, the court, on the defendant's motion, struck out the testimony of the witnesss concerning the record, on the ground that the same was hearsay, incompetent, and irrelevant. After the testimony of the witness as to the record was stricken out, his testimony as to other matters was then competent, for the reason that there was nothing to show that he had testified from a record not made by himself. In all cases where a motion is made to strike out testimony which was not objected to at the time, much discretion is necessarily vested in the trial court. It would require a plain abuse of such discretion in regard to a material matter to justify the reversal of a case for such reason.

There was no error in the ruling allowing in evidence the book of original entries, purporting to be a record kept by the railroad company of the numbers and daily sales of tickets. The court, in the first place, on the objection of the defendant, refused to admit such record, but the district attorney stated that he intended to connect it by the testimony of Kern, who made the original entries. After such statement no further objection was made by the defendant, and the record was received in evidence. The district attorney afterwards called Kern, and identified the record as he promised to do.

The district attorney asked of the witness Bailey the following question: "Is there any way that you can tell or estimate the time that that ticket was sold, from itself, of your own knowledge?" The court overruled the defendant's objection that the question called for the opinion of the witness, and was incompetent, irrelevant, and immaterial, and such ruling is urged as error. The question was not objectionable, and, more than this, the witness answered in effect that he had no way of telling when the ticket was sold except by the record as to the numbers of the tickets sold on that evening.

There is no merit in the contention that the court should not have allowed the witness Freel to testify to the fact of finding the works of two watches in a suit case in defendant's room. The district attorney introduced evidence tending to prove the works of the two watches so found were part of the property stolen by the party who committed the burglary. The burglary is alleged to have been with intent to commit larceny. The fact that stolen property is found in possession of defendant in cases of larceny is always a circumstance tending to prove his guilt. If unexplained, it is a most potent circumstance. The defendant here made no attempt to explain the circumstances as to why the works of the watches were in the suit case in his room. Nor was it error to sustain the objection of the district attorney to defendant's question, asked of the witness Rosenblatt, as to whether or not she examined the defendant's room, and whether or not she saw any burglar's tools or implements, files, or keys around the room. The fact that such tools were not found, if true, would not be competent to prove the defendant innocent.

The defendant seems to earnestly urge that the court erred in admitting the record of the railroad company as to the numbers and report of tickets sold each day, and the testimony of the witness Kern based upon such record. As to the first part of the objection, it appears that the record or report as to the numbers of tickets sold is made up by the agent, who is in charge and sells the tickets, at the end of the day. When the report is made up, copies are made by the use of blank sheets and a wet blotter from the ink on the original report; in other words, letterpress copies of the original are made. The copies are reproductions of the handwriting of the original report. It is but another way of making duplicates of the original entry. If the party who made the original entry had made at the same time several duplicates in his own handwriting they would all be regarded as original entries. Instead of doing this the writing is reproduced from the same characters and the same ink on the original. The duplicates are thus more exact than they could possibly have been by having been copied in the handwriting of the party who made the original. And while it appears that the record as to the closing numbers of the tickets sold on the 26th and 27th days of April, 1905, was offered in evidence by the district attorney, and the defendant's objection thereto overruled, it does not appear that the record was actually received or read in evidence. No copy of any such record is in the transcript. The witness evidently refreshed his memory by the use of the duplicate entries, which he had the right to do. He testified that the closing numbers on the 26th and 27th days of April were in his handwriting. He then testified that the closing number on the 26th was 376,194, and on the 27th 384,752. No objection was made to the witness using the letterpress copies for the purpose of refreshing his memory.

Defendant, in the cross-examination of the witness Conrad, appears to have offered a letter in evidence to which the district attorney objected on the ground that it was hearsay and a self-serving declaration. The court sustained the objection, and the ruling is assigned as error. As the record does not show the contents of the letter, nor its substance, nor by whom it was written, we must presume that the ruling of the court was correct.

There was no error in the instruction to the effect that the jury might, if the evidence warranted, find the defendant guilty of burglary in the first degree. The degree depended upon the time the burglary was committed. When the Fritschie family awoke at about 5:30 o'clock a. m. of the morning of April 28, 1905, they found that the house had been entered during the night and various articles stolen therefrom. The burglar had departed. As to when the entry was made and the property stolen was a question of fact for the jury, and might be arrived at from all the facts and circumstances. There was sufficient evidence to justify the implied finding of the jury that the entry was in the nighttime.

There are no other points sufficiently plausible to merit discussion.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

4 Cal. App. 109

BREE v. WHEELER.

(Court of Appeal, Third District, California. July 16, 1906. Rehearing Denied by Supreme Court September 14, 1906.)

1. ADVERSE POSSESSION—WATER RIGHTS.

No title to water rights accrued by adverse possession, where plaintiff annually interrupted defendant's use.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 232-235.]

2. FRAUDS, STATUTE OF—WATERS AND WATER COURSES—AGREEMENTS—PART PERFORMANCE.

Though Code Civ. Proc. § 1971, and Civ. Code, § 1624, classify water rights as realty, and require written agreements relating thereto, where an oral agreement, actually dividing the water, was acted on and gave to each of the parties possession of one-half the water, and nothing remained to be done, except the execution of a conveyance, a court of equity will protect the rights of the parties.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 334-341.]

3. SAME — AGREEMENTS FIXING WATER RIGHTS.

Where parties have entered into an oral agreement settling disputed water rights, which is carried into effect, and have acquiesced in it for a considerable time, such agreement is not within the statute of frauds.

4. CONTRACTS—REPUDIATIONS.

A party to an executed agreement cannot repudiate it without the other's consent.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1143.]

5. WATERS AND WATER COURSES—AGREEMENT AS USE—ABANDONMENT.

Where plaintiff and defendant orally agreed concerning a division of water rights, and defendant placed in the stream a measuring box for the purpose of dividing the water and, after its use for some time, plaintiff took it out and defendant again, at his own expense, replaced such box, and it was again taken out by the plaintiff, whereupon defendant used all the water, such subsequent use did not destroy his right to the quantum fixed by the agreement.

6. SAME.

Where the parties mutually agreed on a division of water rights, defendant, having been forced to defend his rights, could rely not only on his original claim of right, but on the rights claimed under the agreement and could not be required to elect.

Appeal from Superior Court, Nevada County; F. T. Nyland, Judge.

Action by William Bree against Lewis Wheeler. From a judgment for defendant, plaintiff appeals. Affirmed.

Chas. W. Kitts and Thos. S. Ford, for appellant. J. M. Walling, for respondent.

McLAUGHLIN, J. This is the second appeal in this case—Bree v. Wheeler, 129 Cal. 146, 61 Pac. 782. Upon the second trial, had on amended pleadings, the facts found show that up to 1885 plaintiff was the owner of all the water in dispute and that defendant did not acquire title thereto by adverse possession, or otherwise, unless an agreement, affirmatively pleaded in the amended answer and found by the court, operated to give him the right to one-half of the water.

Plaintiff, who is appellant here, contends that, upon the findings the court should have adjudged him the owner of all of said water instead of decreeing that each of the parties owned one-half thereof. The finding relating to the agreement above mentioned is in substantial accord with the averment of the amended answer in that behalf, and in substance is as follows: In 1885, each of the parties hereto was claiming the water in question, and defendant was using it for irrigating his land, against the protest of plaintiff. They talked the matter over, and it was orally agreed to avoid litigation and in settlement of their respective rights to the use of the water, that they should divide it, the plaintiff taking it during the night, and the defendant during the daytime. This method of division continued for two seasons, whereupon, plaintiff being dissatisfied, the manner of division was changed by mutual consent, and a measuring box was put in the stream which equitably and fairly divided the water, each party taking one-half thereof both day and night. This method continued for two seasons, but in 1889 plaintiff again became dissatisfied, and wrongfully tore out the measuring box. Then a board was placed in the stream by defendant, at his own expense, at a level, with two holes of equal size, to divide the water equally, and plaintiff removed this appliance. The defendant then took all the water, leaving none for plaintiff. After the recital of the foregoing facts, the finding reads as follows: "Defendant continued to divide the water as long as plaintiff would permit him to do so. In order to divide the same it was necessary that a measuring box or other suitable appliance be maintained at the point of diversion. Unless such means of division was maintained, defendant could not divide the water. This condition of affairs continued from 1889 until the commencement of this action." As the plaintiff interrupted the defendant's use annually, no title by adverse possession could accrue, and hence the rights of the latter, and the validity of the judgment depend entirely upon the effect of the compromise agreement or settlement.

Water rights are classed as real property, and hence, under the general rule, any agreement relating thereto must be in writing. Code Civ. Proc. § 1971, Civ. Code, § 1624; Hayes v. Fine, 91 Cal. 498, 27 Pac. 772; Blankenship v. Whaley, 124 Cal. 304, 57 Pac. 79. But in the case at bar the agreement was acted upon by placing a measuring box in the stream, and actually dividing the water, and by mutual consent of the parties each was placed in possession of one-half thereof. To complete the transfer nothing remained to be done except the execution of a conveyance, conveying a proper proportion of the water to each. Each had a perfect equity, entitling him to a deed from the other. When such is the case, a court of equity, in accordance with its familiar rules, considering that as done which ought to be done, will protect the right obtained "as readily and as fully as a legal title." Flickinger v. Shaw, 87 Cal. 133, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Blankenship v. Whaley, supra, and 142 Cal. 566, 76 Pac. 235; Griseza v. Terwilliger, 144 Cal. 462, 77 Pac. 1034; Bates v. Babcock, 95 Cal. 486, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Bigelow on Fraud, vol. 2, p. 445. There is another principle of law under which the agreement must be held binding. It has been held repeatedly and with practical unanimity that an oral agreement fixing a dividing line between owners of land is not within the statute of frauds, and that when the line is in doubt or dispute a settlement between the owners determines the location of the existing estate of each, and when followed by possession and occupancy, binds them in equity and at law as well. "If the parties have carried the agreement into execution, and entered into possession in accordance with it, the courts will not disturb it, though both parties were mistaken as to the true location of the line." Jones on Real Property, §§ 354, 358; White v. Spreckels, 75 Cal. 610, 17 Pac. 715; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604. "It is the policy of the law to give stability to such an agreement, because it is the most satisfactory way of determining the true boundary, and tends to prevent litigation." Cavanaugh v. Jackson, 91 Cal. 582, 27 Pac. 931; Dierssen v. Nelson, 138 Cal. 398, 71 Pac. 456. This doctrine is based on the common-sense proposition that when a dispute exists between two parties, they may adjust their differences by mutual agreement, which, when executed by them will be held binding as to each, and we can think of no reason in law or logic why the principle thus applied to land should not be applied to a case where the parties have deliberately entered into an agreement settling disputed water rights, which agreement was immediately carried into effect, and was acquiesced in for a considerable period of time. And if such an agreement relating to land cannot be disturbed by the parties after it has been carried into effect, a similar executed agreement relating to another class of real property must be held equally efficacious. Jones on Real Property, §§ 358, 359. It must, therefore, be held that plaintiff could not repudiate the agreement made, carried into effect, and acquiesced in by him and by defendant. True, both might, by mutual agreement, repudiate it, but neither alone could do so. The court expressly finds that defendant performed the agreement as long as he was permitted to do so by plaintiff, and his subsequent use of the water did not destroy his right to the quantum fixed upon by mutual consent. It is the fixed policy of the law to encourage the settlement of disputes and the prevention of litigation, and when such settlement has been made, acted upon and acquiesced in, parties will not be permitted to violate the compact unless circumstances of fraud or undue influence are shown. Downing v. Murray, 113 Cal. 462, 45 Pac. 869; Pomeroy, Eq. Jurisprudence, § 850. The agreement was sufficiently pleaded and proved. The defendant was not required to elect whether he would claim title to all or only part of the water. Having been forced into court to defend his rights, he was at liberty to rely not only on his original claim of right, but upon the rights claimed under the compromise agreement. Miles v. Woodward, 115 Cal. 314, 46 Pac. 1076; Banta v. Siller, 121 Cal. 418, 53 Pac. 935. It would be strange indeed if the plaintiff, relying on his original claim and free to assail any and all rights claimed by defendant, could confine the latter to rights obtained under an agreement, which by the very commencement of the action plaintiff was attempting to repudiate. The findings are not inconsistent. The court in effect finds that plaintiff had a right to the whole of the water which right was impaired only by his voluntary act in entering into and effectuating the agreement which vested in defendant the right to one-half thereof.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

149 Cal. 680

In re HAYDEN'S ESTATE. (Sac. 1,493.)

(Supreme Court of California. Sept. 14, 1906. Rehearing Denied Oct. 11, 1906.)

1. Wills—Probate—Proceedings.

An heir of a decedent, in his petition for letters of administration, alleged the intestacy of decedent. Another person filed a petition in opposition to the granting of administration and alleged that decedent died testate and prayed for the probate of her will. *Held*, that the failure of the heir petitioning for administration to file a written opposition to the probate of the will, as required by Code Civ. Proc. § 1312, did not deprive him of a standing in the appellate court, on appeal from a judgment refusing the probate of the alleged will, where throughout the proceedings in the trial court the pleadings were recognized as sufficient to raise an issue on the matter.

2. Same—Burden of Proof.

It is incumbent on one petitioning for the probate of a will of a decedent to make satisfactory proof of the will, and, if he fails to do so, the trial court must, though there is no opposition to the probate, refuse probate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 653-659.]

3. Appeal—Finding on Conflicting Evidence—Conclusiveness.

A finding of the trial court on conflicting evidence will not be disturbed on appeal, where the testimony depends on the credibility of the witnesses.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

4. Wills — Probate — Findings of Trial Court—Sufficiency.

In a proceeding for the probate of a lost will, the petition alleged that decedent died leaving a will, and that W. and a servant, or some person acting with them and under their direction, concealed the will wherein W. was disinherited for the purpose of enabling him to obtain the property. The court found "that F. nor W., nor any other person, * * * carried away any will * * * belonging to * * * decedent, * * * that said F. nor W. ever at any time * * * had in their possession any will of" decedent, "nor are they, or either of them, in the possession of any will, * * * nor did they, or either of them, ever have in their possession * * * any will" of decedent. *Held*, that the omission of the word "neither" before the name of F. did not render the finding insufficient on which to base a decree refusing the probate of the will.

5. Same.

A finding of the court that the allegations of a party seeking the probate of a will of a decedent, "with respect to" decedent "leaving any will or any person having in their possession any will of" decedent, "are untrue," is sufficient to justify the refusal to admit the will to probate.

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

In the matter of the estate of Sarah C. Hayden, deceased. From a judgment refusing the probate of an alleged will of the decedent, Frederick H. Collins appeals. Affirmed.

See 81 Pac. 668.

A. H. Carpenter, for appellant. Nicol & Orr and E. P. Foltz, for respondent.

HENSHAW, J. Sarah C. Hayden died in the county of San Joaquin on the 6th day of June, 1904. After her death A. L. Westing, her grandson, and one of her heirs, applied for letters of administration upon her estate, alleging her intestacy. About nine months before her death Mrs. Hayden, who had become paralyzed in the latter part of the year 1902, and who had failed physically and mentally from that time, was declared incompetent, and Westing was appointed her guardian and continued to act as her guardian until the time of her death. Frederick H. Collins, a nephew by marriage of the deceased, filed a petition in opposition, alleging that Mrs. Hayden had died leaving a last will and testament, and that Westing and a hired servant, or some person acting with them and under their direction, had taken, carried away, and concealed the last will and testament wherein Westing was disinherited for the purpose of enabling him to obtain the property for himself. The petition set up what was alleged to be a copy of the will and a codicil thereto. The court refused probate of the alleged will and granted letters of administration to Westing, and from these decrees these appeals are taken.

It is first contended that as no written opposition to the probate of Mrs. Hayden's will had been filed, as required by the provisions of section 1312 of the Code of Civil Procedure, respondent has no standing before this court, but as Westing himself in his petition for letters of administration had alleged the intestacy of the deceased, and as throughout the proceedings in the trial court the pleadings were recognized as sufficient to raise issue upon this matter, appellant's position is not well taken, and even if respondent were not to be heard, as it was incumbent upon appellant to make satisfactory proof of the will, and he failed to do this to the satisfaction of the trial court, it was the duty of the trial court, even without opposition, to have refused probate to Mrs. Hayden's purported will. There was testimony to show that deceased had made a will and a codicil thereto. There was, however, no testimony that Westing, or anybody acting with or under him, had ever seen or had possession of the will, much less that they had feloniously taken, concealed, or destroyed it. There was also evidence that, if the will was made, it was revoked by the deceased in her lifetime; the testimony showing declarations of the deceased that she did not have a will, and that they, meaning Collins and those in interest with him, were endeavoring to induce her to make a will. The case is typical of the wisdom of the rule so long enunciated and adhered to by this court that it cannot and will not disturb a judgment given upon conflicting evidence. Much of the weight of the testimony in this case of necessity depends upon the standing and credibility of the witnesses upon either side, as to which the trial court, and not this, is alone capable of judging.

The appellant contends that the findings are enigmatical and uncertain. The finding to which this attack is addressed is as follows: "That Annie Fogacci nor A. L. Westing, nor any other person, took or carried away any will or codicil, or other document of value belonging to said Sarah C. Hayden, for the purpose of enabling A. L. Westing to fraudulently or at all get possession of the property of said Sarah C. Hayden, or for any other purpose whatever; that said Annie Fogacci nor A. L. Westing ever at any time found or had in their possession any will of said Sarah C. Hayden, deceased, nor are they, or either of them, in the possession of any will of Sarah C. Hayden, nor did they, or either of them, ever have in their possession or under their control any will whatever of said Sarah C. Hayden, deceased." While unquestionably the finding would have been made clearer by the insertion of the word "neither" before the name "Annie Fogacci," this omission does not nullify the finding, as the context makes perfectly plain what the court meant to declare.

The finding of the court that the allegations of the opposition of Frederick H. Collins "with respect to Sarah C. Hayden leaving any will, or any person having in their possession any will of Sarah C. Hayden, deceased, are untrue," is sufficient as a finding to justify the court's refusal to admit the alleged will to probate.

We have examined the alleged errors of the court in admitting and rejecting evidence. None of the points call for detailed consideration. It is sufficient to say that the rulings were proper.

The orders and decrees appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

149 Cal. 667

RIPPERDAN et al. v. WELDY et al. (Sac. 1,448.)

(Supreme Court of California. Sept. 4, 1906. Rehearing Denied Oct. 4, 1906.)

1. Appeal—Findings—Conclusiveness.

The finding of the trial court on conflicting evidence cannot be reviewed on appeal.

2. Cancellation of Instruments—Confidential Relations—Presumptions.

Where no confidential relation existed between a grantor and a grantee, no presumption against the validity of the deed on the ground of undue influence arose.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 100.]

3. Appeal—Findings—Conclusiveness.

Where, in a suit to set aside a deed on the ground of the incompetency of the grantor, the court on the testimony of the subscribing witnesses testifying in favor of the grantor's mental soundness, and intimate acquaintances testifying both in favor of and against the grantor's competency, found in favor of the grantor's competency, the court on appeal could not interfere with the finding, for the question related only to the weight of the evidence.

4. Interest of Witness—Evidence—Weight of Testimony.

Though, under Code Civ. Proc. § 1879, a witness interested in the event of the litigation is a competent witness, the fact of his interest is a proper matter for the trial court to consider in weighing his testimony.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2439.]

5. Trial—Findings—Finding of Ultimate Fact in Issue.

A finding, in a suit to set aside a deed on the ground of the grantor's incompetency, that on the day the deed was executed the grantor was "entirely competent, mentally and physically, to transact the business of executing and delivering * * * a deed," and that at that time the grantor "was in full possession of his mental faculties and fully understood the transaction," necessarily involves the inference that the grantor was not entirely without understanding, within Civ. Code, § 38, providing that a person entirely without understanding has no power to make a contract, and is a finding of the ultimate fact in issue.

6. Appeal — Review — Construction of Findings.

Findings must be construed so as to support the judgment, rather than defeat it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3769.]

7. Deeds—Future Estates—Validity.

Under Civ. Code, § 767, providing that a future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate or on the termination of a precedent estate created at the same time, a conveyance to take effect at the grantor's death and reserving to him the use of the property during his life is valid.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 381.]

8. Cancellation of Instruments — Pleadings—Issues.

Where, in a suit to set aside a deed, the complaint set forth an ordinary deed, and alleged that the same was procured without the consideration and by the undue influence and fraud of the grantee, and that the grantor was incompetent, which allegations were denied, the court could not determine that the conveyance was void because creating a trust not authorized by Civ. Code, § 857, specifying for what purposes trusts may be created.

9. Deeds—Failure of Consideration—Effect.

A deed made freely, voluntarily, and without fraud, by one who is competent, passes title, though the consideration may fail in whole or in part.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 38.]

10. Same.

Civ. Code, § 1608, providing that, where any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void, applies only to contracts which are executory, at least in part, and does not permit a grantor who has received and retained the consideration for the conveyance to recover the property on the sole ground that the consideration was unlawful in part.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 200-205; vol. 11, Cent. Dig. Contracts, §§ 701-712.]

Department 1. Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action by A. K. Ripperdan and others against Nancy E. Weldy and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robert L. Hargrove, for appellants. W. H. Hatton and L. J. Maddux, for respondents.

SLOSS, J. This action was brought by the plaintiffs, heirs, devisees, and legatees of Isaac Ripperdan, deceased, to set aside a deed of certain real estate and a bill of sale of personal property made by Ripperdan on the 4th day of May, 1901, to Nancy E. Weldy and Jennie W. Jones. The complaint sets forth, as grounds for the relief sought, unsoundness of mind of the deceased, as well as undue influence and fraud exercised by the grantees, and alleges that the defendant Nancy E. Weldy occupied a confidential relationship toward the grantor, and that there was no consideration for the transfers. It is alleged, further, that the grantees had, after delivery of the deed to them, conveyed portions of the land to other defendants, who, it is asserted, took with notice of the incompetency of Isaac, and of the undue influence and fraud practiced by the defendants Weldy and Jones. The prayer is for appropriate equitable relief. The defendants answered, denying all of the allegations of incompetency, undue influence and fraud, and denying, necessarily, any notice by the grantees of Weldy and Jones of any such defects in the original conveyance. The answer also denies the existence of any confidential relation and the want of consideration. After an extended trial the court made its findings, which were in favor of the defendants on every issue, and judgment for said defendants for their costs followed. The plaintiffs appeal from the judgment and from an order denying their motion for new trial.

The main contention of the appellants is on their appeal from the order, and is based on the insufficiency of the evidence to support the findings. As has been said, the trial was protracted. The statement on motion for a new trial shows that some 50 witnesses were examined. It would be impracticable for us to analyze and discuss the testimony of each of these witnesses. Without undertaking such task, we have no hesitation in saying that, on the issues as to which the defendants' evidence was not preponderating or undisputed, there was, putting appellants' case in its strongest light, a distinct and substantial conflict of evidence, which imposed upon the trial court the duty of determining the disputed facts. Nothing is better settled in this court than the rule that, on appeal, the verdict of a jury or the finding of a trial court on conflicting testimony cannot be reviewed. The nature of the testimony and of the questions which were presented to the trial court may be indicated by a brief statement of facts which appeared substantially without dispute. Isaac Ripperdan was a farmer or "rancher," who had for many years been living on his property in Stanislaus county. He was a bachelor. In 1876, Nancy E. Weldy, his niece, with her husband and children, one of whom is the defendant Jennie W. Jones, came to live with him. Thereafter, until his death in 1904, Mrs. Weldy acted as his housekeeper. It is plain from the evidence that in that capacity she made herself very useful, and that a strong attachment existed between uncle and niece. On May 4, 1901, when the deed and bill of sale now in controversy were made, Isaac Ripperdan was 85 years of age. He was, physically at least, somewhat enfeebled by his advanced years, and suffered from impaired eyesight, due to an injury sustained some years before. On May 4, 1901, he conveyed all of his real and personal property, of the value, as found by the court, of about $50,000, over and above incumbrances, to Mrs. Weldy and Mrs. Jones. At the same time and as part of the same transaction they executed an agreement by which, in consideration of the deed and bill of sale, they agreed to provide him, during his life, with board, lodging, clothing, and, if needed, medical attention; to allow him the use of a room in the dwelling on the property conveyed, and free access to all the premises; to furnish him with a buggy and team, and to care for the same; and to pay him the sum of $2,000 a year in quarterly installments during his natural life. They further agreed not to sell or convey any part of the premises during his lifetime. Upon the execution of these documents, Nancy E. Weldy and Jennie W. Jones took possession and control of the premises and the personal property. They thereafter managed the farm, borrowed in their own names the money that was needed to carry on operations, and in all ways assumed and claimed ownership of the property. In June, 1902, an agreement was made modifying the restrictions upon sale contained in the agreement of May, 1901, by permitting the sale of portions of the premises to pay the indebtedness on the lands. Under this modification, the conveyances by Weldy and Jones to other defendants, set forth in the complaint, were made. Isaac continued to live upon the property, and the agreement with him seems to have been faithfully carried out. He enjoyed the care and privileges which Mrs. Weldy and her daughter had contracted to give, and there was evidence that the payments provided for were made to him. In 1888 he had made a will, in which, after giving Nancy Weldy a life interest in the "home place" (a portion of the property here in dispute), he divided the bulk of the residue of his estate between his brothers, sisters, nephews, and nieces, who are the plaintiffs here. Upon his death the will, in which Nancy was named as executrix, was offered for probate. This action was commenced after the will was filed, but before it was admitted to probate.

Most of the testimony at the trial was directed to the question of Isaac's mental condition, and it is to this point that the argument of appellants is principally directed. So far as the issues of fraud and undue influence are concerned, the evidence for the defendants was certainly ample to support the findings, if, indeed, it did not decidedly preponderate. The court was fully justified in finding, as it did, that no confidential relation existed, and, this being so, no presumptions against the validity of the transfer arose. On the issue of the grantor's competency, mentally, to transact business of this character, many witnesses testified on either side. Most of them qualified as "intimate acquaintances" of Isaac Ripperdan (Code Civ. Proc. § 1870), and as such gave opinions "respecting his mental sanity." Generally speaking, the plaintiffs' witnesses expressed the opinion that he was not, in May, 1901, mentally capable of transacting important business, while the contrary view was expressed by the witnesses called by the defendants. The subscribing witnesses to the deed and bill of sale of May 4, 1901, also testified to their opinion in favor of the grantor's soundness of mind. Code Civ. Proc. § 1870. The court, in determining the ultimate fact, evidently regarded the testimony of defendants' witnesses as better entitled to credit. This question relating, as it did, purely to the weight of evidence, was peculiarly for the trial court. With its conclusion we cannot interfere. As to several of the witnesses, appellants argue that they were "interested financially, and therefore disqualified from giving an opinion." But an interest in the litigation does not, of itself, work any such disqualification. By section 1879 of the Code of Civil Procedure it is provided that "neither parties nor other persons who have an interest in the event of an action or proceeding are excluded" as witnesses. "At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes." Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180. Probably counsel do not intend to claim that these witnesses were in a strict sense not competent to testify, but rather that their interest was such that no weight or credence should be given to their testimony. But that is not a question for this court. The interest of the witnesses on either side was undoubtedly a proper matter for the trial court to consider in weighing their testimony; but, whether a witness be interested or not, it still remains for that court to determine whether, under all the circumstances, his testimony is to be credited or not. The witnesses stated the reasons on which their opinions were based, and their conclusions were no doubt weighed in the light of their reasons. Apart from these opinions, there was a good deal of evidence regarding the relations of the parties and the circumstances surrounding the transactions in question. Much of it had a bearing, one way or the other, on the question of Isaac's mental condition. Without undertaking any more elaborate statement of the facts shown, we repeat that, after a careful examination of the record, we are satisfied that the evidence as to competency was ample to sustain the findings.

Appellants contend, further, that there was no sufficient finding on the issues as to Isaac's competency. The court found "that on said 4th day of May, 1901, said Isaac Ripperdan was entirely competent, mentally and physically, to transact the business of executing and delivering to Nancy E. Weldy and Jennie W. Jones, defendants, the deed of conveyance and bill of sale hereinbefore mentioned; that at the time of the execution and delivery of said deed of conveyance and bill of sale by said Ripperdan to said Nancy E. Weldy and Jennie W. Jones the said Isaac Ripperdan was in full possession of his mental faculties and fully understood the transaction." It is objected that the court has merely found that Isaac was "competent to transact business." Appellants claim that competency or incompetency is a conclusion of law, to be drawn from facts, and that there should have been a finding on the fact of soundness or unsoundness of mind. The cases cited do not sustain the proposition that competency or capacity to contract may not properly be found as an ultimate fact, but if we should concede the rule to be as claimed, the finding that Isaac Ripperdan "was in full possession of his mental faculties and fully understood the transaction" amply covers the issue. Civ. Code, § 38, provides that "a person entirely without understanding has no power to make a contract of any kind. * * *" Section 39 reads: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code." In the one case the contract is void, in the other merely voidable. See More v. Calkins, 85 Cal. 177, 24 Pac. 729. In the case at bar no rescission has been or is attempted. Plaintiffs claim that the deed and bill of sale were absolutely void from the beginning. They attempted to establish a case within the purview of section 38. The phrase "entirely without understanding," as used in that section, means a want of capacity to understand transactions of the kind involved. Jacks v. Estee, 139 Cal. 507, 73 Pac. 247. It is impossible that a person without the capacity of understanding a particular transaction can in fact understand it. The finding, therefore, that at the time of the execution and delivery of the deed and bill of sale Isaac Ripperdan "fully understood the transaction," involves necessarily the inference that he was not "entirely without understanding," and is a finding of the ultimate fact in issue. Findings are to be construed so as to support the judgment, rather than defeat it (Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986), and when, from the facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

The appellants base several contentions upon the fact, shown by the evidence, that the deed and bill of sale of May 4, 1901, were executed, together with the agreement above mentioned, whereby Mrs. Weldy and Mrs. Jones agreed that he should, to a certain extent, have the use of the property during his life, that they would give him certain care and attention, and that they would pay him $2,000 a year during his life. It is claimed that all the instruments must be read together, and that, so read, they constitute a conveyance to take effect at the grantor's death, reserving to the grantor the use and enjoyment of the property during his life. If this construction were adopted, it would not affect the validity of the deed as a conveyance. Any objection to which deeds creating estates to commence in future may have been subject at common law (Hawes v. Stebbins, 49 Cal. 369; Chandler v. Chandler, 55 Cal. 270) has been removed in this state by section 767 of the Civil Code (Blakeman v. Miller, 136 Cal. 139, 68 Pac. 587, 89 Am. St. Rep. 120). Again, the argument is made that the effect of the various instruments of May 4, 1901, was to transfer the property to Mrs. Weldy and Mrs. Jones in trust for the maintenance of the grantor during his life—a purpose which, it is claimed, is not authorized by Civ. Code, § 857—or that, if the trust be valid, it terminated at the grantor's death, and there is a resulting trust in favor of his estate. We need not consider whether any trust was created or sought to be created by the transaction of May 4, 1901, for the reason that the question is not within the issues made by the pleadings. The complaint sets forth an ordinary deed and bill of sale, which, it is alleged, were procured without consideration by the undue influence and fraud (false and specious promises) of the defendants Weldy and Jones, and which were signed by one incompetent to transact business. These allegations were denied. The complaint nowhere charged that there was a conveyance upon express trusts, whether for authorized or unauthorized purposes. No issue was presented which would have authorized the court to set aside the deed except for fraud, undue influence, or incompetency. A determination that the conveyance was void because made in trust for purposes not permitted by the Code, or that it conveyed no beneficial interest beyond the life of the grantor, would have been outside of the issues, and a finding of facts from which such determination followed would, if made, have been entitled to no consideration.

Finally, with reference to this agreement, it is argued that the provision against alienating the estate during the lifetime of Isaac is void, and that with it the consideration for the deed fails. If the deed transferred a title in fee simple, a covenant by the grantees that they would not transfer the property is void, as repugnant to the interest created by the deed. Section 711 of the Civil Code declares against repugnant conditions restraining alienation. "But the rule does not depend upon the mere form in which the restraint is imposed. It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor. Such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression." Prey v. Stanley, 110 Cal. 423, 42 Pac. 908. But the mere fact that a part of the consideration for the transfer consisted of a covenant which could not be legally enforced does not make the deed absolutely void. A deed made freely, voluntarily, and without fraud by one who is competent passes title, even though the consideration may fail in whole or in part. Whether the consideration failed or became void, so as to afford a basis for rescission, is another question, which does not arise here. If the invalidity of the promise not to convey the property during Isaac's life furnishes a ground for rescission under sections 1689, 3406, and 3407 of the Civil Code (which may well be doubted), such ground has not been alleged, nor such relief sought. Appellants contend that under section 1608 of the Civil Code the entire contract is void if any part of the consideration is unlawful. Whatever may be the effect of this section as to contracts which are executory in whole or in part, we are satisfied that it cannot be construed so as to permit the grantor of property, who has received and retained the consideration for his conveyance, to recover the property conveyed upon the sole ground that the consideration was unlawful in part. It is the general rule that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are in pari delicto, the courts will not interfere to disturb the acquired rights of either at the instance of the other. 9 Cyc. 549; Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; McGregor v. Donnelly, 67 Cal. 149, 7 Pac. 422; Patterson v. Doner, 48 Cal. 369; St. Louis, etc., R. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Brower v. Fass (Neb.) 83 N. W. 832. In view of this rule (in support of which many more cases might be cited), section 1608 must be held to have application only to contracts which are, in part at least, executory.

There are no other points which, in our opinion, require special notice.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(149 Cal. 392)

EGRESSY et al. v. STANSBURY et al. (L. A. 1,873.)

(Supreme Court of California. July 2, 1906.)

1. Appeal — Briefs — Filing — Time — Dismissal.

Where the time for filing appellant's points and authorities expired prior to April 18, 1906, and no points and authorities were filed up to May 7th, on which date a motion to dismiss the appeal was filed, the motion must be granted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3108–3110.]

2. Same — Holidays — Effect.

The act of the Governor in proclaiming legal holidays, beginning with April 19, 1906, was inapplicable to the right of an appellant to file his points and authorities on an appeal, the time for the filing of which had expired before any holidays were proclaimed.

In Bank. Appeal from Superior Court, Los Angeles County.

Action by S. Egressy and another against Charles Stansbury and another. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal. Granted.

Cole & Cole for appellants. L. M. Fail, for respondents.

PER CURIAM. The motion of respondent to dismiss the appeal in the above-entitled cause is granted. The time for the filing of the appellant's points and authorities expired long before the 18th day of April, 1906. No points and authorities had been filed up to the 7th day of May last, and on that day the motion to dismiss the appeal was filed in this court. The act of the Governor in proclaiming legal holidays, beginning with the 19th of April last, could have no effect whatever upon the right of the appellant to file his points and authorities in a case such as this, where his time had expired before any holidays were proclaimed.

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4 Cal. App. 78

WEMPLE v. YOSEMITE GOLD MIN. CO. et al. (Civ. 180.)

(Court of Appeal, Third District, California. July 9, 1906.)

1. Mines and Minerals—Mortgages—Mining Claims—Description.

When a mortgage on a mining claim was executed the mortgagor held a deed for an undivided interest in the "Slap Jack Mine," and also a deed of a mine known as the "Jim Blaine Mine," located by W., the boundaries of which coincided with the "Slap Jack Mine." The mortgage described the property as the "Jim Blaine Mining Claim," being the property located by W. on January 1, 1899, of record, etc., together with all mining property described in the deed of conveyance made by B. to the mortgagor, of record, etc. It was thereafter determined that the location of the "Jim Blaine Mine" by W. was ineffectual, and that B.'s deed to the mortgagor conveyed nothing. *Held*, that the description was sufficient to pass the interest acquired by the mortgagor in the "Slap Jack Mine."

2. Mortgages—Parties—Junior Lienors.

Code Civ. Proc. § 726, provides that no person holding a conveyance from or under the mortgagor of the property mortgaged or having a lien thereon, which conveyance or lien does not appear of record at the time of the commencement of the foreclosure proceedings need be made a party to the action, etc. *Held* that, where a junior mortgagee, whose mortgage appeared of record before the commencement of a suit to foreclose the senior mortgage, was not made a party to such suit, the rights of the junior mortgagee and his assignee were unaffected by the foreclosure decree.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1692.]

3. Same—Redemption.

Where the holder of a junior mortgage was not made a party to a suit to foreclose a senior mortgage, the holder of such junior mortgage was only entitled to redeem as against the senior mortgage so foreclosed.

4. Same—Redemption—Effect.

Where the holder of a junior mortgage on certain mining property was not made a party to a suit to foreclose a senior mortgage, and the property was redeemed by the successors in interest of the mortgagors, such redemption operated as a payment of the senior mortgage debt, and the senior mortgage would not, therefore, be kept alive in equity for the benefit of the redemptioners as against the holders of the junior mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1878–1886.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by E. H. Wemple against Yosemite Gold Mining Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. A. Blanchard, for appellant Gold Min. Co. J. P. O'Brien and Crittenden Hampton, for appellant Britton. W. C. Kennedy, F. W. Street, and W. M. Beggs, for respondent.

CHIPMAN, P. J. Foreclosure of mortgage. Plaintiff had judgment from which, and from the order denying their motion for a new trial, all the defendants, except the Yosemite Gold Mining Company, appeal. After the complaint was filed, the Yosemite Gold Mining & Milling Company was made a party defendant as the grantee of the Yosemite Gold Mining Company. The Yosemite Gold Mining Company (hereinafter referred to as defendant company) executed its mortgage to one Joseph Marsden, plaintiff's assignor, on October 25, 1899, which was, on October 27, 1899, duly recorded in the office of the county recorder of Tuolumne county. The land mortgaged embraced several mining claims, and among them a claim called the "Jim Blaine Mine," also called the "Slap Jack Mine." Defendants other than the defendant company, were alleged to have or to claim some interest in the premises. They disavowed any interest in any of the claims, except the "Slap Jack Mine," which they averred included the same ground as the "Jim Blaine Mine." As to this mine they averred that their title was superior and adverse to any title of the defendant company, the mortgagor, or of plaintiff; they also averred that plaintiff's said mortgage was without efficacy as a lien upon their said mine; also that a first and prior mortgage upon the "Slap Jack Mine" had been foreclosed and the property sold thereunder, and that whatever title the defendant company, or any person from whom it claimed, ever had, was "lost and merged in the foreclosure of the first and prior mortgage." The court found that a $^9/_{20}$ interest in the "Slap Jack Mine" was incumbered by the mortgage sued upon, and decreed foreclosure thereof accordingly. It is from this part of the judgment that defendants appeal. The so-called "Slap Jack Mine," the mortgaged premises, was located by one Walter J. Coyle on January 1, 1896. An attempt was made to relocate the same ground, as that embraced in the "Slap Jack Mine," under the name of "Jim Blaine Mine," by one McWhirter, on January 1, 1899, but it was found by the court to have been ineffectual, the ground not then being open to location by any one, and this finding is not challenged. By deed dated August 6, 1896, Coyle conveyed an undivided one-fourth of this mine, each, to Harry Argall, F. L. Argall, B. Griswold and F. L. Emerson. By deed, dated August 6, 1896, the Argalls conveyed to Jacob Miller an undivided $^1/_{20}$ interest in the mine. The title then stood $^9/_{40}$ in each of the Argalls, $^{10}/_{40}$ in defendant Griswold, $^{10}/_{40}$ in defendant F. L. Emerson and $^2/_{40}$ in defendant Miller. The court found that at the commencement of this action there was, and still is, pending a suit to quiet the title of the defendants, the Emersons, Britton, and Miller as plaintiffs against the Argalls, Yosemite Gold Mining Company and Yosemite Gold Mining & Milling Company, and that the action was at the time of the present trial on appeal to the Supreme Court, and undecided. On June 23, 1897, the Argalls, Griswold and said F. L. Emerson (Miller not joining) mortgaged their interest (being $^{19}/_{20}$) to secure a promissory note for $1,600 executed to said Joseph Marsden, who, on October 25, 1899, assigned the note and mortgage to one H. A. Blanchard. As certain rights are now claimed by appellants to have arisen out of this mortgage, by reason of its antedating the mortgage in suit, it becomes necessary to trace its history. Blanchard brought suit to foreclose on November 5, 1899, making the mortgagors parties defendant, and also E. L. Emerson, Jacob Miller, F. F. Britton, and A. L. Emerson, alleging that the last four named defendants claimed some interest in the mine. The Argalls, E. L. Emerson, and Miller, not answering, their default was duly entered. The other defendants answered. Neither Marsden, mortgagor of the mortgage in the present suit, nor his assignee, Wemple, was made a party defendant to the Blanchard foreclosure suit, although the mortgage now in suit was of record when the Blanchard foreclosure suit was commenced. In this latter action, decree of foreclosure was duly entered February 23, 1900, and sale by commissioner, H. A. Hardinge, of $^{19}/_{20}$ interest in the mine was ordered and afterwards made to Peter Berg on March 31, 1900, and certificate of sale was issued to him. Within 12 months, certain defendants in that action, namely E. L. Emerson, F. F. Britton, and A. L. Emerson, successor in interest of said judgment debtors, tendered to Peter Berg and also to Commissioner Hardinge the money necessary to redeem from the foreclosure sale, and demanded the assignment of the certificate of purchase, but were refused. Thereafter, to wit, on March 27, 1901, these same three defendants commenced an action to enforce redemption, claiming to own $^{19}/_{20}$ interest in said mine as successors of the Argalls, Griswold, and F. L. Emerson, as judgment debtors in the Blanchard foreclosure action. The defendants in the redemption suit answered, denying most of the allegations in the complaint set forth, and specifically denying that plaintiffs were, at the commencement of the suit, or ever were, the owners or interested in the property in question. Defendants subsequently filed an offer to allow said Britton, E. L. and A. L. Emerson to redeem said mine upon payment of a certain stated amount. E. L. was the husband of Mrs. A. L. Emerson. This offer was accepted and, by consent, judgment for the redemption was entered in favor of Britton, Emerson, and Emerson and they received the certificate of sale and on September 7, 1901, a judgment was entered adjudging that Britton, Emerson, and Emerson had redeemed said mine, from said foreclosure sale, within the time allowed by law, as successors in interest of the judgment debtors, the Argalls, Griswold, and F. L. Emerson, and that the judgment and decree has become final and has been fully satisfied; that on November 6, 1899, when said foreclosure action was commenced by Blanchard, the records of Tuolumne county did not show that the Yosemite Gold Mining Company had, or claimed to have, any interest in or to said mine, and that on that day there was no conveyance of record from the Argalls, Griswold, F. L. Emerson, or Jacob Miller to said last-named mining company. But the court found in the present case, and the evidence was, that the Argalls executed and delivered to the Yosemite Gold Mining Company, on October 2, 1899, a conveyance of $^9/_{20}$ interest in said mine and that the said deed was duly recorded January 12, 1900. This is the source of the interest of the Yosemite Gold Mining Company in the mortgaged premises. The court also found that neither the mortgagee, Marsden, nor his assignee, Wemple, the present plaintiff, of the mortgage made October 25, 1899, now sought to be foreclosed, was made a party to foreclose the Blanchard mortgage and neither of them appeared in that action, and neither of them was a party to, or appeared in the action to redeem from the judgment in the Blanchard foreclosure. The court found that neither E. L. Emerson nor F. L. Emerson had any interest in the premises at the commencement of this action. It appeared also that Peter Berg conveyed to defendant, Yosemite Gold Mining Company, the "Jim Blaine," or "Slap Jack Mine," on June 1, 1899, recorded October 13, 1899.

The court found as conclusions of law: That the undivided $^9/_{20}$ interest of the "Slap Jack" mining claim is subject to plaintiff's mortgage; that the claims of the Yosemite Gold Mining Company, and the Yosemite Gold Mining & Milling Company are, and each of them is, subsequent to the claim of plaintiff and his said mortgage; that the undivided $^{11}/_{20}$ interest of said mine is owned by defendants, Mrs. A. L. Emerson, F. F. Britton, and Jacob Miller, and is not subject to said mortgage.

Appellants contend that the evidence is insufficient to justify the decision that $^9/_{20}$ interest in the "Slap Jack Mine" was subject to the mortgage sued upon, because: First, the "Slap Jack Mine" was not described in the mortgage with sufficient definiteness; second, the title of appellants is superior to the mortgagor's title; third, whatever interest or equity of redemption the Yosemite Gold Mining Company, mortgagor of the mortgage sued upon, ever had in the mine in question, was foreclosed by the proceedings had in the foreclosure of the first, or Marsden mortgage, by Blanchard; fourth, there is a still further claim made by appellants: Considering that plaintiff's mortgage created a lien on the Argall interest, equity will keep alive the Blanchard mortgage as a protection to the redemptioners from the Blanchard foreclosure.

1. The description of the controverted premises stated in the mortgage of defendant company was as follows: "The Jim Blaine Mining Claim, being the same property located by R. S. McWhirter on January 1, 1899, of Record in Book 10, p. 271, Quartz Claims, Tuolumne County Records." Then follows the description of several other mining claims, at the close of which the mortgage continues: "All of said mines and mining property being the same described in that deed of conveyance made by Peter Berg to the Yosemite Gold Mining Company on June 1, 1899, of Record in Book A of deeds, vol. 41, p. 521, recorded on October 3, 1899, Tuolomne County Records." It is urged that because the location of the "Jim Blaine Mine" by McWhirter was ineffectual for any purpose, as found by the court, and because the deed of Peter Berg conveyed nothing, he having no interest to convey, the mortgage failed to describe or refer to the "Slap Jack Mine" and hence mortgaged no part of that mine. It is not disputed that the two designations referred to the same ground; it was so alleged by defendants and it so appeared from the testimony of defendants and was so understood by all parties. We do not think the mortgage was intended to embrace only such interest as the mortgagor acquired through the Berg deed or through the McWhirter location. When the mortgage was executed the defendant company held the deed of the Argalls to the "Slap Jack Mine" thus described. It seems to us that the description used in the mortgage was intended to identify the property mortgaged by reference to documents which referred to the same property as was referred to in the Argall deed. As the "Jim Blaine Mine" embraced precisely the same ground, we think there can be no mistaking the intention of the mortgage to include this ground. The purpose of the description of property mortgaged or deeded is to identify the property, and is not to indicate the source of the title. The property in a deed or mortgage may be sufficiently described by appropriate reference to any duly recorded document or public record containing the required description and proof of the description is complete by the introduction, in evidence of such document or record.

2. It is contended that the title of appellants is superior, paramount, and adverse to the title mortgaged, and hence cannot be litigated in this action. The point is grounded upon the alleged fact that appellants are the owners of the "Slap Jack Mine" through the locator Coyle, while the mortgagor, the defendant company, claims the "Jim Blaine Mine" through McWhirter. We do not so understand the evidence. The McWhirter location was void. Defendant company claims through the Argalls, whose source of title in the Coyle location is the same as that of appellants. The real controversy in the case is as to the relative rights of the parties arising out of the Blanchard mortgage foreclosure and the Wemple, or plaintiff's mortgage foreclosure. The court decreed that certain defendants, Britton, Mrs. A. L. Emerson, and Miller, were the owners of $^{11}/_{20}$ of the mine in question (about which there is no controversy); and that the remaining $^{9}/_{20}$ interest therein was subject to plaintiff's mortgage, being the interest of the Argalls which they had conveyed to the defendant company.

3. The vital question in the case is thus stated by appellants: That whatever interest or equity of redemption the defendant company, the mortgagor, or the respondent, ever had in the "Slap Jack Mine," was foreclosed and lost by the decree, sale and proceedings had in the foreclosure of the Blanchard, or first mortgage. The point made that the mortgage of defendant company did not sufficiently describe the mine, has been already disposed of. The second reason given by appellants in support of their contention raises the question, namely, that whatever title the defendant company had was foreclosed and lost by the foreclosure of the first or Blanchard mortgage. The evidence is undisputed that the Blanchard mortgage was prior in date and recordation to plaintiff's mortgage. But when the Blanchard foreclosure suit was commenced (November 6, 1899), the second or plaintiff's mortgage was of record (October 29, 1899), and defendant company, the mortgagor, held a deed from the Argalls, executed and delivered October 2, 1899, a month before the Blanchard foreclosure suit was commenced; it was, however, not recorded until January 12, 1900. Blanchard was charged with constructive notice of plaintiff's mortgage, but he failed to make either plaintiff or his assignor a party to his foreclosure. Section 726 of the Code of Civil Procedure refers to persons having a lien on the mortgaged premises as well as a conveyance thereof. The result of this failure was to leave the junior mortgage and the rights of the junior mortgagee and his assignee unaffected. Carpentier v. Brenham, 40 Cal. 234; Henderson v. Grammar, 66 Cal. 332, 5 Pac. 488; Savings Bank v. Central Market, 132 Cal. 36, 54 Pac. 273; Hibernia Savings Bank v. London & L. Ins. Co., 138 Cal. 260, 71 Pac. 334; Frates v. Sears, 144 Cal. 246, 77 Pac. 905. Whatever interest the junior mortgagee had in the mortgaged premises, by virtue of his mortgage, as against the senior mortgage, his right was the right of redemption, and it could not be taken from him by foreclosure of the senior mortgage, except by making him a party to that action. Id. The senior mortgage originally impressed a lien on $^{19}/_{20}$ of the property—the entire interest except Miller's. The court found that of these $^{19}/_{20}$ the junior mortgage impressed a lien upon $^{9}/_{20}$ discharged from any lien of the senior mortgage, presumably because title thereto vested in the junior mortgagor, defendant company, by virtue of the deed from the Argalls to the defendant company, the deed inuring to the benefit of the mortgagee; or, in other words, the deed feeding the mortgage. In support of the view of the court, it is also contended by respondent that the turn which the foreclosure proceedings took in foreclosing the senior mortgage was such as to wipe out that mortgage, at least as to the Argall interest, and leave the property subject alone to plaintiff's lien. Indeed, unless by some means the lien of the Blanchard mortgage was lifted from the Argalls' $^{9}/_{20}$ interest, included in the senior mortgage, the Argalls could only convey their interest subject to the Blanchard mortgage. The argument of respondent upon the point that the Blanchard mortgage lien was discharged by the redemption, effected by the successors of the mortgagors' interest in the property, rests upon the following principles: That the exercise of the right of redemption confers no new rights and affects only the interest which the redemptioner was entitled to redeem; when redemption is made by the execution debtor, or his assigns, grantees, or successors in interest, the effect is merely to terminate the same and restore the property to its original condition. 20 Am. & Eng. Ency. of Law, pp. 639, 640. That the judgment and receipt of redemption in money discharges the judgment of foreclosure, sets aside all the proceedings thereunder and places the parties in the same position they were in before the suit was brought, except that the debt is paid. Citing Hocker v. Reas, 18 Cal. 650; Perkins v. Center, 35 Cal. 713; Eldridge v. Wright, 55 Cal. 531; also Stoddard v. Forbes, 13 Iowa, 296; Woodward v. Cowdery, 41 Vt. 496.

We do not understand that appellants controvert these principles, but they claim that appellants having redeemed the property from the Blanchard foreclosure, as successors in interest of the judgment debtors, they are in equity subrogated to all the rights and liens of the mortgagee in that action, and as between them and all prior lien holders, equity will preserve to them the lien of the prior mortgage. In Matzen v. Schaeffer, 65 Cal., at page 82, 3 Pac. 93, the principle is approved as laid down by Mr. Pomeroy in his Equity Jurisprudence, vol. 3, § 1212: "When any person having a subsequent interest in the premises, and who is therefore entitled to redeem, for the purpose of protecting his interest, and who is not the debtor primarily and absolutely liable for the mortgaged debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. He is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." And the court held further that this equitable result follows, though a receipt was given speaking of the mortgaged debt as having been fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record. In Schaeffer v. McClosky, 101 Cal. 576, 36 Pac. 196, it was held that one who is forced to pay the debt of another, in order to protect his own interest, and who is not a mere volunteer or intermeddler, is in equity to be subrogated to the debt. See Hines v. Ward, 121 Cal. 115, 53 Pac. 427. In Darrough v. Herbert Kraft Company Bank, 125 Cal. 272, 57 Pac. 983, the court held that where the owner of the mortgaged premises paid off a senior lien thereon without actual knowledge of the junior lien, the latter shall derive no advantage over the senior lien; and that it will be presumed that such owner made the payment for his own benefit, and not for the benefit of the junior lien holder, and for the protection of his interests, equity will treat such owner as the assignee of the original senior lien holder, and will revive and enforce such senior lien for his benefit.

Respondent does not seriously controvert these principles, but he contends, among other things, that appellants, for various reasons, have not, by their pleadings, shown that they are entitled to invoke these rules. Conceding the sufficiency of the pleadings, it seems to us that, in claiming to be the successors in interest of the Argalls, the only interest in controversy, appellants have failed to show a superior equity to the rights claimed by plaintiff. It appears that the Argalls conveyed their interest to defendant company May 31, 1899; that defendant company mortgaged the property October 25, 1899, and that the deed of the Argalls was recorded January 12, 1900. Appellants do not allege or show by evidence the date of their conveyance by which they became successors in interest of the Argalls and the other makers of the Blanchard mortgage. Claiming, as they did, that their right was superior to that of the plaintiff, the burden was on them to prove it. Plaintiff did not know, and could not know, the source of defendants' title or interest. The evidence is that Blanchard filed his complaint to foreclose on November 5, 1899; decree of foreclosure and sale was entered February 23, 1900; the commissioner made sale March 31, 1900; the complaint for redemption was filed June 24, 1901. There was an answer to the complaint denying most of its allegations. Findings of fact were waived and by consent a decree was entered adjudging that "plaintiffs herein redeemed the premises * * * as successors in interest of the judgment debtors in the action aforesaid." In their answer to plaintiff's complaint in the present action, appellants allege that "at the time of the commencement of this action, they were, ever since have been, and now are the owners of that certain quartz mine," etc. They, therefore, make no claim to ownership prior to the commencement of this action, which was July 24, 1902, and the earliest date any interest is shown in them is June 24, 1901. It would thus appear, and the trial court might well have inferred, that appellants in the present action—F. F. Britton and Mrs. A. L. Emerson, became successors of the interests conveyed to them, including the Argall interest, long after the Argalls had conveyed to the defendant company and long after their conveyance was recorded and had inured to the benefit of the mortgagee of defendant company. When, therefore, appellants assumed to redeem as the successor in interest of the Argalls, they had constructive notice that the Argalls had already conveyed their interest to defendant company and that defendant company had mortgaged that interest to plaintiff's assignor. So far as appears they may also have had actual notice of the deed, and Mrs. Emerson, so far as appears, may also have had actual notice of the mortgage. Appellant Britton testified that he "did not know anything about this particular mortgage in controversy," but he said nothing about the deed. There is no fraud or bad faith alleged or shown in the conveyance by the Argalls to defendant company; there is neither allegation nor proof of mistake by appellants or that they were misled in any way in becoming successors in interest of the judgment debtors in the Blanchard foreclosure. As to $^{11}/_{20}$ interest in the property, they secured title which the court by its decree recognized and protected by declaring it to be subject to the senior mortgage and by refusing to subject it to plaintiff's lien. As to $^{9}/_{20}$, the Argall interest, the court held it subject to plaintiff's mortgage lien, and in effect held that by redeeming from the senior mortgage sale, and paying off the judgment debt, appellants thereby discharged the lien of that mortgage upon the Argall interest. We are unable to discover any equitable principle upon which the senior mortgage should be kept alive for the benefit of appellants or which would enable them to enforce a lien upon the Argall interest under the facts disclosed. We are quite convinced that the equitable principles invoked by appellants cannot be made to serve such object. It is perhaps proper to add that the case of Frates v. Sears, 144 Cal. 246, 77 Pac. 905, relied upon by respondent, does not entirely meet the situation here, and it is not necessary to resort to the rule there established. In that case when the junior mortgagee, who had not been made a party to the foreclosure of the senior mortgage, brought his action to foreclose and made the senior mortgagee a party (who was the purchaser at his foreclosure sale), the latter failed in enforcing his prior lien because, when he answered, his mortgage debt had become barred by the statute of limitations. In the present case the senior mortgage was not barred when the answer was filed. The reasoning may go further, but the point decided in Frates v. Sears was that the lien of the senior mortgage is lost, if, when he asserts it against the foreclosure of the junior mortgage, his mortgage debt is barred.

Respondent also relies upon the point that as soon as the Argall deed was delivered to the defendant company it commenced to feed the mortgage of plaintiff, although not recorded until later, and that the neglect of defendant company to record this deed cannot affect the rights of plaintiff. Numerous authorities are cited in support of the proposition. We neither affirm nor deny its soundness, in this particular case, but prefer to rest the decision upon the ground above stated.

The judgment and order are affirmed.

I concur: BUCKLES, J.

I concur in the judgment: McLAUGHLIN, J.

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4 Cal. App. 154

LOGAN v. McMULLEN.

(Court of Appeal, First District, California. July 23, 1906.)

1. Brokers—Employment—Memorandum.

A letter, written to a broker advising him that if he could purchase certain described real estate the signer thought he would be ready to purchase the same on the succeeding Monday, at a specified price, was not a sufficient note or memorandum of a contract to employ the broker to purchase the property required by Civil Code, § 1624.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 44.]

2. Same—Performance of Service.

Where a broker was employed to purchase certain real estate for his customer, his contract was not performed unless he procured an enforceable contract from the owners to make the sale or brought the parties together so that his employer would have an opportunity to secure such contract.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 65.]

3. Same.

A broker for the purchaser of real estate cannot call upon his employer to come to the place of business of the vendor, and there make the contract, or negotiate for its terms.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 69, 75–81.]

4. Trial—Offer of Evidence—Rejection.

An offer of evidence which, taken in its entirety, fails to show a cause of action, is properly rejected.

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Walter E. Logan against J. C. McMullen. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. S. Farquar, for appellant. Dudley Kinsell, for respondent.

HARRISON, P. J. Action to recover for services as broker for the purchase of certain real estate. A judgment of nonsuit was rendered against the plaintiff, and he has appealed therefrom. At the trial, after testifying that he was a real estate broker, and that he had had several interviews with the defendant regarding the property referred to in the complaint, the plaintiff offered in evidence the following instrument as a note or memorandum in writing requisite under section 1624, Civ. Code, for his recovery, viz.: "Oakland, Cal., July 31, '03. Walter E. Logan: Sir—If you can purchase N. W. corner of 13th and Franklin streets 75x100 for $42,000 I think we would be ready to purchase same by Monday next. J. C. McMullen;" and in connection therewith offered to prove that, acting under it, he went to San Francisco on Friday, July 31st, and had an interview with the owners of the property, and showed them this instrument, and got from them "an offer" that they would accept $42,000; that the proposition was made that it was to be "arranged" on Monday; that a few minutes before noon on the next day, Saturday, the defendant stated to him that he would go with him to San Francisco on the next outgoing narrow gauge train, to which he replied that he could not go on that train but would go on the next broad gauge train and would meet him at the owner's office; that he went over, and remained there for three hours, but the defendant did not make his appearance; that thereafter the defendant met him and stated that he recognized that he had rendered services in the matter, and that he would be compensated therefor. The defendant objected to the introduction of the instrument on the ground that it is incompetent and irrelevant; that it does not comply with the requirements of section 1624, Civ. Code; that it does not purport to employ or authorize the plaintiff to purchase the real estate for the defendant or to act as his broker. The court sustained the objections, to which ruling the plaintiff excepted; and the plaintiff, admitting that there was no other writing or authorization of employment, and offering no other evidence, the defendant moved for a nonsuit upon the ground that the evidence did not sustain any of the allegations of the complaint. The court granted the motion, to which the plaintiff excepted.

The court properly sustained the objections of the defendant to the above instrument. It does not purport to be an employment of the plaintiff as a broker or agent for the purchase of the real estate, but is rather to be construed as merely a proposition to him to ascertain whether it could be purchased at the designated price; but whatever construction is to be given to its terms, inasmuch as the plaintiff did not purchase the property or obtain from the owners an agreement for its sale which could be enforced by the defendant, the latter did not become liable to him for any services as broker or agent in the matter. If the plaintiff would assume that, by virtue of the instrument, he was authorized to act as broker for the defendant for the purpose of effecting a purchase of the property for him, and would claim compensation for his services, it was his duty to procure from the owners and deliver to the defendant a valid contract for its sale which could be enforced by the defendant; or, if he should obtain from the owners a verbal agreement to make the sale, and bring the owners and the defendant together, so that the latter would have an opportunity to secure such contract. Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195; Gunn v. Bank of California, 99 Cal. 350, 33 Pac. 1105; Mattingly v. Pennie, 105 Cal. 516, 39 Pac. 200, 45 Am. St. Rep. 87. The conditions under which a broker for the purchase or sale of real estate is entitled to commissions are stated in the case last cited as follows: "In order to entitle a broker under such a contract to recover commissions where no sale has actually been consummated, it is incumbent upon him to prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed; and either that he procured from that person a valid contract binding him to purchase the property upon those terms, or that he brought the vendor and the proposed purchaser together so that the vendor might have secured such contract if he desired. On no other terms can he recover. The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor and not simply to the broker to enter into such a contract, he cannot be considered a purchaser." The broker must perform all of the services thus required of him before he can claim compensation from his employer. His principal is under no obligation to assist him in their performance or to relieve him from a full compliance with his duty. The broker for the purchaser cannot call upon his principal to go to the place of business of the vendor, and there make the contract or negotiate for its terms. He is employed for the very purpose of relieving his principal from taking any trouble in the matter, and he must either bring to him a perfected contract, or the vendor in person, ready, able, and willing to make the contract. The defendant was under no obligation to hunt up the owners, or go to San Francisco for the purpose of securing a contract, and his failure to do so did not operate to relieve the plaintiff from the necessity of bringing the vendor to Oakland if he did not secure a valid agreement for a sale. The plaintiff did not offer to show the purpose for which the defendant was to go to San Francisco; and as by the terms of the above instrument the defendant was not to be ready for the purchase until the following Monday, and as the plaintiff's proposition to the owners was that the matter was to be "arranged" on Monday, there does not seem to have been any necessary connection between the trip to San Francisco and the purchase of the lot. By declining to accept the defendant's proposition to go by the first narrow guage train, and not receiving from him any acceptance of his own counter proposition to go by the broad gauge train, it does not appear that there was any meeting of their minds or any agreement between them to go to San Francisco. The facts which the plaintiff offered to show in connection with the instrument were insufficient to render the instrument admissible. Inasmuch as he was not entitled to compensation by virtue of the agreement unless he had obtained a contract from the vendors, or brought them and the defendant together, the whole of the evidence offered would be incompetent to establish any cause of action against the defendant. An offer of evidence which, taken in its entirety, fails to show a cause of action, is properly rejected by the court. "The offer must be complete in itself, and must not omit facts without which the facts offered are not relevant." Chamberlain v. Vance, 57 Cal. 75. As the instrument in writing was excluded there was no evidence before the court in support of the allegations of the complaint, and the court had no alternative but to grant the nonsuit.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 55

PEPPER v. NEIMAN.

(Court of Appeal, Second District, California. July 6, 1906. Rehearing Denied Aug. 30, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENT — RESOLUTION OF INTENTION — CONSTRUCTION.

A resolution of intention to make a street improvement, which, in its title, declares the intention of the municipal authorities to improve a portion of a street, and which states in its body that it is the intention to construct a cement curb along each line of the roadway of the street between designated points, except along such portions of the line of the roadway on which a cement or granite curb has already been constructed, etc., does not provide for two distinct lines of work, one along each boundary of the roadway, but describes the improvement of the street between the points specified.

2. SAME—POSTING NOTICE — STATUTES—CONSTRUCTION.

St. 1891, p. 196, c. 147, § 3, providing that a notice of a contemplated street improvement shall be posted along the line thereof at not more than 100 feet in distance apart, requires notices not more than 100 feet apart longitudinally along the line of the improvement, and notices posted on either side of a street intended to be improved are notices posted on the line, so that if such notices are not more than 100 feet apart, measuring the distance along the center of the improvement, the statute is complied with, and diagonal measurements are not to be considered.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 787.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Enoch Pepper against F. Neiman. From a judgment for plaintiff, defendant appeals. Reversed.

Bicknell, Gibson, Trask, Dunn & Crutcher, and S. M. Haskins, for appellant. Enoch Pepper, in pro. per. and H. S. Rollins, for respondent.

PER CURIAM. This is a suit to quiet plaintiff's title to three lots in the city of Los Angeles fronting on Flower street. The defendant in his answer claims a lien upon each lot—upon two for the sum of $75.29 each, and upon the other for the sum of $80.61—under a street assessment for the cost of the improvement of a portion of Flower street. The answer sets up seriatim all the proceedings required by the street improvement act; and, in a cross-complaint repeating these allegations, the defendant seeks to foreclose his liens. It is stipulated and found by the court that all the proceedings for the improvement of the street and assessment of the lots were regular, except the posting of the notices of the contemplated work or improvement on the ground, as to which it is stipulated and found: That the length of the portion of the street improved is 4,583 feet, and the width of the street between curb lines 56 feet; that the number of notices posted was 52 in all; and, that they were posted alternately on the east and west sides of the street. It appears, therefore, from the stipulation and findings that the distance between the notices, measured diagonally across the street, is something over 100 feet, though less if measured longitudinally with the street, and on this ground the court held the assessment to be void.

The resolution of intention in the present case is entitled: "An ordinance of the mayor and council of the city of Los Angeles, declaring their intention to improve a portion of Flower street, and determining that bonds shall be issued to represent the cost thereof." In the first section it is provided: "That it is the intention of the city council of the city of Los Angeles to order the following work to be done, to wit: "(1) That a cement curb be constructed along each line of the roadway of said Flower street from the southerly curb line of Sixth street to the northerly curb line of Pico street (excepting along such portions of the line of said roadway upon which a cement or granite curb has already been constructed to the official line and grade)," etc. "(2) That a cement sidewalk six feet in width be constructed along each side of said Flower street," etc. "(3) That a cement gutter be constructed along each side of said Flower street," etc.

It is contended by the appellant that the work described in the ordinance of intention is the improvement of Flower street between the points specified, and by the respondent that there were two distinct lines of work provided for, one along each boundary of the roadway. Assuming the latter to be the case, it would follow that the distances between the notices along the line of each improvement would be much in excess of 100 feet. But we do not think that the ordinance can be so construed. As expressed in the title, the intention was to improve a part of Flower street, and in the first section of the ordinance "the line of said roadway" is referred to. We are of the opinion, therefore, that the case is the same in this respect as was the case in Dowling v. Hibernia Sav. & L. Society, 143 Cal. 425, 77 Pac. 141, where the roadway was included in the improvement proposed.

The fact remains, however, that the distance between the notices, measured diagonally across the road, was over 100 feet; and the question thus arises, whether this was a sufficient compliance with section 3 of the street improvement act, which provides that the notices shall be "posted along the line of said contemplated work or improvement at not more than one hundred feet in distance apart." St. 1891, p. 196, c. 147. The question is not without difficulty; but, on the whole, we are of the opinion that the section requires notices not more than 100 feet longitudinally along the line of the improvement; that the entire street is the line referred to; that notices posted on either side are notices posted on the line, and if such notices are not more than 100 feet apart, measuring the distance along the center of the improvement, the section is complied with, it matters not upon which side of such center line the notices are actually posted; and that the diagonal measurements are not to be considered.

It is ordered that the judgment be reversed.

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4 Cal. App. 147

DORRIS et al. v. McMANNUS et al. (Civ. 212.)

(Court of Appeal, Third District, California. July 20, 1906.)

QUIETING TITLE—EVIDENCE.

Defendants in an action to quiet title, having pleaded such claim as they had, and introduced no evidence in support thereof, findings that it was without right and adverse to plaintiffs are authorized without any evidence by plaintiffs other than to show their title.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 89.]

Appeal from Superior Court, Modoc County; N. D. Arnot, Judge.

Action by P. S. Dorris and another against Laura J. McMannus and others. Judgment for plaintiffs. Defendants Laura J. McMannus and another appeal. Affirmed.

Chas. W. Slack and John W. Bourdette, for appellants. G. F. Harris, Gillis & Tapscott, and Jaimeson & Adams, for respondents.

CHIPMAN, P. J. Action to quiet title. Plaintiffs had judgment, from which and from the order denying their motion for a new trial defendants Laura McMannus and Martha S. McConnell appeal.

There are numerous defendants, none of whom appeal, except the defendants Laura McMannus, Martha McConnell, and Charles Bohnert; the latter of whom appealed on separate transcript (No. 207, Sac. No. 1,339). We affirmed the judgment and order in that appeal on May 15, 1906. (Cal. App.) 86 Pac. 909. The present appeal is presented by different counsel, who urge points not made in the Bohnert appeal, and, for this reason alone, we again examine the case. The complaint is unverified, and contains the usual averments that defendants claim an estate or interest in the lands adverse to plaintiffs, and that such claim is without right. Plaintiffs further aver "that by means of the false representations and pretenses aforesaid of the said defendants, and each and every of them, the plaintiffs, and each of them, are greatly embarrassed in the free enjoyment, use and disposition of their said described lands," and that plaintiffs' interest in said lands is "greatly depreciated by reason of the probability of title in the said defendants, or some of them, resulting from and growing out of said false and pretended claims of the said defendants." Defendant McMannus answered, denying generally the allegations of the complaint; also averring that, on December 14, 1900, this defendant commenced an action against Presley A. Dorris and Carlos J. Dorris, copartners as P. A. Dorris & Bro. (through whom plaintiffs deraign title), upon a promissory note executed by them, which action is now pending; that in the event defendant obtains judgment in said action, she intends to institute suit to set aside the conveyance of the lands described in the complaint, on the ground that when transferred to plaintiff said lands belonged to the said Presley A. and Carlos J. Dorris, and that the said transfers to plaintiffs were procured to be made for the purpose of hindering and delaying the creditors of the said Presley A. and Carlos J. Dorris. Defendant prayed that the action as to her be not tried until the said action upon the said promissory note is tried and determined, and that defendant recover her costs. Defendant McConnell in her answer denied the averments of the complaint specifically, except that she did not deny that she claimed some interest in the property adverse to plaintiffs. She alleged a similar defense to that set up by defendant McMannus, as a creditor of P. A. and C. J. Dorris; she denied that her claim or interest was without right, but neither she nor defendant McMannus specifically alleged or claimed any interest in the land, and neither of them set forth any title or claim otherwise than such as might arise, should they become judgment creditors of P. A. and C. J. Dorris, partners, as P. A. Dorris & Bro. The court found that since June 29, 1900, plaintiffs have been and now are the owners of the title in fee simple of the land in question; "that the said defendants and each of them, claim an estate therein, adverse to plaintiffs," but that such claim is without right. The court then finds the facts specifically negativing the allegations of fraud in the transfer to plaintiffs, and also, by way of deraignment of plaintiffs' title, tracing it through one Jerome Churchill, who for many years prior to June 29, 1900, had loaned the said firm of the Dorrises large sums of money, and had held deeds to the said land and other property belonging to the said Dorrises as security therefor; that the said firm was unable to pay this large indebtedness, and on the date last named the said Churchill and the members of said firm had a full settlement by which it was agreed that the title should remain in said Churchill to all said property in consideration of the said Churchill fully discharging all claims against said firm, and that thereupon on said date said members of said firm released and quitclaimed all their interest in said property to said Churchill; that the said Churchill paid full consideration "and more than said property was worth;" that the said transfer was not fraudulent, nor for the purpose of delaying creditors of said firm, but was made "in good faith for a good and valid and ample consideration." The court also found that on the date of the transfer of said lands to plaintiffs, to wit, on June 29, 1900, neither P. A. nor C. J. Dorris, nor the said copartnership, "had any right, title, interest, or estate, either legal or equitable, in said real estate, * * * but that * * * the whole thereof, both legal and equitable, belonged to and was vested in fee in the said Jerome Churchill;" that "by the false and pretended claims of defendants [naming all of them] * * * plaintiffs * * * are greatly embarrassed in the free enjoyment, use, and disposition of their said real estate," and are thereby rendered unable to sell or dispose of the same except at greatly depreciated values and at great loss to plaintiffs.

1. Appellants contend that the allegation of the complaint as to defendants' claim of interest in the land adverse to that of plaintiffs was essential in this form of action—citing Lawrence v. Getchel (Cal.) 4 Pac. 544, and cases from other jurisdictions; and that the allegation having been denied, it was incumbent on plaintiffs to prove it—cit-

ing Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 389; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; United Land Ass'n v. P. I. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988. Also the allegation that the claim of defendants is without right being denied, it also must be proved by plaintiffs—citing Tompkins v. Sprout, 55 Cal. 31. The findings in favor of plaintiffs upon these allegations are challenged as unsupported by any evidence, and that, therefore, the judgment and order should be reversed. Defendant McConnell, by her special denials, failed to deny that she claimed some interest in the land adverse to plaintiffs, but defendant McMannus, by her general denial, raises the question. If defendants' denials are to be treated as general to the unverified complaint, they merely put in issue the title to the land. Pennie v. Hildreth; Adams v. Crawford, supra. We think, however, that these defendants (appellants) have pleaded such claim as they had, shadowy though it in fact was (see Bohnert's Appeal), and on which they offered no proof whatever. They alleged fraud in the conveyance to plaintiffs, and set up a right to have the action suspended until they could have their claim against the Dorrises, through whom plaintiffs deraign title, ripen into judgment, to be followed by an action to set aside plaintiffs' conveyance. Without a judgment they were in no position to attack the deed for fraud (Aigeltinger v. Einstein, 143 Cal. 609, 77 Pac. 669); but they refused to disclaim any right or interest, and asserted all the title or right they had, as called upon by plaintiffs to do, and, though unavailing, conjectural, and uncertain, it was yet an assertion of a claim of right in the land. The failure of defendants to submit any evidence in support of their claim left the court free to find that it was without right, and also to find that such as it was it was adverse to plaintiffs, and this without aid from plaintiffs' evidence. But plaintiffs, unnecessarily we think, in view of defendants' failure to submit any evidence, did, however, submit evidence touching the issue of fraud tendered by defendants, and fully established the entire good faith of the transactions culminating in plaintiffs' title, free from any taint of fraud. In commenting upon sections 738 and 739 of the Code of Civil Procedure, it was held in Bulwer M. Co. v. Standard M. Co., 83 Cal. 589, 23 Pac. 1102, that the purpose of averring an adverse claim is to notify defendant of the nature of the action, and requiring him to set forth and litigate any adverse title he may claim to have or to disclaim having such title either expressly or by default; that "the only material issues tendered by a complaint in this class of cases relates to the title of the real property described in the complaint; therefore there was no necessity for a finding upon the formal but immaterial issue, as to whether the defendant had asserted an adverse title before the commencement of the action." It was said further: "The object of sections 738 and 739 is to enable the plaintiff, in such action, to dispel whatever may be regarded by third persons, as well as by defendant, as a cloud upon his title; for even though the defendant makes no adverse claim, third persons may regard plaintiffs' title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiffs' title, depreciating its value, and which he would be entitled to have removed by the decree of the court." Appellants contend that this is not the law, and that the expressions of the court were not necessary to the decision and were but dicta, and were used in a case where the defendant had disclaimed any estate or interest. It seems to us that the "material issues" in this class of cases "relate to the title of the real property described in the complaint" and nothing else. When the title is found to be in the plaintiff, and no title or interest is shown in defendant, it necessarily follows that the claim of the defendant is without right, whether adverse or not. If the defendant makes default the court may find the allegations of the complaint to be true; why not also when the defendant answers but fails to support it by evidence? How can plaintiff know the nature of defendant's claim unless it is pleaded, and would it not be unreasonable to hold to a rule requiring him to show that a claim of which he has no knowledge is without right, except by showing his own right? If defendant's claim be pleaded, the burden is then upon defendant to establish it, failing in which, the findings must be against defendant. Crook v. Forsyth, 30 Cal. 662; Stoddard v. Burge, 53 Cal. 394. This seems to us both reasonable and logical and in conformity with the object of the action, as stated in the case reported in Bulwer M. Co. v. Standard M. Co., supra. However this may be, defendants denied plaintiffs' title, and set up their adverse interest. The issues usual in such cases were thus formed, and each party was called upon to make good by evidence his affirmative averments, touching his own title to or interest in the property. Neither party was required to disprove his adversary's case, but could rest upon proof of his own title.

2. Appellants further contend that, because the court found the specific facts showing ownership, and also found generally that plaintiffs were the owners of the property, the general findings became mere conclusions of law, and the specific findings must support the conclusion of ownership, and necessarily the evidence must support the specific facts found, or a reversal must result. Citing Gruwell v. Seyboldt, 82 Cal. 7, 22 Pac. 938; Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. Appellants designate eight separate findings, which, it is claimed, fall within the above objection. It would unnec-

essarily prolong this opinion to state these findings and the evidence found in the record to support them. These findings seem to have had for their main object to deraign the title, untainted by fraud, through Churchill to plaintiffs, and to show the circumstances under which he came into possession and control of the property, the relation to the Dorrises, the title by which he held the property, the equity retained by the Dorrises, and finally that, in consideration of discharging their indebtedness to Churchill, they deeded and released all their interest, legal and equitable, to him; it was found that he conveyed to plaintiffs and that the transactions set forth were free from fraud. The evidence, we think, supports these findings, and, when taken in connection with the complete findings, fully support the general findings of title in plaintiffs. Appellants in their brief say that the court obviously attempted to find that the transfer to plaintiffs was not a fraud upon the creditors of P. A. and C. J. Dorris. We think the court succeeded in its attempt. The alleged apparent contradiction between finding designated 8 in defendants' brief and finding 5 is not real. The agreement and transfer of the Dorrises to Churchill, and them to plaintiffs, occurred on the same day, and when Churchill conveyed to plaintiffs it is true that P. A. and C. J. Dorris no longer had any equitable interest in the property, and long before this date the legal title had vested in Churchill. It may be doubted whether the court was called upon to find the evidence going to prove ownership, having found such ownership in plaintiffs (Daly v. Sorocco, 80 Cal. 367, 22 Pac. 211); but conceding appellants' position that, having done so, the evidence must support the findings, we think this requirement is fully met. In point of fact a perfect and unbroken chain of title, free from fraud, from the government to plaintiffs is shown. Against it is urged purely technical rules of law which, though entitled to recognition, are without merit under the circumstances and facts disclosed.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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4 Cal. App. 50

McGEHEE v. SCHIFFMAN. (Civ. 247.)

(Court of Appeal, Second District, California. July 5, 1906. Rehearing Denied Aug. 30, 1906.)

1. NEGLIGENCE—PLEADING—COMPLAINT.

In an action for injuries alleged to have resulted from defendant's negligence, it is sufficient for the complaint to charge that the act was negligently done, without stating the particular omission which rendered the act negligent, provided it also appears from the facts averred that the negligence caused or contributed to the injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 174, 175, 182.]

2. SAME—PROXIMATE CAUSE.

Plaintiff alleged that defendant extracted seven of her teeth and removed all of them from her mouth except one, which, by defendant's carelessness, negligence, and unskillfulness, was permitted to drop and pass into plaintiff's right lung, without any fault or negligence on plaintiff's part. *Held*, that the complaint was not demurrable for failure to show that defendant's negligence was the proximate cause of the injury, because it was necessary that plaintiff should have used the muscles of her throat in order that the tooth could have gotten into her trachea.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 183½.]

3. PHYSICIANS AND SURGEONS — NEGLIGENCE OF DENTIST—EVIDENCE.

In an action against a dentist for injuries caused by a tooth dropping into plaintiff's trachea, and thence into her lung, evidence *held* to sustain findings that defendant carelessly and negligently permitted the tooth so to pass into plaintiff's trachea, without fault on her part, by reason of which she was damaged.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Alice C. McGehee against A. F. Schiffman. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

A. B. McCutchen, for appellant. E. Edgar Galbreth, for respondent.

ALLEN, J. Action to recover damages on account of injuries sustained through negligence. Judgment for plaintiff, new trial denied, and defendant appeals from such judgment on the roll, and from an order denying a new trial.

The first contention of appellant is that the complaint, which alleges that "the defendant did then and there extract seven of said teeth and remove all of the same from her mouth excepting one of said teeth, which, by said defendant's carelessness, negligence, and unskillfulness, was permitted and allowed by him to drop and pass into plaintiff's right lung, without any fault or negligence on her part," was insufficient, in that the negligence averred was not the proximate cause, for the reason that it is manifest that plaintiff, having control over her own muscles and breathing apparatus, the tooth by any negligence or omission of defendant could only have been allowed to escape into the mouth, and that it should reach the lung comprehended action on plaintiff's part which would be the proximate cause of the injury; that, if there was an unbroken sequence of events through which the injury was chargeable to defendant, those continuous events should have been pleaded; that the complaint was uncertain, in that it cannot be ascertained "how or in what manner any carelessness on the part of the defendant occasioned the injury, nor how the defendant by any act or omission of his could permit or allow the plaintiff's tooth to drop or pass into her right lung. It is sufficient to allege the negligence in general terms, specifying, however, the particular act which is alleged to have been negligently done. "Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises. * * * It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself." Stephenson v. Southern Pac. Co., 102 Cal. 148, 34 Pac. 620. When we consider that the demurrer admits that through want of care defendant allowed the tooth to drop into the lung, whereby the injury followed, it removes from consideration the possibility of any intervening facts or circumstances being the proximate cause of the injury. "It is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury." Smith v. Buttner, 90 Cal. 100, 27 Pac. 29. In the complaint under consideration it is averred that he dropped the tooth into the lung, the fact which caused the injury. The dropping of such tooth is admitted to have been occasioned through want of care. Nor can a court say, as a matter of common knowledge, that the fact admitted was impossible without some other agency acting upon it. We regard the complaint as sufficient, and in no sense as ambiguous or uncertain.

Upon the appeal from the order, it is contended that there is no evidence in support of the finding of the court that defendant was negligent, or that such negligence caused the injury. There was evidence tending to show that defendant undertook for a consideration to extract certain teeth; that preliminary thereto he administered an anesthetic, from which plaintiff was rendered entirely unconscious, and that four teeth were extracted; that thereupon plaintiff was placed a second time under the influence of the anesthetic, and defendant undertook the extraction of three other teeth; that when plaintiff regained consciousness she was strangling and coughing as though she were choking, and she felt as if some foreign substance had gone through her windpipe; that she continued this coughing and became sick; that an abscess formed in the lower lobe of the lung, and quantities of yellow pus were expectorated; that her condition was such as might be expected to result from a foreign substance in the lung; that afterwards, during a fit of coughing, she expelled from her lung a tooth. It appears further that plaintiff was in perfect health before she entered defendant's office to have such teeth extracted; that from that day she began to be sick, and thereafter was continuously under the care of a physician; that after the tooth was expelled, though in a weak condition, she began to improve. It was further in evidence that by the use of ordinary care the extractor could keep the mouth of the patient clear of blood and, in case a tooth should escape from the forceps, as is frequently the case, he is able to remove it; that constant care is necessary to be exercised that teeth may not escape into the trachea; that a skillful operator keeps track of the teeth as extracted and knows when he has taken them all from the mouth, and examines the teeth actually extracted to see that no fragments are left in the mouth; that in the exercise of ordinary care the operator could discover whether any of the teeth or any fragments thereof had not been removed from the mouth. It further appears that a tooth slipping from the forceps may pass into the lungs; that the use of nitrous oxide as an anesthetic would increase the possibility of a tooth escaping from the mouth into the windpipe. There is no evidence in the record that defendant took any of the precautions before mentioned, or made any observations to see whether or not he had completed his task. In addition to all this, there was evidence tending to show that ordinarily a patient regaining consciousness will not cough; that, if coughing and strangling ensues after consciousness is regained it is recognized as an evidence of the fact that a foreign substance has escaped, and that unusual and great precautions are thereupon taken by the operator to cause its immediate removal; that, notwithstanding plaintiff's coughing and giving every evidence of having some foreign substance in her windpipe, no attention was paid to her by the defendant, and no effort made to ascertain the cause of her unusual condition. There was therefore competent evidence tending to establish the averments of the complaint, not only as to the negligence, but as to the proximate cause of the injury. Nor can we say that there was established any intervening act of plaintiff, voluntary or otherwise, which contributed to such injury. We think, therefore, that there is evidence in the record sustaining the findings of the court that defendant carelessly and negligently permitted and allowed a tooth to drop and pass into and down plaintiff's windpipe, and thence into plaintiff's right lung, without fault upon her part, by reason of which plaintiff was damaged.

There is no prejudicial error apparent in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

(149 Cal. 531)

NEWPORT et al. v. TEMESCAL WATER CO. (L. A. 1,788.)

(Supreme Court of California. Aug. 10, 1906. On Rehearing, Sept. 8, 1906.)

1. Waters and Water Courses—Subterranean Connection—Evidence.

Evidence in an action to enjoin the pumping and carrying off of waters of a valley *held* to sustain a finding that there was no subterranean connection between the waters thereof and those of another valley.

2. SAME—DIVERSION—INJURY TO LAND—EVIDENCE.

Evidence in an action to enjoin the pumping of water *held* to sustain a finding that the land from under which it was drawn was, in any case, arid and unprofitable.

3. SAME—INJUNCTION—DAMAGES.

Where it is to the interest of the public that water be pumped and diverted to supply the needs of a town, and the monetary injury to the land from under which it is taken can be determined, an absolute injunction will not be granted, but merely one conditioned on failure to make good the damage.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 117.]

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by William Newport and others against the Temescal Water Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

H. C. Rolfe and C. C. Haskell, for appellants. Joseph H. Call, Purington & Adair, and E. W. Freeman, for respondents.

HENSHAW, J. Perris Valley is a basin of 40 or 50 square miles in extent. The surface soil is of inferior character, arid and alkaline. At a depth varying from 8 to 40 feet below the surface the land consists of unstratified silt, detritus, and gravels. The voids in this soil carry water, and the water-bearing soils are from 100 to 400 feet in depth. Contiguous to Perris Valley is Menefee Valley, a somewhat similar, though smaller, tract of land. The surface soil of the Menefee Valley is of better quality than that of Perris Valley, and, like the latter, rests on water-bearing gravels. The Temescal Water Company, defendant herein, is a corporation engaged in the collection and distribution of waters for the use of its stockholders and others. It supplies the inhabitants of the town of Corona with water. The town of Corona, with a population of 2,700, has grown up dependent upon the water supply of defendant, and property to the value of $4,000,000 is subject to complete destruction should that supply fail. Of that supply all except an insignificant portion is taken by defendant from Perris Valley. In collecting and husbanding this water and delivering it to its consumers the defendant has expended nearly $1,000,000, and the value of its water rights and other properties is at least $2,000,000. In January, 1901, the defendant first purchased 160 acres of this water-bearing land in Perris Valley, and from wells then existing, and from additional wells which it bored, pumped water from the underlying saturated gravels and carried it through its flumes and conduits for about 40 miles to the lands of its stockholders at Corona. Subsequently, in March, 1903, the defendant purchased 3,340 additional acres of like lands. Thereafter it pumped and conveyed from its lands so acquired 600 or more inches during the irrigating season of each year. Upon March 1, 1904, some six landowners in Perris Valley, one of whom, the plaintiff Newport, is also a landowner in the Menefee Valley, brought this action for an absolute injunction to restrain the defendant from further pumping and carrying off the waters of Perris Valley. The essential allegations of their complaint, upon which were founded their demand for an injunction, are that the plane of saturation, when not illegally interfered with, stands from within 8 to 20 feet of the surface of the ground; that upon their lands were growing trees, vines, grasses, and shrubbery, sustained by the waters so standing at this level; that by capillarity, percolation, and like natural forces, these waters were drawn toward the surface, moistening and nourishing the roots of herbage and vegetation; that the effect of the pumping of defendant was to lower the plane of saturation so as to render it impossible for the water to reach the roots and thus to destroy these vegetable growths. It was further charged that each of the plaintiffs used, and had used, large quantities of the water for surface irrigation, for the growing of crops and for the nourishing of vines and trees; that this lowering of the water plane by defendant made pumping more difficult and expensive and would in time deprive plaintiffs of all water. Finally, it was alleged that Menefee Valley, with Perris Valley, formed a part of one and the same catchment basin, and that the effect of defendant's pumping in Perris Valley was to lower the plane of saturation under plaintiff Newport's land in Menefee Valley, and thus to work the same disastrous result. The defendant answered by denying the alleged acts and the resultant damage. It denied any subterranean connection between the water-bearing gravels of Perris Valley and Menefee Valley, and alleged that these valleys were disconnected and were in different water sheds. As to the lands in Perris Valley, it denied that in a state of nature the saturated gravels in any way contributed to the nourishment of the vegetation, and alleged that the lands were in great part alkaline and unfit for husbandry, and could not produce fair corps either from the subsurface waters, or from surface irrigation, or from both. Affirmatively it alleged that, underlying the surface of Perris Valley and but a few feet below the surface, was a stratum of hard-baked clay known as "hard pan," below which stratum lay the saturated gravels, and which stratum prevented the capillary drawing of the waters to any point so near the surface as to aid vegetation; that the effect of this hard pan was to turn the roots of trees, shrubs, and grasses, which could not penetrate through it, giving all vegetation but a shallow and worthless soil in which to endeavor to live; moreover, that when surface irrigation was attempted, by reason of this hard pan the waters were never returned, and never could return, to the underlying gravels from which they were taken, but were dissipated and wasted by evaporation. As affirmative defenses the defendant then pleaded its expenditures, the nature of its works, the use to which it had been putting the water, the knowledge and acquiescence of the plaintiffs, and other matters from which it asked the court to decree that plaintiffs' cause of action was barred by their laches and by estoppel. After a protracted trial the court found in favor of the defendant upon substantially all the disputed matters. The findings of the court are attacked, and some 96 specifications are set forth and argued. Plaintiffs' opening brief—366 pages in length—is largely devoted to an analysis of, and an argument upon, the evidence, in their endeavor to show that it does not support the findings of the court. The transcript contains about 1,000 pages of the evidence. To follow and answer plaintiffs' argument would amount to no more than a setting forth of the evidence which does sustain the findings, and to do this fairly would fill a volume of our Reports. It must suffice, therefore, to say that a critical examination satisfies us that the findings, one and all, are amply supported.

But briefly to illustrate the difficulty of discussing the findings within the broadest limits of a judicial opinion, the finding touching Menefee Valley may be instanced. The court found "that percolating waters in said Menefee tract do not connect with percolating waters in Perris Valley so that the water level in said Menefee Valley has been or can be affected by pumping water from lands in said Perris Valley." Upon this question a vast deal of evidence was introduced. Upon the part of the plaintiff, as has been said, it was contended that the subterranean connection between the two tracts of land was perfect, that the percolation and filtration was free, and that the direct effect of the pumping of defendant was to lower the water level in Perris Valley and to cause a corresponding lowering of the level in Menefee. Upon the part of the defendant it was shown that there was a decided ridge and elevation of ground between the two tracts so that certainly the surface drainage of the two were separate and distinct. Government topographical maps were introduced to show that the drainage of the basin of Perris Valley was down the San Jacinto river westerly to Lake Elsinore, while the drainage of the basin of Menefee Valley was distinctly separate and trended southwesterly through Salt creek. Expert witnesses were likewise called to testify to their belief that there was no subterranean connection between Menefee and Perris Valleys, and that their subterranean drainage outlets were likewise distinct. Certain of defendant's experts declared their belief in the existence of a more compact earth formation between Menefee and Perris Valleys which would effectually prevent and forbid anything like a free seepage or percolation of waters. Defendant, in support of this, urges the existence of dry wells upon this divide; that is to say, that wells dug upon either side of it in Perris or Menefee Valleys carried abundant water, while wells upon this divide yielded very little, and for practical purposes none at all. This, in turn, was disputed by plaintiffs, who showed that they had sunk wells along the pretended divide, and these wells went into free water-bearing gravels. Defendant again answered this by saying that, conceding this to be so, the wells merely tapped the gravels; that the quantity of water which the wells would produce was not established by this, and still less that it did not establish a water communication between the two valleys; that the nonexistence of this water communication was demonstrated by the fact that the water level in the wells of Menefee Valley was about 6½ feet higher than the water level of the wells in Perris Valley before any pumping had taken place; and, finally, that it was untenable to argue that Salt creek, into which Menefee Valley drained, with a grade of 48 feet and at a distance of 3 miles, would not lower the water level in the Menefee wells, which remained standing 48 feet above, while lowering the water level in Perris Valley 10 feet at a distance of five or six miles, would cause the water level in the Menefee tract to lower 10 feet. This naked statement of the conflicting evidence has been given to illustrate the technical nature of the testimony. When it is considered what astute arguments may be, and have been, raised upon either side in the analysis of it, it demonstrates the impossibility of attempting to discuss these arguments in all their varied phases.

As we have said, it must suffice to say that the findings of the court are well sustained. Those findings were, first, as has been said, that there was no subterranean connection between the waters of Perris and Menefee Valleys. This finding disposes of the alleged injury to plaintiff Newport's land in Menefee Valley. The court, in turn, found the existence of the layer of hard pan under Perris Valley, the alkaline nature of the soil, and the natural tendency of surface irrigation to draw this alkali to the top of the ground and thus destroy vegetation. Specifically it found "that about one-fourth of the lands of the plaintiff Newport in Perris Valley, nine-tenths of the land of the plaintiff Hoffman, and about one-third of the land of the plaintiff Pierce, are so impregnated with alkali, or mountainous, as to be rendered thereby practically unfit for agricultural purposes, and the remainder of the lands of said plaintiffs in Perris Valley are adapted to growing grain in seasons of abundant and seasonable rain, but, during average years, such land cannot be profitable farmed, and, on account of hard pan, subsoil, and climatic conditions, said lands are of little value for agricultural purposes, and, when irrigated, do not produce profitable crops with reasonable regularity and abundance." This finding is attacked as being unsupported by the evidence. It is further said that it is too indefinite in its declaration that the lands have "little value for agricultural purposes," and that when irrigated do not produce profitable crops with "reasonable regularity and abundance." The evidence showed that, of all the lands in Perris Valley owned by the plaintiffs, which lands aggregate some 5,590 acres, and which lands for the most part had been owned for 20, 15, or 10 years, less than 58 acres were being irrigated by these plaintiffs. The plaintiff Elisha H. Pierce so irrigated "35 acres, more or less," of alfalfa and 1 acre of trees and vines and vegetables, which could not be grown without artificial irrigation. The plaintiff William Hoffman, in 1902, irrigated less than one-eighth of an acre, upon which were growing a few vegetables and fruit trees. The plaintiff Waters for more than 5 years had been irrigating about 2 acres planted to trees, vines, and shrubbery. Plaintiffs Paggi, who purchased their land after the defendant's pumping plant was in operation, irrigated one-eighth of an acre of alfalfa and "20 acres more or less" of grape vines, while the plaintiff Newport never used any of the water in Perris Valley at all. We do not set forth the small quantity of the land so irrigated out of the tract of 40 or 50 square miles with any idea that, because the use was little, and the value small, the defendant and the inhabitants of Corona which it supplied should in any way receive any preference, or should for such reason be thought to have any superior right. Such an argument has no standing in a court of law and is distinctly repudiated. But it does serve to support the finding of the court that the land is arid and unprofitable. For it is not to be supposed that, with an abundance of water under the soil, if the soil itself was fit for cultivation, those waters would not long since have been used to transform the desert of Perris Valley into a fruitful garden. The court further found that, in the 3 years during which the defendant had pumped water from the valley, the plane of saturation had lowered some 10 feet. But it distinctly declared against the post hoc propter hoc argument that this lowering was caused by the pumping, and found that for several years prior to 1901, when the defendant commenced pumping, the long period of drouth that had existed for the previous 10 years, with the pumping of others than the defendant, had resulted in lowering the plane of saturation; that defendant's pumping has only contributed, with these other causes, to the lowering, and that there was no reason to believe that its continued pumping would in time exhaust the saturation or the water, but "with normal rainfalls and such as has been usual in the past 40 years in Perris Valley and surrounding country, said water plane will return to its former level, such as it was before any water was pumped therefrom, and will continue to furnish sufficient water for the reasonable use of plaintiffs and defendant without being greatly or permanently lowered." Since the time when defendant commenced to pump in 1901, the finding is that the water plane has been temporarily reduced an average of about 10 feet—"part of which reduction has been caused by defendant, the remainder by plaintiffs, by third parties and by natural causes."

These findings so completely dispose of this controversy upon its merits that little is left to be said. It becomes wholly unnecessary to consider the court's finding of laches. Important as the consideration of this question must prove to be, where an absolute injunction is sought against work of public or quasi public benefit, such discussion must be postponed until the time when it necessarily arises. It is to be observed, however, in this case, that the plaintiffs do not ask for damages and an ancillary injunction until such damages are paid, but ask for an injunction absolute, without seeking monetary compensation. But, on the question of monetary loss, the showing is that the additional cost of pumping caused by the lowering of the water plane 10 feet would be, for alfalfa, the crop requiring the most water, not more than $1 per acre. So that $58 per year would fairly represent the monetary loss of these plaintiffs for all the land which they irrigated, even if the lowering of the plane were wholly attributable to defendant. But, as has been said, the finding of the court establishes that the lowering was due to the use of water by plaintiffs themselves, and by others, as well as to the natural cause of drouth, quite as much as to the operations of defendant. And, finally, upon this proposition it may be said that, where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and, failing to make such compensation, should be enjoined from further damage. For, as was said by this court in Montecito Valley v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113, in a case similar to this, "a prohibitory injunction should only be granted if any and all other forms of relief should be found inadequate." In this case, however, the plaintiffs sought an absolute injunction. This they conceived to be their right under Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, which had been decided but two months before the commencement of their action. The decision of Katz v. Walkinshaw is adhered to, but as plaintiffs, on the facts, failed to establish any ground for relief under the principles there laid down, no amplification of those principles becomes necessary.

The objections and exceptions to the admission and rejection of evidence taken at the trial do not call for detailed consideration. No one of the rulings adverse to appellants had any bearing upon the findings which we have considered so as in any way to have affected the result, and, for the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). In their petition for a rehearing counsel for appellants make a point which I think should have received further consideration before any final disposition of the case. They contend that, if they are denied the injunction for which they prayed only because their injury may be fully compensated by money damages, such damages should have been allowed in this suit under their prayer for general relief, and that it was error, in view of the admitted fact that their lands are permanently damaged by the same unlawful acts which were enjoined in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, to turn them out of a court of equity without any relief and with a judgment against them for all the costs of a protracted litigation. The argument advanced in support of this proposition seems to me very cogent, and deserving of the further and serious consideration of the court; and for this reason I dissent from the order denying a rehearing.

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149 Cal. 704

SNEED v. MARYSVILLE GAS & ELECTRIC CO. (Sac. 1,221.)

(Supreme Court of California. Sept. 20, 1906.)

1. EVIDENCE—OPINION EVIDENCE.

In an action for the negligent killing of plaintiff's intestate by touching or coming in close proximity to an electric wire there was evidence that decedent had knowledge at least of the danger of touching a charged electric wire. *Held*, that the admission of testimony of decedent's mother that he did not know the dangers of electricity was prejudicial error.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2242.]

2. WITNESSES—COMPETENCY—KNOWLEDGE OF FACTS.

Under Code Civ. Proc. § 1845, requiring a witness to have knowledge of facts testified to, except in express cases, the testimony of a mother that her son had no knowledge of the danger of electricity is inadmissible, particularly where it is shown that her statement was based solely on the fact that he had always lived with her and had never told her of such knowledge.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 80-85.]

3. TRIAL—OBJECTION TO EVIDENCE.

Where the court rules on the merits of an objection to the competency of evidence, made immediately after the answer, and directs the objector to ascertain the competency on cross-examination, and no point is made at the time as to the timeliness of the objection, such point is barred.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 183-190.]

4. SAME — OBJECTIONS — STATEMENT OF GROUNDS.

An objection to a question as to whether the witness' son had a knowledge of the dangers of electricity, on the ground that it had not been shown that the witness knew anything about such knowledge, sufficiently presents the question as to the competency of such evidence.

5. DEATH—DAMAGES—AMOUNT.

Under the statute the damages to be recovered by an administrator for an injury causing the death are limited to the pecuniary loss suffered by the heirs of decedent by reason of his death, including both the deprivation of that to which the heirs would have been legally entitled had the decedent lived, and that which it might be reasonably expected they would have received from him, although only a moral obligation rested on him in relation thereto.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 112.]

McLaughlin, J., dissenting in part.

In Bank. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Elizabeth M. Sneed, administratrix of James L. Sneed, deceased, against the Marysville Gas & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Garret W. McEnerney, William B. Besley, Forbes & Dinsmore, and F. P. Deering, for appellant. W. H. Carlin, for respondent.

SHAW, J. This is an action to recover damages for the death of the deceased, James L. Sneed, alleged to have been caused by the negligence of the defendant. Plaintiff recovered judgment, defendant moved for a new trial, and its motion was denied. The defendant appealed from the judgment, and also from the order denying its motion for a new trial. The action was begun by James A. Sneed, the father of the deceased, as the administrator of the estate. After judgment, James A. Sneed died and the present plaintiff was substituted in his place, as administratrix and as plaintiff. The deceased, at the time of his death, was in the service of the defendant in the capacity of a plumber or plumber's assistant, and was engaged in the work of joining two pieces of pipe at the top of a water tank house owned by defendant. At an elevation about five feet higher than the platform on which he was at work there were eight wires stretched, each carrying a high potential electric current of 16,000 volts, the wires and electric current being owned, controlled, and managed by the defendant. The nearest of these wires was about five inches away from a vertical line extended upward from the edge of the tank house platform, so that, if the deceased attempted to stand erect with his head projecting over the edge of the platform, he would inevitably come in contact with or near to this wire. His death was caused by the electric current from this wire entering his head as he made the attempt to stand erect, while at the same time having his head bent over forward looking down at a fellow workman on the ground below.

The particular charge of negligence against the defendant was that the place, as above described, where deceased was at work was, by reason of the proximity of the wires and the powerful electric current carried by them, a place of danger; that the deceased did not know the nature or properties of electricity, nor the dangers incident to coming in close proximity to the said wires carrying said electric current; that defendant, with full knowledge of the dangers arising from the proximity of said wires and electric current to said platform, and of the ignorance of the deceased concerning the same, put him to work thereon without instructing him, or warning him of the said dangers. Under the issues it became material and important to ascertain on the trial whether or not the deceased, prior to his death, had any knowledge of electricity and the dangers arising from its use on the said wires. Evidence was given on this issue by both parties, and the jury specially found that the deceased did not have such knowledge. It is earnestly claimed by the defendant that the competent evidence is not sufficient to sustain this finding. There was evidence tending to show, and defendant insists that it was sufficient to prove, that he did possess that knowledge. It is necessary to mention this only for the purpose of demonstrating the importance of excluding from the jury any incompetent evidence on the subject, and to show that injury was likely to be caused by the admission of improper evidence tending to prove such lack of knowledge. The present plaintiff, the mother of the deceased, was a witness for the plaintiff. She testified that at the time of his death the deceased was 22 years of age and had lived with her all his life, that he had been working out for himself ever since he was 19, and was working for defendant in its gas department on September 17, 1901, the day of his death. Thereupon the following question and answer was asked and given in her examination in chief: "Q. Did he, up to that time, have any knowledge of electricity or its dangers? A. He had no knowledge." Objection was made to this on the ground that it had not been shown that the witness knew anything about the knowledge of the deceased regarding electricity or its dangers. The court overruled the objection, remarking to defendant's counsel, "You can find out on cross-examination." On cross-examination on the subject she testified that he had for three or four months before his death, worked for defendant as a plumber, and had previously worked in the same occupation at the woolen mills; that she had been at the woolen mills and had seen him working there six or seven times, about half an hour each time; that she did not think they had any electric motors or wires at the woolen mills; that she did not know that he had run a motor there, and did not think he did; that he did not learn of electricity or its dangers either in his work at the woolen mills or in his work for the defendant; that she knew he knew nothing about it; and that the only reason she had for saying this was that he always told her everything he was doing anywhere, and that if he had learned of electricity and its dangers he would have told her something of it, and that he had not told her anything about it. Thereupon the defendant moved the court to strike out the testimony of the witness as to the lack of knowledge of deceased, on the ground that it was hearsay, and the motion was denied.

In these rulings we think the court erred. There was evidence on behalf of the defendant to the effect that electric motors were installed and used in the woolen mills while Mr. Sneed was working there; that he was there instructed how to run the motor and informed of the danger from contact with wires carrying electricity. While it may be that there is no evidence that he was ever informed that one might receive what is called a "brush discharge" from coming in close proximity to highly charged wires, without actual contact therewith, there clearly is evidence that he knew the danger arising from such contact. The evidence leaves it doubtful whether the death was caused by a "brush discharge" or by a discharge from actual contact with the wire. In view of this condition of the evidence, the action of the court in practically informing the jury that they could consider, as evidence on the question, the positive declaration of the mother that he had no knowledge of any such danger, would probably be taken by the jury as highly significant, and, if this declaration was incompetent, its admission must be presumed to have been injurious to the defendant. That it was incompetent, under the circumstances shown, is clear. Ordinarily one person cannot know what is in the mind of another, and direct testimony by a witness that another knows or does not know a particular fact is, for that reason, in most cases improper. Such knowledge can only be shown by his declarations, or inferred from circumstances, and proof of it can only be made by proof of his declarations or of circumstances from which it can be inferred, as that he was, or was not informed, or that he was in a position from which he could, or could not, see, and such like conditions. "A witness can testify of these facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others are admissible." Code Civ. Proc. § 1845. This section is inaccurate, so far as it refers to the admission of the declarations of others as an exception. In such case the witness testifies merely to the making of the declaration, which he must have heard in order to be a competent witness to testify to it, and hence, the fact to which he testifies is a fact within his own knowledge, derived from his own perceptions. With respect to opinions and inferences, the only exceptions to this general rule at all similar to the case at bar are the opinions of subscribing witnesses to a writing, and of intimate acquaintances of a person as to the sanity of such signer or person (Code Civ. Proc. § 1870, subd. 10), and those cases where, from the nature of the case and the difficulty of accurately describing in words the facts on which the inference or opinion is based, a witness is allowed to testify directly to the conclusion or inference that another person was, on a particular occasion, angry, calm, agitated, excited, intoxicated, rational, or irrational, and the like. Holland v. Zollner, 102 Cal. 638, 36 Pac. 930, 37 Pac. 231; People v. Manoogian, 141 Cal. 592, 595, 75 Pac. 177; People v. Lavelle, 71 Cal. 351, 12 Pac. 226; People v. Sanford, 43 Cal. 29. We, of course, are not speaking here of expert opinions in matters of science or special knowledge. None of the cases go so far as to hold it competent for a witness to testify directly that another person was, or was not, possessed of knowledge or learning of, or concerning, a particular fact. We can see no reason for extending the exceptions to the general rule so far as would be necessary to sustain the admission of the testimony in question. And this is especially true of the denial of the motion to strike out the testimony after the cross-examination, which the court suggested, had disclosed that the witness had no means of knowing the knowledge possessed by her son, other than his silence on a subject as to which there was no especial reason for him to speak to her.

The respondent makes some technical objections to the consideration in this court of the question of the competency of this evidence. The first one is that the objection to the question came too late, being apparently made after the question was answered. In the bill of exceptions the objection seems to have been made immediately after the answer, and there is nothing to indicate that there was not time to make it sooner, except the fact that the answer is very brief. We think, however, that the conduct of the court in apparently making the ruling on the merits of the objection, instead of on the point that the objection was not timely, and in directing defendant's attorney to ascertain the facts bearing upon the objection on the cross-examination, should be considered as a bar, to the point that the objection came too late. The attorney might well have inferred therefrom that the court was ruling on the objection on its merits, waiving the point that it was untimely, and consequently may have been led to refrain from claiming that the answer was given before he had time to object. There is nothing to indicate that the court did not so consider the matter, or that counsel for plaintiff was then relying on the point that the objection was too late, or was in any respect misled or injured by the lateness of the objection. The ground of the objection substantially presented to the court the question of the competency of the evidence sought to be elicited. The testimony of a witness as to the knowledge possessed by another is incompetent evidence, because the witness can have no knowledge of the fact to which he is asked to testify. Hence the objection that it had not been shown that the witness knew of the knowledge possessed by the deceased was, in substance, an objection that the evidence proposed is incompetent. It was merely a specific statement of the particulars which rendered the evidence incompetent. We do not think it necessary to consider the sufficiency of the evidence to sustain the allegations that the deceased was uninformed of the dangers arising from the use of electricity and its transmission through wires, that the defendant was aware of his ignorance in these particulars, and that it failed to instruct him concerning the same, or inform him of the danger incident to the place of his employment and the proximity thereto of a high potential electric current. The evidence upon another trial may be different, as also may be the verdict.

It is further contended by the appellant that the damages allowed by the jury were excessive, and a considerable part of the argument on both sides is devoted to this subject. Inasmuch as a new trial will be necessary because of the error in the admission of evidence, as heretofore stated, we do not consider it proper to discuss the question of excessive damages. With regard to the measure of damages, in view of the argument made, and of the probability of another trial, it is proper to that say that it is definitely settled that, under our statute, the damages to be recovered for an injury causing death are always limited to the pecuniary loss suffered by the heirs of the person killed, by reason of his death. Munro v. Dredging Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Morgan v. S. P. Co., 95 Cal. 516, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Pepper v. S. P. Co., 105 Cal. 401, 38 Pac. 974; Green v. S. P. Co., 122 Cal. 566, 55 Pac. 577; Wales v. Pacific E. M. Co., 130 Cal. 523, 62 Pac. 932, 1120; Keast v. Santa Ysabel, etc., Co., 136 Cal. 260, 68 Pac. 771; Dyas v. S. P. Co., 140 Cal. 308, 73 Pac. 972; Hillebrand v. Standard B. Co., 139 Cal. 236, 73

Pac. 163. We think it may be further said that this pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have a moral obligation only. 8 Am. & Eng. Ency. of Law (2d Ed.) pp. 922, 939; 13 Cyc. p. 367; Redfield v. Oakland C. S. Ry. Co., 110 Cal. 288, 42 Pac. 822; 3 Suth. on Dam. (3d Ed.) § 1272, p. 3736; ibid. § 1273, p. 3740.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

McLAUGHLIN, J. I dissent. "All intendments of the law are in favor of the regularity of the judgment and proceedings in the court below, and it is incumbent upon the appellants to show error affirmatively." People v. Gibson, 106 Cal. 458, 39 Pac. 864; McLennan v. Wilcox, 126 Cal. 53, 58 Pac. 305; People v. Allen, 144 Cal. 300, 77 Pac. 948. The objection to the question asked Mrs. Sneed was interposed after she had answered, and there is nothing in the record to show that the court was requested to, or did, consider the objection as having been made at the proper time. True, this may have been the case, but it might with equal plausibility be assumed that the objection was overruled because it was tardily made. Under the rule above quoted the latter view should be accepted as correct, and this done it certainly cannot be said that the ruling was erroneous. A motion to strike evidence from the record must be based on a timely and sufficient objection to its introduction, and hence there was no error in refusing to eliminate the testimony of Mrs. Sneed. If, however, it be conceded that the evidence was objectionable and the ruling improper, still I cannot persuade myself the error was prejudicial. A mother may, perhaps, know that her son had no knowledge of electricity or its dangers, because he has never had an opportunity to acquire such knowledge either by personal observation, reading, or intercourse with persons who could give him information on the subject. If his life has been spent at a place so isolated that she must know of his every act, she would be in a position to say that he had no knowledge of something he had never seen, and could not have heard or read about. The answer of Mrs. Sneed was of a very general character, and upon cross-examination it was demonstrated beyond question that she could not have known, and did not know, anything about her son's knowledge touching this or any other subject. Crediting jurors with the usual measure of intelligence they certainly could not have been misled by a general statement absolutely unsupported by the reasons she gave for having made it.

NOTE.—Justice SLOSS being disqualified, Justice McLAUGHLIN, one of the justices of the District Court of Appeal for the Third Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

(149 Cal. 683)

In re DILLON'S ESTATE. (Sac. 1,478.)

DILLON v. CROSS.

(Supreme Court of California. Sept. 17, 1906.)

EXECUTORS — MANAGEMENT OF ESTATE — EXPENSE ACCOUNTS—REVOCATION OF PROBATE —COSTS.

After the probate of a will and the appointment of an executor, a petition was filed for the revocation thereof. While the issues were still unsettled, the court allowed, instead of retaining for future determination, items of expense in an account of the executor for the services of experts in handwriting to determine the validity of a second will. *Held*, erroneous, in view of Code Civ. Proc. § 1332, providing that, where the probate of a will is revoked, the costs must be paid by the party resisting the revocation, or out of the estate, as the court directs.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 451–453; vol. 49, Cent. Dig. Wills, §§ 891–894.]

Department 2. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Objections by P. F. Dillon to an account of C. W. Cross, executor of Patrick Dillon, deceased. From an order allowing the account, objector appeals. Reversed with directions.

James G. Maguire and Thomas S. Ford, for appellant. P. F. Simonds, for respondent.

LORIGAN, J. A document dated March 8, 1904, purporting to be the last will and testament of Patrick Dillon, deceased, was duly admitted to probate in the superior court of Nevada county and letters testamentary issued to the respondent, C. W. Cross, named in the will as executor. Within a year thereafter another document, dated October 24, 1904, which was claimed to be in fact the last will of said deceased—olographic in character—was filed by appellant, P. F. Dillon, together with a petition by him praying for its admission to probate and that the probate of the prior will be revoked and the letters testamentary which were issued thereon to said C. W. Cross be canceled and set aside. In his answer to this petition said C. W. Cross, as executor, set up that the alleged document filed by the appellant, Dillon, was a false, fictitious, and forged instrument. Thereafter by amendment to his petition for revocation of the original probate, and the admission to probate of what he claimed to be the later will, the appellant, Dillon, filed a contest against the validity of the prior will, urging as ground therefor that its execution had been procured through the undue influence of C. W. Cross, the executor named therein. The respondent, Cross, demurred to this amended petition, and his demurrer was undisposed of, and hence the issues on the contest were not settled, when the point now presented on this appeal—the validity of the order of the lower court settling the second account of the executor, Cross—arose in the lower court. This account was filed on October 20, 1905, while the petition for revocation of the prior will, and the contest of the same, were pending. The appellant, Dillon, filed his objections to four items of the account, aggregating $714.90, consisting of expenditures by the executor with reference to the olographic will presented by said Dillon for probate. These items consisted of $150 paid D. T. Ames for examination and opinion as handwriting expert on the said olographic will; a sum of $150 paid C. Eisenschimel for opinion as handwriting expert on the same matter; the further sum of $100, retaining fee, paid to said D. T. Ames as handwriting expert; and $314.90 paid for photographing and enlarging the will. The court allowed all of these items in said account to the executor, Cross, and this appeal is taken from the order making such allowance.

We think the court erred in making such allowance on the settling of this account. It should have retired all these items objected to from it, to be considered and disposed of at a later date, and when the contest concerning which the executor claimed to have incurred these expenses had been determined. While it is the duty of an executor after a will has been admitted to probate to defend the will against attack (Estate of Whetton, 98 Cal. 203, 32 Pac. 970), this does not confer upon him an unqualified right to incur and charge against the estate all items of expenditure, in resisting the attack, which he may see fit. His duty in this regard is qualified to the extent that he can only be allowed for such expenditures as are necessary and are made in defending the attack upon the original probate in good faith. This is obvious from the section of the Code (Code Civ. Proc. § 1332) providing for the allowance of costs on the contest of a will after probate which declares that "* * * if the probate is revoked, the costs must be paid by the party who resisted the revocation, or, out of the property of the deceased, as the court directs." It will be observed from the reading of this section that, where the executor is unsuccessful in resisting the revocation of the probate, he is not as a matter of right entitled to his costs incurred in that contest, but the court is vested with discretion to determine whether he shall be charged with them, or whether the estate shall bear them. This section contemplates that, before the estate shall be charged with the costs of the contest, the court should be in a position to know whether or not the contest was waged by the executor in good faith, with a reasonable belief that the attack on the original probate was unjustified. Certainly the court upon the settlement of an account, which involves an application to compel the estate to bear extraordinary costs, cannot in advance, before even the settlement of the issues involved in the contest, say that such expenditures were necessary, or incurred in good faith by the executor. In settling an account before the determination of the contest the court has no power to enter into a consideration of these questions. It could not determine on the settlement whether there was any merit in the contest or not, whether there was any validity in the claim that the will subsequently offered for probate was a forgery, or whether the will originally probated was obtained by undue influence or not. And yet these are all matters which must necessarily be determined in order that under section 1332, Code Civ. Proc., supra, the reasonable discretion vested in the court to charge the executor, or the estate, with the payment of the costs of the contest can be exercised. The section above referred to evidently contemplates a trial of the contest before an allowance for costs of the extraordinary character here involved can be made. It contemplates that the court shall be in possession of the facts and circumstances surrounding the contest as a basis upon which its discretion can be properly and fully exercised, and as upon a settlement of the account the court could not be placed in possession of them, and could not determine whether the costs claimed were necessarily incurred, or whether the executor acted in good faith in incurring them, the items should have been retired from the account for subsequent consideration when the court could be placed in full knowledge of all the facts from which to determine whether, if found to be proper costs, they should be charged against the executor or borne by the estate. This is what the lower court should have done with reference to the items in the account presented which were objected to by appellant.

The order settling the account is reversed, with directions to the lower court to settle the account by charging the executor with $714.90 in addition to the balance charged against him in the account as settled by the court.

We concur: McFARLAND, J.; HENSHAW, J.

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149 Cal. 695

NORRIS v. HAY et ux. (L. A. 1,701.)

(Supreme Court of California. Sept. 17, 1906.)

1. VENDOR AND PURCHASER—CONTRACTS—RESCISSION BY VENDOR—NONPAYMENT OF PURCHASE MONEY.

A contract for the sale of real estate required the purchaser to make a deposit to assume a mortgage, and to pay the balance before a specified date. There was no provision for forfeiture on default. The purchaser made the deposit, but failed to pay the balance on the date specified. *Held*, that such delay did not terminate the contract, in the absence of measures by the vendor to terminate it.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 369–372.]

2. SAME — RESCISSION BY PURCHASER — GROUNDS—SUFFICIENCY.

In an action by a purchaser to rescind the contract for the vendor's fraudulent representations, it appeared that the vendor represented that he had not made any prior contract to sell, that he had contracted to sell to a third person, that the third person had not paid the price on the date specified therefor, that his contract provided for no forfeiture for noncompliance, that time was not made the essence thereof, that the vendor took no measures to terminate it, and that the third person was endeavoring to perform, and claimed rights as against the purchaser. *Held* to warrant a finding that the representations were fraudulent authorizing the purchaser to rescind since the contract with the third person was in force.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 45–48.]

3. SAME—FAILURE TO PAY PURCHASE PRICE—RIGHT OF VENDOR.

A contract for the sale of real estate required the purchaser to make a deposit with a third person, to assume a mortgage, and to pay the balance before a specified date. The purchaser made the deposit, but failed to pay the balance on the date specified. *Held*, that the vendor in suing for the deposit, stood on the contract as if in force, for if he had elected to rescind he could only have sued for damages for breach of contract.

4. SAME—BONA FIDE PURCHASER—NOTICE.

A person, contracting for the purchase of real estate, who has no knowledge of an unrecorded prior contract, binding the vendor to sell the premises to another, may rely on the representations of the vendor that no prior contract has been made.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 45–48.]

5. SAME—FALSE REPRESENTATIONS BY VENDOR—RIGHT TO AVOID.

A vendor, contracting for the sale of real estate, who represents to the purchaser that no prior contract relative to the premises exists, will not be permitted to avoid the false representations by claiming that though a prior contract to sell to a third person was made, yet, by reason of circumstances unknown to the purchaser, it might be inferred that the prior contract had been abandoned.

6. SAME—RIGHT OF PURCHASER TO RESCIND.

A vendor, in a contract of sale, agreed to convey a good title and represented that he had made no other contract for the sale of the premises. The vendor had made a prior contract, and there was a doubt as to its validity. *Held*, that the purchaser in the second contract, was entitled to rescind.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 45–48, 188–193, 200.]

7. JUDGMENT—RES JUDICATA—PERSONS CONCLUDED — ACTION TO RESCIND PURCHASE — EVIDENCE.

Where, in an action to rescind a contract for the purchase of real estate, on the ground of the vendor's false representations that he had not previously contracted to sell the premises, it appeared that the vendor had previously contracted to sell the premises to one who had deposited a part of the purchase price with a third person, the judgment roll in the action by the vendor to recover the deposit, was inadmissible, the purchaser not being a party thereto, nor bound by any adjudication therein.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1230–1233.]

Department 2. Appeal from Supreme Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Henry C. Norris against Andrew Hay and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Jones & Weller, for appellants. Robt. E. Ross and Hunsaker & Britt, for respondent.

LORIGAN, J. This action was brought to rescind a contract for the sale and purchase of land in Los Angeles county, and to recover certain amounts of money paid by plaintiff to defendant under the contract, and for other relief, on the ground that at the time said contract was made, and, as an inducement to its execution, the defendants Hays made false and fraudulent representations to plaintiff with regard to the condition of the title to the land agreed to be purchased. Plaintiff had judgment, and defendants appeal from an order denying a motion for a new trial.

The court found that plaintiff and other persons associated themselves together in a joint venture to purchase a tract of land from the defendants Andrew Hay and his wife Lizzie T. Hay. That about December 22, 1902, an agreement was entered into between Norris, representing the syndicate, and the Hays, whereby Norris was to purchase the said land for the sum of $104,000, the contract providing for certain payments to be made in cash and the balance of the purchase price to be secured by mortgage upon the property purchased; that at the time said contract was entered into, the Hays, for the purpose of inducing plaintiff and his associates to contract for the purchase of the land on the terms agreed upon, represented to plaintiff that they had not entered into any contract or obligation whatever for the sale of said land to any person, and repeatedly stated to plaintiff and his associates that they particularly never had any transaction with one West affecting the title to said land; that not a "scratch of a pen" had been made between themselves and West concerning the title to the property or with reference to any agreement to convey the same; that believing such representations and statements to be true, and in reliance thereon and induced thereby plaintiff made the contract of purchase with them above referred to; that plaintiff paid to defendants as the contract required $15,000 in coin, and executed promissory notes to the defendant Lizzie T. Hay for $37,000 secured by mortgage; that plaintiff would not have executed said contract nor made such payments or delivered said notes and mortgage, save that he believed the statements and representations of said Hays to be true; that, after such payment and delivery of said notes, and before final payment, plaintiff and his associates for the first time discovered that said representation made by the Hays, that they had entered into no prior contract whatever affecting the title to said land was false and untrue, the lower court finding in that regard, that, on September 4, 1902, several months prior to the contract with plaintiff, the Hays had entered into a contract with one W. F. West for the sale of said land to him for $80,000, upon which he had deposited $10,000 with the Title Insurance & Trust Company of Los Angeles, the common agent of all parties to the contract; that plaintiff and his associates, when such representations were made, were ignorant of the existence of the contract between Hays and West; that such contract between the Hays and West continued to be in force and effect from its date till the commencement of this action by plaintiff, and had not been abrogated by the parties thereto. The court, on these findings, entered judgment, rescinding and setting aside the contract between plaintiff and the Hays, and awarded other relief prayed for, which, as no attack is made on the judgment, it is unnecessary to state.

The principal point made upon this appeal is that the evidence was insufficient to sustain the finding that, at the time the Hays entered into the contract with plaintiff, their agreement with West as to the same land was in force and effect, and the further finding that their representations to the plaintiff that no such contract existed were false and untrue. There can be no question but what the evidence abundantly shows that the Hays emphatically represented to plaintiff and his associates when negotiating for the sale to them of this land that they had not made any prior contract affecting the title to it with West or any other person, and we are satisfied that it appears satisfactorily from the evidence that, when the contract for the sale of this land with Norris was entered into, the West contract which it is not questioned but that the Hays had executed, was a valid and subsisting contract.

The claim of appellants (while admitting the execution of the contract with West) is that the evidence shows, that, long prior to the subsequent contract with Norris, the Hays and West had abandoned and abrogated their contract. We think, however, that the contrary is apparent. There is nothing in the evidence to show any express abandonment or abrogation. The West contract called for a deposit of $10,000, which was made, the assumption of a $13,000 mortgage by West and payment by him, on or before October 25, 1902, of the balance of $57,000. There was no provision in the contract for forfeiture of rights under it for noncompliance with the condition of final payment nor any provision making time the essence of the contract. The final payment to be made by West was overdue less than two months when the contract with plaintiff was made. Up to that time no successful effort had been made by the Hays or West to terminate the contract. Mere delay on the part of West did not forfeit his right under it as the Hays had not taken any effective measure to terminate them. North Stockton, etc., Co. v. Fischer, 138 Cal. 101, 70 Pac. 1082, 71 Pac. 438. As far as the record discloses, there was no action taken by either of these parties which, when the contract with Norris was made, or subsequent thereto, precluded West from tendering full payment on his part under his contract, notwithstanding final payment had been delayed, or from enforcing specific performance under its provisions. Aside from this, however, the evidence shows that West was always insisting that he had subsisting rights under the contract, and subsequent to October 25th and up to the time this present suit was commenced, was actively endeavoring to obtain the money with which to make final payment and was insisting that he had a right to do so. He was making such endeavor, and asserting that the contract was a subsisting one up to and after the payment by plaintiff of the $15,000 to the Hays. In fact, it was he who first brought notices of the existence of his contract to plaintiff and his associates. He sent a party to open negotiations with them for the purchase from him of his rights under it, declaring that they could not get a title except through him; that the Hays could not deliver the property to plaintiff and his associates unless they would see him and get the title through him.

Taking, then, these facts into consideration—that the contract between the Hays and West in itself provided for no forfeiture; that time was not made the essence of the contract; that mere lapse of time of itself did not terminate West's rights; that no agreement had been entered into by the parties rescinding, abandoning, or abrogating it; that West was at all times endeavoring to perform its conditions and claiming rights under it, even as against plaintiff—and we think the court was right in finding that when the Norris contract was entered into the West contract was in full force and effect, and that the representations to the contrary embraced in the statements of the Hays that they had entered into no contract whatever with West or any other person were fraudulent and untrue. It is true that there was evidence of some conduct on the part of both the Hays and West relative to the contract between them from which it is claimed a rescission or abandonment of it followed. But we do not think any such result was effected. The contract between them was in the hands of the Title Insurance & Trust Company as the common agent to whom West had paid the $10,000. After default by West in the final payment to be made October 25, 1902, the Hays had granted him further time, and then notified the Title

Insurance Company not to accept any further payment if West tendered it, and demanded from the company payment to themselves of the $10,000 deposited by West, but which, however, West notified the trust company not to pay. Upon such notice by West the Hays might have acted and terminated the contract, but they did not see fit to do so. They commenced a suit (which was not at issue when the present action was brought) against the trust company to recover the $10,000 deposited by West as money held by it for them under the contract. In so doing they were standing upon the contract as still in force, and claiming the money by virtue of its terms. If the contract had been rescinded or abandoned by the parties, the Hays would not have been entitled to maintain an action for this $10,000 under the contract, but only to recover such damages as might have resulted to them from West's breach of it, and, unless such damages, West would have been entitled to the $10,000. Shively v. Semi-Tropic L. & W. Co., 99 Cal. 259, 260, 33 Pac. 848. So that as the Hays, by their suit, were asserting rights under the contract as still in force, and West was claiming under the contract and endeavoring to dispose of the land of the plaintiff and his associates, asserting that title to it could only come through him, these facts, instead of supporting the theory of the Hays that the contract was abandoned, would tend to support the finding of the court that it was not.

And while we are satisfied that the evidence shows that at all the times in question the West contract was unrescinded and in force, it is to be remarked that the contract between the Hays and West was not recorded, and that plaintiff had no knowledge of its terms, nor of the transactions between Hays and West, above referred to, nor of the commencement of the action against the Title Insurance & Trust Company. Plaintiff was not required to make inquiry as to any of these matters. He had a right to rely absolutely upon the representations of the Hays that no contract of any kind affecting the title had been made, either with West or any other person. And giving the facts immediately referred to, upon which the Hays rely to show an abandonment of the contract, their greatest force, they simply tend to render the matter of abandonment uncertain, and it is hardly necessary to say that, after having expressly represented that no contract whatever existed relative to the title to these lands with West or any other person, the Hays will not be permitted to avoid their false representations in that respect by claiming that, although a prior contract was made with West, still, by reason of certain facts and circumstances unknown to plaintiff and resting exclusively in pais, it might be inferred that the contract was abandoned. As we say, these facts at best simply render the matter of abandonment equivocal. Under this situation, Norris was not required to determine at his peril whether the claim of West under his contract was valid or not. There was at least a reasonable doubt whether it had been abandoned or rescinded, and Norris was not required in this condition of doubt to complete his payment and subsequently litigate with West the validity of his prior contract, but was entitled upon discovery of the existence of the West contract to institute a suit for the rescission of his subsequent contract with Hays. This is but the application of the general rule that a vendee is entitled to rescind where it is apparent that there is a reasonable doubt as to the validity of the title to the land which the vendor contracts to convey to him. Under his contract, West acquired an equitable interest in the land. When the Hays contracted with Norris it was for a good title, but at that very time, and even up to the time this action was commenced, it was at least reasonably doubtful whether the prior contract with West was or was not subsisting. Under such circumstances Norris was not required to proceed with his purchase and take title the validity of which as against the asserted claim of West might involve him in litigation, and the sufficiency of which it would require parol evidence to sustain. Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

It is claimed by appellant that the court erred in its rulings as to the exclusion and admission of evidence. We do not think any of the rulings, if erroneous, were of such materiality as to require a reversal.

It was not error to refuse to admit in evidence the judgment roll offered by appellants in the case of Hay v. The Title Insurance & Trust Company, above referred to. That action was brought to recover the $10,000 deposited by West. The complaint was filed November 25, 1902. The title Insurance Company subsequently paid the money into the court and West was by order of interpleader substituted as defendant in the action. He did not answer until January 26, 1903, three weeks after the complaint in the present action was filed—January 5, 1903. As the right of plaintiff to recover was fixed at least as early as the filing of this complaint no proceedings in the case of Hay v. Title Insurance Company could affect those rights. The court admitted the complaint in that case in evidence. Conceding that this was proper, nothing further in the judgment roll was admissible. Norris was not a party to that action, and was not bound by anything appearing in the pleadings, or by any matters adjudicated, and the excluded portion of the judgment roll applied to matters occurring subsequent to the commencement of the action by plaintiff.

The order and judgment appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

149 Cal. 702

In re NIGRO'S ESTATE. (S. F. 4,602.)

(Supreme Court of California. Sept. 19, 1906.)

COURTS—STARE DECISIS—RULES OF PROPERTY.

The decision that, under Civ. Code, § 1386, subds. 2 and 5, as existing prior to the amendment of 1905 by providing that where a decedent leaves a surviving husband or wife and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife, etc., nieces and nephews of a decedent dying intestate, leaving surviving a widow, but neither father, mother, brother nor sister, do not succeed to any part of his estate is a rule of property, and will be followed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 336–339.]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

In the matter of the estate of one Nigro, deceased. From a decree of partial distribution, nieces and nephews of the decedent appeal. On motion to dismiss appeal. Appeal dismissed.

Samuel M. Shortridge and Walter H. Linforth, for appellants. Sullivan & Sullivan and Theo. J. Roche, for respondent.

HENSHAW, J. This is a motion to dismiss an appeal from a decree of partial distribution. The deceased died intestate leaving surviving him a widow, no father, no mother, no brother, no sister, but nieces and nephews. The nieces and nephews appeal, and the motion to dismiss is based upon the ground that, having no interest in the estate, they are not parties in interest so as to be entitled to appeal. It is conceded by the attorneys for the appellant that, if this court adheres to its decisions in Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, and Estate of Carmody, 88 Cal. 616, 26 Pac. 373, the appellants in this case have no standing, and the appeal should be dismissed. The conclusion that, under section 1386, subdivisions 2 and 5, Civil Code, as they stood before the amendment of 1905, nephews and nieces, where there was no surviving brother or sister, did not succeed to any portion of the estate of the deceased, was reached first in department in the Ingram Case, and afterward the decision in the Ingram Case was advisedly adopted by this court in bank. Such interpretation of the law has, therefore, become a rule of property which should be and is hereby adhered to.

The appeal is therefore dismissed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.

4 Cal. App. 63

PEOPLE v. CHADWICK. (Crim. 28.)

(Court of Appeal, First District, California. July 9, 1906. Rehearing Denied by Supreme Court Aug. 31, 1906.)

1. PERJURY—INSTRUCTIONS.

In a prosecution for perjury, the jury were charged that in order to convict they must determine whether defendant gave the testimony "which the indictment charges he did give"; that it was for the jury to determine whether defendant swore to the testimony alleged in the indictment to be false, whether such testimony was false, whether defendant at the time he swore to such testimony knew it to be false, and whether the testimony so alleged to be false was material to the issue then before the court. *Held*, that such instruction was not objectionable, as misleading the jury to consider any testimony given by defendant on a previous hearing other than that laid in the indictment, and to convict him if they found that any portion of such testimony was false.

2. SAME—MATERIALITY—QUESTION FOR COURT.

In a prosecution for perjury, the materiality of the testimony to the issue is a question of law for the court.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 133.]

3. SAME—PROOF OF PERJURY—DIRECT EVIDENCE.

Where perjury was assigned on defendant's testimony that he had written certain telegrams while in a cell in Ogden, Utah, and immediately gave them to S., evidence of two police officers that before reaching the police station, after defendant was arrested at Ogden, S. took one of the telegrams from her hat, and handed it to one of the officers, and that the other was found in defendant's grip, which the officer took charge of when defendant was arrested, and searched immediately after reaching the police station, and before defendant was taken to his cell, constituted "direct" evidence of the falsity of defendant's testimony, under Code Civ. Proc. § 1881, defining "direct evidence" as that which proves the fact in dispute without inference or presumption, and which, in itself, if true, conclusively establishes the fact.

4. SAME—INFORMATION—SUFFICIENCY.

Where defendant was informed against for sending a forged telegram, and the court held such information sufficient, defendant could not again object that the information was insufficient in a subsequent prosecution for perjury committed on the trial for sending such telegram.

5. SAME—MATERIALITY OF TESTIMONY—INSTRUCTIONS.

Where defendant was charged with perjury committed in a prosecution against him for sending a forged telegram, an instruction that, as it was shown on the trial of the former prosecution for sending such telegram that defendant did not in fact actually send the telegraphic message, but merely furnished the message to the operator to be sent by telegraph, it was not material when and where the telegrams with reference to which the forgery was assigned were written, was properly denied.

6. INDICTMENT — PLURALITY OF OFFENSES—REMEDY—DEMURRER.

An objection that an indictment for perjury charged two offenses, which appeared on the face of the indictment, must be raised by demurrer, as provided by Pen. Code, § 1004, subd. 3.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 468.]

7. SAME—WAIVER.

Where an objection that an indictment for perjury charged two offenses was not taken by demurrer, it was waived, as provided by Pen. Code, § 1012.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 501.]

8. WITNESSES—HUSBAND AND WIFE—DECLARATIONS.

Code Civ. Proc. § 1881, subd. 1, and Pen. Code, § 1322, prohibiting a husband or wife from being examined as a witness for or against the other except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other, if otherwise admissible, by the testimony of a witness who heard them.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 740, 741.]

9. CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE.

In a prosecution for perjury, evidence *held* insufficient to establish that defendant had been previously convicted of a felony.

10. SAME—ADMISSIONS.

Evidence of accused, in a prior prosecution for sending a forged telegram, that he had been previously convicted of a felony was a mere extrajudicial statement, and insufficient, of itself, to establish an allegation of prior conviction in a subsequent prosecution for perjury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1867.]

11. CRIMINAL LAW—APPEAL—PRESUMPTIONS—REVERSAL.

In a prosecution for perjury, accused was also charged with having been previously convicted of a felony, and was convicted on both charges. He was sentenced to imprisonment for the shortest term for which he could be imprisoned if the charge of prior conviction had been established. *Held*, that it would not be presumed on appeal that the court would have imposed the same sentence if accused had been merely convicted of perjury, and, the evidence being insufficient to establish the charge of prior conviction, the judgment should be reversed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3035.]

Appeal from Superior Court, San Francisco County; Carroll Cook, Judge.

Ernest Moore Chadwick was convicted of perjury, and he appeals. Reversed and remanded.

E. M. Chadwick, in pro. per. Attorney General U. S. Webb, for the People.

HARRISON, P. J. Upon an indictment charging the appellant with the crime of perjury, in having willfully and falsely testified at a trial of himself under the charge of forgery that two certain telegrams, purporting to have been signed by Marie Schneider, which were introduced in evidence at that trial, were written by him on or about the 1st day of March, 1901, in a cell or room of the police station in the city of Ogden, in the state of Utah, after he had been arrested at the said city of Ogden, and while he was detained and imprisoned in said cell or room under said arrest, and that the said telegrams were at said time and place delivered by him to one Norine Schneider, he was tried and convicted before a jury in the superior court in and for the city and county of San Francisco, and has appealed from the judgment rendered thereon and from an order denying him a new trial.

1. The court gave the jury the following instruction, viz.: "You have heard the testimony in this case, and it is for you to determine: * * * Fourth. That the defendant swore to the testimony alleged in the indictment to be false. That is a question of fact for you to determine, whether he gave the testimony which the indictment charges he did give, or whether he gave any portion of it. Fifth. That such testimony was false; that is, whatever testimony he gave in that action, if he gave it, and if you find there was such an action, and if he gave any of such testimony, that the testimony that he did give, or some portion of it, was false. Sixth. That the defendant, at the time he swore to such testimony, knew it to be false. That is a question of fact for you to determine, bearing in mind the rule of law that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. Seventh. That the testimony so alleged to be false was material to the issue then before the court."

It is urged by the appellant that, as evidence of any false testimony for which the defendant could be convicted is limited to that laid in the indictment, it was error for the court to thus permit the jury to consider any testimony given by him at the previous trial other than that laid in the indictment, and to convict him if they should find that any portion thereof was false. We are of the opinion, however, that the above language of the court will not admit of this construction, and that from the whole instruction given them the jury could not have understood that they could convict the defendant for any false testimony other than that which is charged in the indictment. They were told that in order to convict the defendant they must determine whether he gave the testimony "which the indictment charges he did give"; and, by being told in direct connection with this that they must find "that such testimony was false," they were expressly limited to the testimony laid in the indictment. The clause "whatever testimony he did give in that action," which is relied upon by the appellant, is by its connective "that is" placed in direct apposition with the clause "that such testimony was false," and is to be construed as an explanation thereof, and with the same limitation. The further direction to determine whether "any of such testimony" which he gave in the prior action was false limited their consideration to "such" of the testimony laid in the indictment as they should find had been given by him, and is to be read as a continuation of, and in connection with, the prior portion of the instruction. The frequent limitation of their consideration to "such testimony" must have been understood by the jury as referring simply to whatever testimony of that charged in the indictment they should find was given by him.

2. In direct connection with the last sentence of the above-quoted portion of the instruction, the court told the jury that "whether the testimony alleged to be false was or was not material is a question of law which it is for the court to determine, and not for the jury; the question of the materiality of evidence, no matter when and how it may arise, is always one of law for the court, and not of fact for the jury"; that in rendering a verdict in criminal cases the jury "only has the right to find the facts, and apply to them the law as given by the court, and on a trial for perjury it is the duty of the court to instruct the jury as to what facts would show the testimony to be material"; and said to the jury that if they found certain facts to be as alleged, the testimony, charged in the indictment herein to have been given by the defendant, was material to the issues in the former action.

There was no error in thus instructing the jury. Whether testimony given upon the trial of a cause is material to the issues then before the court is a question of law to be determined by the court; but, as is sometimes the case, especially upon a trial for perjury, the materiality of testimony will depend upon the existence of certain other facts, and if these facts are controverted their existence must be determined by the jury. The instruction to them that the existence of these facts would, as a matter of law, render the testimony material, and that they must so find, is in entire harmony with the instruction that, for the purpose of reaching a verdict, they must determine whether it is material. In being permitted to determine the existence of these facts, the determination of the materiality of the testimony was left with the jury. A jury is at all times required in rendering their verdict to apply the facts shown in evidence in accordance with the rules of law given them by the court; but in so doing the verdict is none the less rendered by the jury. See People v. Lem You, 97 Cal. 224, 32 Pac. 11; Ball v. Rawles, 93 Cal. 228, 28 Pac. 937, 27 Am. St. Rep. 174; Pen. Code, § 1126.

3. The court also instructed the jury as follows: "Before the defendant can be convicted of the offense charged in the indictment, his guilt must be shown by the positive and direct testimony of two witnesses, or by the positive and direct testimony of one witness and corroborating circumstances; in other words, the law prescribes a different rule of evidence in perjury cases than prevails in ordinary cases, both as to the kind and amount of testimony required to convict. The rule is different as to the kind of evidence, for positive testimony is absolutely necessary in a perjury case, and circumstantial evidence, standing alone, is never sufficient. Again, for nearly all violations of the law the evidence of one credible witness is sufficient to support a conviction, but in prosecutions for perjury, the rule is clearly the contrary, and is as I have stated. In perjury cases, in order that the evidence may be deemed sufficient, there must be positive testimony to a contrary state of facts to that sworn to by the defendant at the previous trial; that testimony must either be by two witnesses, or by one witness and corroborating circumstances."

Section 1968 of the Code of Civil Procedure declares: "Perjury and treason must be proved by testimony of more than one witness; treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances."

The above instruction, it will be seen, in addition to stating the provisions of section 1968 of the Code of Civil Procedure, told the jury that the guilt of the defendant must also be shown by the "positive and direct" testimony of two witnesses, or the "positive and direct" testimony of one witness and corroborating circumstances. As the instruction in this respect was favorable to the appellant, he does not claim that it was erroneous, but contends that there was no "direct" testimony of the guilt of the defendant; that "there was no witness who was present at said cell, and swore that the defendant did not there write said telegrams, and did not deliver them to Norine Schneider"; his counsel saying, also, in the brief filed in his behalf, that "if it were sought to prove the defendant guilty of the crime charged in the indictment by direct testimony, the prosecution would have to produce at least one witness who was in the cell with the defendant all the time during his incarceration at Ogden, and such witness would have to testify that the defendant did not during such incarceration write said telegram, and did not then and there deliver the same to Norine Schneider. Such direct evidence was not produced, and the jury did not follow the instruction of the court in finding the defendant guilty." It was clearly shown at the trial herein that at the trial of the former action the defendant did give the testimony charged in the indictment to have been then given by him; that at that time he testified that he was arrested at Ogden in the nighttime, and on the same night was taken to the police station in that city, and confined in a cell or room upstairs in the building; that at some time during the morning of the next day after his arrest, and while he was still confined in that room, he wrote the two telegrams in question, and in the afternoon of that day, while still confined in the room, delivered them to Norine Schneider. For the purpose of showing the falsity of this testimony the prosecution called as a witness James F. Pender, who testified that he was the officer who, in company with the chief of police, arrested the defendant at Ogden, and took him from the hotel where he was arrested to the police station; that Norine Schneider was with the defendant when he was arrested, and accompanied them from the hotel to the police station; that while they were on the way from the hotel to the police station, and before they reached it, Miss Schneider took one of the telegrams from her hat, and handed it to the witness; that at the time the defendant was arrested he had a grip, which the witness took along with them, and searched after they reached the police station and before the defendant was taken upstairs to the cell or room in which he was confined; that upon so searching the grip they found and took from it the other telegram. Similar testimony was given by the chief of police. The perjury with which the defendant is charged is that, upon the trial in the former action, he falsely testified that the telegrams set forth in the indictment herein were written and delivered by him to Norine Schneider in his cell at Ogden, and after his arrest in that city. That he gave such testimony fully appears, as above shown, and in fact is not disputed. The fact in dispute at the trial herein, and upon which the falsity or truth of his testimony depended, was whether the telegrams had been written and delivered to her before his arrest, or whether he had written and delivered them in his cell after his arrest. If they were written before he was arrested, his testimony that he wrote them after his arrest, and while confined in his cell under such arrest, was false. Any evidence, therefore, sufficient to establish as a fact that the telegrams had been written before his arrest would establish the physical impossibility of their having been written by him in his cell after his arrest, and thus demonstrate the falsity of his testimony.

"Direct evidence" is declared in section 1831 of the Code of Civil Procedure to be "that which proves the fact in dispute directly without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Upon a trial for perjury, direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him. People v. Green, 54 Cal. 592; People v. Barry, 63 Cal. 62; People v. Wells, 103 Cal. 631, 37 Pac. 529; People v. Porter, 104 Cal. 415, 38 Pac. 88. The testimony of the witness Pender was direct and positive that he had the telegrams in his possession before the defendant was placed in his cell; that one was given to him by Miss Schneider before he was taken to the police station, and that he found the other in the defendant's grip, which the witness took possession of at the time he arrested the defendant. These facts do not depend upon inference or presumption, but were directly testified to by Pender and the other witness, and such testimony, if true, directly established the physical fact that the telegrams were written before the arrest of the defendant. In the language of the instruction, it was "positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial." See People v. Wells, supra. The verdict of the jury shows that they accepted the testimony of these two witnesses as true, and that the testimony of the defendant to the contrary was false.

4. The court properly refused the instruction asked by the defendant to the effect that the information in the prior action was defective, and did not charge a crime, for that reason that it fails to state that the message was sent "by telegraph," and that the testimony of the defendant was therefore not material. Whether that information was defective or not was a question to be determined by the court in which that trial was had. That court held it to be sufficient, and its action in this respect was sustained by the Supreme Court. People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

Upon the same grounds, the court properly refused to give the instruction asked by the defendant to the effect that, inasmuch as it was shown at the trial of the former action that the defendant did not in fact actually send the telegraphic message, but merely furnished the message to the operator to be sent by telegraph, it was not material to know when and where the telegrams herein considered were written.

The further objection that the indictment charges two offenses—a perjury committed in swearing falsely that the telegrams were written in Ogden, and another perjury committed by swearing that they were delivered to Norine Schneider at the same place—arises upon the face of the indictment, and whether well taken or not should have been presented by demurrer. Pen. Code, § 1004 (3). It is unnecessary to determine whether such objection is well taken or not, but, as it appears upon the face of the indictment, it was waived by failing to make the objection by demurrer. Pen. Code, § 1012.

5. It is urged by the appellant that, inasmuch as Norine Schneider was the wife of the defendant, the court erred in permitting her to testify in behalf of the people without first obtaining the consent of the defendant. This objection, as well as the facts upon which the objection is urged, is not sustained by the record. It is recited in the minutes of the trial under the date of July 28, 1902, "Thereupon Norine Schneider was duly sworn and examined for the people and excused." The bill of exceptions does not show the character or extent of the examination, or that she gave any testimony in the case; and it is perfectly consistent with this recital that she was "excused" from testifying upon the ground that it appeared that she was the wife of the defendant. His testimony, which is set forth in the bill of exceptions, was not given by her as a witness at the trial herein, but is merely the testimony of the witness

Elderkin, the official stenographer, that upon the trial of the former action she gave such testimony. The provisions of the Code (Code Civ. Proc. § 1881 [1]; Pen. Code, § 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other, if otherwise admissible, by the testimony of a witness who heard them. The Code merely makes either spouse incompetent as a witness in an action or proceeding against the other, but does not render their statements elsewhere given privileged against being shown by competent testimony.

6. The indictment against the defendant also charges him with a previous conviction of a felony, and the jury so found. The appellant contends that there was no evidence in support of this portion of the verdict, and we are of the opinion that this contention must be sustained.

In support of the issue upon this portion of the indictment, the bill of exceptions states that the prosecution offered in evidence "the judgment roll in case No. 11,906, in the Matter of the People of the State of California vs. Harry Westwood Cooper, Department No. 12 of the Superior Court; judgment roll filed Jan. 14, 1898," together with testimony that "the party mentioned therein is the defendant at the bar, Ernest Moore Chadwick." The judgment roll thus offered is not set forth in the bill of exceptions, nor is there any recital therein of the character of the proceeding; whether the judgment was rendered in a civil or in a criminal proceeding, or, if the latter, whether the defendant was convicted of a felony or of a misdemeanor. In the absence of any showing of the character of the judgment, the jury were not authorized to find therefrom that the defendant had suffered a prior conviction of a felony.

The only other evidence bearing upon this issue is the following: At the trial herein the prosecution called as a witness the official reporter of the trial of the defendant upon the charge of forgery, who read in evidence the testimony given by him at that trial. Upon his cross-examination therein the defendant was asked by the district attorney the following question, viz., "Were you on the 14th day of June of the year 1898 convicted of a felony"? to which he answered, "I was; yes, sir." This evidence merely showed that the defendant, upon a certain occasion prior to the indictment herein, had admitted that at the designated date (June 14, 1898) he had been convicted of a felony. It will be observed that this inquiry and statement were directed to a different date from that laid in the indictment, that being by a judgment which bears date on the 14th day of January, A. D. 1898.

The fact that the defendant had been previously convicted of a felony was a distinct element of the charge made against him in the indictment, and the defendant has the right to insist that the prosecution shall establish the existence of that element by competent evidence before he can be convicted thereof. While the testimony of the witness that such admission was made during the former trial was corroborated by his testimony that he entered it in his stenographic notes of the trial at the time it was made, and afterwards made a transcript in longhand of those notes, from which he read the statement at the trial herein, it was in legal effect only the parol statement of the witness that he had heard the defendant make such admission. The rule is clearly established in this state that the extrajudicial statements or admissions of a defendant, in the absence of other evidence of the commission of the crime charged against him, are insufficient to establish his guilt (People v. Jones, 31 Cal. 565; People v. Simonsen, 107 Cal. 345, 40 Pac. 440); and they are equally insufficient to establish the existence of any substantive or essential element of a crime charged against the defendant. The admission of the defendant to which the witness testified was none the less extrajudicial for having been given under oath during the trial of the charge of forgery against him. It was not an admission of any fact connected with the transaction for which he was then prosecuted, or for which he is prosecuted herein, or made with any reference to the charge contained in the present indictment. As there was no evidence of any fact showing that a felony had been committed, or connecting him with any facts constituting a felony, his naked admission that he had been convicted of a felony was insufficient to establish that element of the present indictment.

7. Although this portion of the verdict was unauthorized, it does not follow that a new trial must be granted. The verdict that the defendant had suffered a prior conviction is severable from that portion finding him guilty of perjury, and, as we have seen that the latter portion of the verdict is sustained by the evidence, the verdict of a prior conviction may be disregarded, and judgment entered against the defendant upon that portion of the verdict which was sustained by the evidence. In the judgment rendered by the court the defendant was sentenced to imprisonment in the state prison for the term of 10 years. This is the shortest term for which he could be imprisoned if the charge of prior conviction had been established; and, although the court might have sentenced him to imprisonment for the same term upon a verdict merely finding him guilty of perjury, it cannot be assumed that the court disregarded any portion of the verdict in fixing the term of imprisonment, and its judgment in that respect cannot, therefore, be sustained. See People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

The judgment is reversed, and the cause remanded to the superior court, with direction to that court that if, within 20 days after the filing therein of the remittitur from this court, the district attorney shall apply for an order dismissing that portion of the indictment which charges the defendant with having been convicted of a felony prior to the commission of the offense of perjury charged therein, and said application shall be granted, the court, in the exercise of its discretion upon the facts and circumstances of the case, shall pronounce judgment and sentence upon the defendant, as provided in section 126 of the Penal Code, and thereupon its order denying a new trial shall stand affirmed. If the district attorney shall not within said period of 20 days make said application, the superior court is directed to grant a new trial.

We concur: COOPER, J.; HALL, J.

4 Cal. App. 63

PEOPLE v. CHADWICK. (Cr. 1,360.)

(Supreme Court of California. Aug. 31, 1906.)

WITNESSES—HUSBAND AND WIFE—EVIDENCE OF WIFE.

Testimony given by defendant's wife on a prosecution of defendant for forgery, and not objected to by him, was admissible against him on the trial of a charge of perjury committed by him in the forgery case, so far as it tended to show the materiality of his testimony given on the trial for forgery, and made the basis of the charge for perjury.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 785.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Ernest Moore Chadwick was convicted of perjury, and he appeals. On petition to transfer the case from the District Court of Appeal to the Supreme Court. Petition denied.

For opinion in Court of Appeal, see 87 Pac. 384.

Ernest Moore Chadwick, in pro. per. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The petition of the defendant to transfer this cause from the District Court of Appeal of the First District to the Supreme Court, to be heard and determined therein, is denied.

If the decision of the District Court of Appeal was intended to declare, as the defendant insists that it does, that when, upon the trial of a case, the wife of the defendant has testified against him without objection by him, her testimony then given may in all cases be read against him, over his objection, upon another trial of that or any other charge against him, we do not approve of that portion of it. No such question was necessarily involved in the case. The affirmance of the judgment, so far as the reading of such testimony is concerned, was justified by the fact that upon the trial of the forgery charge the defendant made no objection to the testimony of Norine Schneider against him, and that upon the trial of the perjury case, resulting in the judgment appealed from, he did not object to the reading of the testimony given by her upon the other trial. Furthermore, the testimony given upon the forgery trial by the wife of the defendant, not objected to by him, was admissible against him upon the trial of a charge of perjury committed by him in the forgery case, so far as it would tend to show the materiality of the testimony given by him upon the trial for forgery, and made the basis of the charge of perjury.

(7 Cal. Unrep. 289)

In re DOMINICI'S ESTATE.*

KOHLER et al. v. ARNDT et al. (Civ. 231.)

(Court of Appeal, Third District. California. July 23, 1906. On Rehearing, Aug. 22, 1906.)

1. APPEAL—EXCLUSION OF EVIDENCE—PRESUMPTIONS.

Where the court reserved its ruling on testimony objected to, and the record is silent as to what the ruling was, it must be presumed that the court excluded it, and it cannot be considered on appeal.

2. WILLS—CONSTRUCTION—DEVISEES.

Testator gave his property to his sister and his nephew, S., and "his sister, my niece," and on the death of his sister added a codicil giving the share of his sister to "the other two residuary legatees therein named, S., and to his sister, my niece, whose name is Marie K., and whose residence is Salzwedel, Germany, share and share alike," and confirming his will save as it was inconsistent with his codicil. The evidence showed that S. had a sister living, but that her name was not Marie K., and that Marie K. was not his niece. *Held*, that the words referring to Marie K. were used to express the name and residence of testator's niece, and not having accomplished that were to be disregarded as surplusage.

3. SAME—COMPROMISE OF CONTEST—CONCLUSIVENESS.

A person not a party to a will contest, nor to a compromise resulting therefrom, is not bound by it.

Appeal from Superior Court, Stanislaus County; W. M. Conley, Judge.

Action by Marie Kohler and others against Christiane Arndt and others to determine the construction of the will of Joseph Dominici, deceased. From a judgment for defendant and an order denying their motion for a new trial, complainants and others appeal. Reversed.

W. H. Hatton and T. J. Maddux, for appellant Kohler. W. O. Minor, J. M. Knox, and Loewy & Gutsch, for respondent Arndt.

BUCKLES, J. This is an action to determine the proper construction of the last will and testament of Joseph Dominici. The appeal is by Marie Kohler and the heirs of William Dominici, deceased, and the heirs of Sophia Miller, deceased, from the judgment and from the order denying their motion for a new trial.

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*Opinion vacated and rehearing granted by Supreme Court September 21, 1906.

After making some specific devises, and appointing George W. Bates executor, the will provides: "Lastly, I give, bequeath and devise all the rest, residue and remainder of my property, real and personal, of whatsoever kind or character or wheresoever situated, share and share alike, unto my sister, Louise Jahnke, and unto my nephew Heinrich Schluther and his sister, my niece, all residing in Luckow, Hanover, Germany." This was dated November 22, 1897. On May 3, 1898, the following codicil was added, after recital of having made the will: "Now therefore I do make, publish and declare this to be a codicil to the same. I hereby ratify and confirm said will in every respect, save so far as any part thereof is inconsistent with this codicil. Whereas it has come to my knowledge that my sister, Louise Jahnke, one of the residuary legatees therein named, is dead, I hereby give, bequeath and devise the share of my said estate in said will given, bequeathed and devised to my said sister to the other two residuary legatees therein named, Heinrich Schluther and to his sister, my niece, whose name is Marie Kohler, and whose residence is Salzwedel, Altmark, Germany, share and share alike."

A contest of said will was filed by Sophia C. Ward, a daughter of Sophia Miller, a deceased sister of testator, and, as a result of said contest, the following stipulation in writing was entered into: "It is hereby stipulated by and between the parties hereto that the contest of the probate of will heretofore filed herein shall be dismissed, and that letters testamentary shall be issued to George W. Bates, the executor named in said will, and that the property of the said estate shall be distributed as follows, to wit: "(1) The expenses of administration shall be paid. (2) There shall be distributed to Marie Kohler, the surviving legatee and devisee named in said will, one-half of the residue, less one hundred ($100.00) dollars. The remaining portion of said estate shall be distributed as follows: (a) The specific legacies of one hundred dollars each shall be paid to the daughter of Milton F. Dominici, and to the female children of E. B. Learch. (b) That part of said remaining portion of the said estate which, by the will, or the intestate law of California would have been distributed to Marie Kohler, which is by this stipulation waived by her, shall be divided among the heirs represented by the contestants of said will. (c) The remaining portion of the said estate shall be distributed according to the intestate laws of the state of California, save and except that no portion thereof shall be distributed to Marie Kohler, except the portion of said estate hereinbefore, by stipulation, agreed to be distributed to Marie Kohler, to wit, one-half, less one hundred dollars. W. H. Hatton, Attorney for Marie Kohler. L. J. Maddux and L. W. Fulkerth, Attorneys for Contestants. L. L. Dennett, Attorney for Petitioning Executor."

There were filed three petitions for distribution. One by George W. Bates, the executor, and asks that the estate be distributed according to said stipulation. A petition for distribution by Christiane Arndt (formerly Christiane Schluther), the sister of Heinrich Schluther. This petition alleges the death of Heinrich Schluther. That petitioner is the only sister of Heinrich Schluther, and is the party named in said codicil as the sister of said Heinrich Schluther, and niece of deceased, and who, by mistake, deceased called "Marie Kohler," and by mistake stated to reside in Salzwedel, Altmark, Germany. That it was the intention of deceased to name Christiane Arndt in the codicil as the name of the sister of Heinrich Schluther, and his intention to bequeath to her, and not to Marie Kohler, the bequest mentioned in said codicil as made to the sister of Heinrich Schluther. That by the last bequest in said will the testator intended to devise and bequeath the residue of his estate to said Louise Jahnke, Heinrich Schluther, and his sister, as a class, to wit: to his, testator's, sister, Louise Jahnke, and the two children of his sister, Marie Schluther (formerly Marie Dominici), now deceased. That it was the intention of testator in making the bequest in said codicil to devise and bequeath the share of his estate formerly devised and bequeathed to Louise Jahnke, to said Heinrich Schluther and to his sister, Christiane Arndt as a class, and that it was not the intention of the testator, either in the will or codicil, to give Marie Kohler anything, and that her name and place of residence, to wit, Salzwedel, Altmark, Germany, were inserted in said codicil by mistake and inadvertence. That this petitioner was not a party to the alleged compromise and settlement of contest. The third petition, that of Marie Kohler, after setting forth the jurisdictional facts, alleges that she is one of the residuary legatees mentioned in said will and codicil. That by mistake she is described as the sister of Heinrich Schluther, and that it was the intention of the testator to name the petitioner in said will and codicil as one of the residuary legatees, and that he so expressed his intention by expressly naming her and her residence. Acknowledges the compromise and claims the distributive share therein stated she should have.

The court found that the word "and" was inadvertently and unintentionally omitted before the words "my niece, whose name is Marie Kohler," etc., in said codicil at the time of the execution thereof. Inserting the word "and" the devise in the codicil is made to read as follows, "to the other two residuary legatees, named, Heinrich Schluther and to his sister 'and' to my niece whose name is Marie Kohler." When the codicil was made, Heinrich Schluther was living. The codicil itself recites that there were but two residuary legatees after the death of the testator's sister, Louise Jahnke, and the purpose of the codicil seems to have been to dispose of the devise in the will to her. The inserting by the court of the word "and" there would still appear to be three residuary legatees. But in order to determine the true meaning, in this instance, of the testator, the will and the codicil must be read in the light of each other. The gentleman, Mr. Dennett, who drew the will, testified that Dominici did not remember the name of the niece, but was to return with it at a later date and then the name was to be inserted. The testator did return and gave the name "Marie Kohler," and whose residence is "Salzwedel, Altmark, Germany," and this Mr. Dennett supposed to be the name and address of Heinrich Schluther's sister. It did not occur to him that the testator had named in his will four residuary legatees, nor that he was adding another when the codicil was drawn. It seems to me the will provides but three residuary legatees, to wit: Louise Jahnke, Heinrich Schluther, and Heinrich Schluther's sister; "my niece" is but descriptive of "his sister," whose name was not then remembered by testator. When he did remember the name of this sister of Heinrich Schluther, as he doubtless supposed he did, he returned and made the codicil. He had then learned of the death of his sister, Louise Jahnke, and, in addition to having the name of Heinrich Schluther's sister inserted, he desired also to dispose of the devise made to his dead sister, and the scrivener, Mr. Dennett, proceeded to write the codicil, and, in disposing of the dead sister's devise, used the words "the other two residuary legatees," which of itself shows that there were but three residuary legatees in the will, and, as Dennett understood the testator, there would be but two residuary legatees in the codicil; and this is borne out by the phraseology "to the other two residuary legatees therein named, Heinrich Schluther and to his sister, my niece, whose name is," meaning thereby the sister of Heinrich Schluther. Now let us see the probability of this having been the true intention of the testator. The testimony shows that he had been in correspondence with the Schluther family for years. He was a carpenter, and, before leaving Germany, had helped to construct the house the Schluthers lived in, which had also been occupied by his parents. His son Solon had visited Germany and the Schluthers, and put in the most of his time with them, and they were his and his father's favorites. This son Solon had died after returning to this country, about November 13, 1897, a month before this will was made.

The testator had been heard to speak of this sister, Christiane Schluther, several times and had written her a letter, but was never heard to speak of Marie Kohler; and, when speaking of the Schluthers, it was always in terms of affection. To one witness, J. F. Beausang, in speaking of Christiane, he always spoke of her, not by name, but as Heinrich Schluther's sister. Maria Schluther was the mother of Christiane Arndt (Heinrich Schluther's sister), and during her lifetime the testator wrote to her once or twice a year. She died June 18, 1890, and after that he wrote one letter to Christiane, and had not written at all for the last few years. She had written one later to testator announcing the death of her mother, and probably another after the will was made announcing the death of his sister, Louise Jahnke. It appears also that the testator and his brother William, residing in La Grange, Cal., were not on good terms, and while the Schluthers were on friendly terms with Joseph, the testator, Marie Kohler was on friendly terms with William. The wife of the testator was the godmother of Christiane Arndt. On November 17, 1897, the testator wrote his sister, Louise Jahnke, and which was received after her death by Christiane Arndt, and is as follows: "Dear Sister: Have not heard from you for a long time, sad news from me, Solon my last joy isn't any more. He died the 13th of this month. Requested me to send you all his last greeting. Write soon, also would like to hear from Henry Schluther and his sister." The will was made November 22, 1897—five days later. There is no testimony indicating any further correspondence was received by testator from the Schluthers, though there was testimony showing that soon after Heinrich Schluther was married in November, 1898, he wrote to testator. The testimony of Mr. Dennett, though not clear upon the subject, would indicate that the testator brought to him a letter from Marie Kohler when he came to have the codicil drawn. This is what Mr. Dennett said: "When Mr. Dominici came down he gave me instructions for the will, and I asked for the names and explained to him that the personal data would be sufficient if it was perfectly clear, but that the names would be better. Subsequently he came down and at that time he told me that he had received a letter from Germany giving them, and had ascertained that Louise Jahnke was dead. And he then gave me, in accordance with our previous understanding, the name which he wished to go in the will or in the codicil, and I understood that to be the name of Henry Schluther's sister. He never suggested to me that he wanted to change from Henry Schluther's sister to any one else. The idea and desire was simply to make clear the provision of the will. * * * I don't remember particularly what part the letter played in what took place, with the exception of the fact that my attention was called to the fact that he had such a letter."

These, then, are the facts relied upon to support the claim the testator intended to and did make Christiane Arndt his third residuary legatee in his will, and did not intend by his codicil to make Marie Kohler a residuary legatee. There was some evidence that the testator had declared his intention of making the Schluther people his legatees, but this testimony was objected to and ruling reserved, and although the record is silent as to what the ruling was, it must be presumed the court excluded it when it came to consider the matter and render its decision, and, therefore, such evidence is not considered here. Civ. Code, §§ 1318, 1340. The evidence shows the intimacy of the testator with the Schluthers; that they were in his mind all the time, and that there was an absence of friendliness between himself and Marie Kohler and her parents; that just before making the codicil he had received a letter from Germany, whether from Christiane Arndt notifying him of the death of his sister Louise or from Marie Kohler, but probably from both. If from Marie, then, that is the only letter which appears to have been written by her to the testator. That there is a mistake in the codicil is patent on the face of it. The words in the will "to my sister Louise Jahnke and unto my nephew Heinrich Schluther and his sister, my niece," indicate without any doubt or confusion that Louise Jahnke, Heinrich Schluther and Heinrich's sister, who was testator's niece, were the three persons and none others who were intended to be the residuary legatees. Now when his sister dies or when he learns of her death he desires to dispose of the share she was to take and also to have the name of Heinrich's sister stated, and for these purposes, and for no other, makes the codicil. This view is borne out by the statement in the codicil—"to the other two residuary legatees therein named, Heinrich Schluther and to his sister," etc. Since it very clearly appears that the only intention of the testator in making the codicil, outside of disposing of his dead sister's share, was to have the name of Heinrich's sister, who was his niece, expressed, to show the names of all the persons who were his residuary legatees. Marie Kohler does not pretend to be Heinrich's sister, but there is no contention but what Christiane Arndt is his sister and the only sister living, the only other sister having died November 30, 1889, and of whose death the testator knew, as shown by his letter to Christiane written October 26, 1890. The sister of Heinrich was one of the residuary legatees in the will. The codicil says: "I hereby ratify and confirm said will in every respect, save so far as any part thereof is inconsistent with this codicil," and the codicil still making her a residuary legatee, it seems to me there can be no question that in the connection in which they are used the words "whose name is Marie Kohler and whose residence is Salzwedel, Altmark, Germany," were used to express the name and residence of Christiane Arndt, and as they do not accomplish that are mere surplusage, which in the interpretation of the will and codicil are to be given no meaning at all. The testimony in the case and the wording of the will and of the codicil all show clearly that the inserting of the word "and" after "my niece" in the court's interpretation of the codicil, was unwarranted. Christiane Arndt was neither a party to the contest of the will nor to the compromise which resulted therefrom, and could not be bound by it. Marie Kohler, not being a legatee, cannot claim as such under the said compromise.

The order and decree of distribution and the order denying a new trial are reversed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

On Rehearing.

BUCKLES, J. This is a petition on the part of Marie Kohler for a rehearing. The petition contains nothing new. The case was fully gone into at the hearing and thoroughly considered in writing the opinion. We are therefore unable to see any reason for granting a rehearing.

The petition is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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4 Cal. App. 207

NULL v. SUPERIOR COURT OF SHASTA COUNTY et al. (Civ. 272.)

(Court of Appeal, Third District. California. Aug. 6, 1906. Rehearing Denied by Supreme Court, Oct. 4, 1906.)

1. Justices of the Peace—Appeal—Trial.

Where a justice of the peace determined on a question of venue that he was without jurisdiction and dismissed the action, and plaintiff appealed to the superior court, the appeal being on a question of law, it was the duty of the superior court to affirm or reverse the decision, and, if reversed, to remand the case for trial, and, objection having been made to the jurisdiction of the superior court, it had no authority to proceed to a trial and to render judgment.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 472, 655-657.]

2. Certiorari — Judgments — Payment of Judgment.

Where a judgment has been voluntarily paid, it will not be reviewed on certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 45.]

3. Same—Burden of Proof.

Where, on application for certiorari to review a judgment, respondent set up the payment of the judgment to defeat the issuance of the writ, the burden was on him to show that the payment was voluntary.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 106.]

Petition by E. M. Null for certiorari to review the action of the superior court of Shasta county in rendering a judgment against petitioner in an action brought against him by the J. F. Bedford company. Writ issued.

Reid & Dozier and J. H. Creighton, for petitioner. Braynard & Kimball, for respondent.

CHIPMAN, P. J. The following facts appear from the petition and the return: Petitioner is a resident of Shingletown township, Shasta county, and executed his promissory note, of which the following is a copy: "$30.40. Shingletown, Cal., Aug. 6, 1902. One day after date I promise to pay to the J. F. Bedford Co. or order, thirty & 40-100 dollars, interest at ten per cent. per annum. E. M. Null." The payee commenced an action on said note against the maker (petitioner here) in the justice's court of Anderson township, said county, at which time the maker was a resident of Shingletown township. Summons was issued in said action and was served in Redding township, said county, and was returned and filed with the justice of the peace in Anderson township. The defendant in that action filed a demurrer to the complaint for insufficiency of facts, and that the court "has no jurisdiction of the person of the defendant or the subject of the action," which was overruled, and the defendant answered, alleging part payment and tendering the amount still alleged to be due plaintiff; subsequently, defendant (petitioner here) moved, on affidavit, for a change of the place of trial on the ground of bias of the justice of the peace. The motion was granted and the cause transferred to Redding township. It appears that, upon the filing of the papers with the justice of the peace of Redding township, plaintiff filed and amended complaint to which defendant answered, and on June 16, 1905, the cause came on for trial. Defendant objected to the trial on the ground that "neither the justice's court of Anderson township nor the justice's court of Redding township had jurisdiction of the person of defendant or of the cause of action." The said justice of the peace of Redding township rendered the following decision: "After due consideration of the law as well as the facts in the case, the court finds that it is without jurisdiction in the matter; that the cause should be properly tried in Shingletown township," and judgment passed for defendant for costs. It further appears that plaintiff in that action perfected its appeal to the superior court, giving notice that the appeal was "taken on questions of both law and fact," and on July 14, 1905, all the papers in the action were certified to the superior court and on October 27, 1905, the cause came on for trial in said court, the plaintiff, by leave of court, having amended its complaint so as to allege that defendant, since the execution of said note promised and agreed in writing to pay said promissory note and all sums due and to become due thereon, at Anderson, in Anderson township. Before proceeding with the trial, defendant (petitioner herein) "objected to the trial of said cause and to the hearing in said superior court on the ground that neither the superior court nor the justice's court of Anderson township, in which the action was instituted, had any jurisdiction of the person of the defendant or of the cause of action." The court overruled the objection, and proceeded with the trial and "entered judgment for plaintiff as prayed for in the complaint." The return to the writ consists of the certified papers and various steps taken in the case to final judgment in the superior court.

There is an answer to the petition for the writ, verified by one of the attorneys of defendant herein. It sets forth facts relating to the proceedings had in the two justices' courts, where the case was pending on its way to the superior court, some of which we do not deem material in the view of the matter we have taken. It is alleged, among other things, that the trial, or hearing, such as it was, in the justice's court of Redding township was by consent of both parties; that a trial was duly had before said justice, a jury having been waived, witnesses sworn and examined on the part of both parties, and the cause submitted to the court for its decision and judgment; that the matter was taken under advisement, and the "said justice duly made, rendered, and entered his judgment in said matter after consideration of the law as well as the facts, which said judgment was against the plaintiff therein and in favor of petitioner herein for his costs." It is also alleged that at the trial in the superior court "petitioner did not make any special appearance or objection to the jurisdiction of said superior court, nor did he object to the hearing therein, but consented to the setting of said cause for trial and caused subpœnas to issue for witnesses in his behalf," and that witnesses were sworn and examined by both parties, but it does not appear to what issue or for what purpose they were sworn. It is further alleged that, "long prior to the filing of petitioner's petition herein, petitioner freely paid the full amount of said judgment and costs, and duly received a full written receipt and satisfaction of the same," as follows: "[Title of Court and Cause.] To W. O. Blodgett, Esq., County Clerk of Shasta County. You are hereby authorized and instructed to satisfy of record the judgment heretofore rendered in the above entitled action, the same having this day been fully paid and discharged. Dated Feby. 28th, 1906. Charles H. Braynard, Attorney for Plaintiff." It is well settled by our Supreme Court that an action commenced in the justice's court cannot be tried anew in the superior court until the issues of fact have been tried in the justice's court. S. P. R. R. Co. v. Superior Court, 59 Cal. 471; Rickey v. Superior Court, 59 Cal. 661; Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648; Fabrette v. Superior Court, 77 Cal. 306, 19 Pac. 481; Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379; Smith v. Superior Court (Cal.) 84 Pac. 54. When the justice of the peace of Redding township determined that his court was without jurisdiction, the only appeal to the superior court, available to the plaintiff, was upon a question of law, and it became the duty of that court to affirm or reverse the decision of the justice's court, and, if reversed, to remand the case for trial upon the issues of fact. Myrick v. Superior Court, supra.

It is urged that there was a trial upon the issues of fact in the justice's court of Redding township. It appears that a day was agreed upon for a trial of the case, and witnesses were called and examined. But it also appears that the defendant in the action objected to the jurisdiction of the court, and, so far as appears, the evidence may have been, or at least some of it, directed to the question of jurisdiction. The justice seems to have regarded the question of jurisdiction as properly before him and it was the only issue decided by him. There was no trial of the merits of the action or the issues of fact, and no judgment or decision on the merits or on any issue of fact unless it be on the single issue of jurisdiction, which may have involved a question of fact. In effect, the justice dismissed the case at the cost of the plaintiff. De Jarnatt v. Marquez, 132 Cal. 701, 64 Pac. 1090, is cited by respondent. There, although the justice's court had no jurisdiction, the case was tried in the superior court on an appeal from questions of both law and fact, without objection being made to the jurisdiction of the latter court, while here, as we have seen, there was objection to the jurisdiction of the superior court. Personally, I venture to doubt the soundness of the decision in De Jarnatt v. Marquez, supra.

Respondent makes a point that where a judgment has been fully paid and satisfied it will not be reviewed on certiorari, citing Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489; Kenney v. Parks, 120 Cal. 24, 52 Pac. 40; Warner Bros. Co. v. Freud, 131 Cal. 646, 63 Pac. 1017, 83 Am. St. Rep. 400. Where the judgment has been voluntarily paid, it will not be reviewed on certiorari, and this was the case in Morton v. Superior Court, cited by respondent. But, if made under what would be regarded as legal compulsion, the judgment may be thus reviewed. Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; Vermont Marble Co. v. Black, 123 Cal. 21, 55 Pac. 559; Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Pac. 1017, 83 Am. St. Rep. 400. A compulsory payment is one made to prevent seizure by a party armed with apparent authority to seize property. Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Bucknall v. Story, 46 Cal. 599, 13 Am. Rep. 220.

The question, then, here is, upon whom rested the burden to show whether or not the payment of the judgment was voluntary? As respondent sets up this payment to defeat the issuing of the writ, and as all we know of the payment comes from the respondent, we think the burden was on respondent to show that payment was voluntary. The plaintiff company had a judgment on which it could have execution, and there is no evidence that execution was stayed; it was in its power, through execution, to seize the property of defendant in the action.

The petitioner asks to have it adjudged that neither the justice's court of Redding township nor that of Anderson township ever acquired jurisdiction of the person of petitioner or of the cause of action on said promissory note, also that the said superior court was without jurisdiction to determine the merits of the said action. The question as to the jurisdiction of the superior court to determine the merits of the action depends entirely, in the view we take of the case, upon the failure of the justice's court to try the issues of fact, and we hold that the superior court was without such jurisdiction. Its power over the case was limited to the question of the jurisdiction of the justice's court, which it should have decided and remanded the case, with directions either to proceed with the trial of the issues of fact, or to dismiss the case, according as the court found on that single question. We cannot anticipate the decision of the superior court, or direct what it should be. It has jurisdiction to determine the question of law brought before it by the appeal. Furthermore, we cannot know what the respective parties may do when the cause is remanded. The pleadings and issues may be materially modified or changed should the superior court direct a trial of the case. In determining the question of jurisdiction of the justice's court whence came the appeal, the superior court will take into consideration all the facts that may have been, or may hereafter be, submitted to it touching the institution of the action and its history thereafter and the steps taken by the respective parties.

Let the writ issue with directions to respondent to vacate the judgment in the action of J. F. Bedford Company v. E. M. Null, petitioner herein, and to proceed thereafter to hear and determine the jurisdiction of the justice's court and to remand the cause with directions to the last-named court to either try the issues of fact or to dismiss the action, according as the said superior court shall determine the question of jurisdiction of said justice's court.

We concur: BUCKLES, J.; McLAUGHLIN, J.

(7 Cal. Unrep. 279)

PLYLER v. PACIFIC PORTLAND CEMENT CO. (Civ. 182.)*

(Court of Appeal, Third District, California. July 16, 1906. On Rehearing, Aug. 15, 1906.)

1. TRIAL — SPECIAL ISSUES — DISCRETION OF COURT.

Under Code Civ. Proc. § 625, as amended by Act March 6, 1905 (St. 1905, p. 56, c. 62), requiring that the court, on request in writing, must direct the jury to find a special verdict on all or any of the issues, the court must submit the special issues formulated in writing by either party only when they are within the issues, and where, in an action for injuries, the plaintiff alleged that his fall from an elevated walk was caused by smoke and the absence of guards, special issues, limiting, respectively, the cause of the injury to the absence of the guards and to the smoke and not referring to the combination of the two dangers, were properly refused.

2. SAME—ISSUES NOT INVOLVED.

Where special issues were requested as a whole and some submitted issues not in the case, the court was not bound, without a special request, to direct the jury to find on any of them.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by James Plyler against the Pacific Portland Cement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Paul C. Harlan and C. H. Wilson, for appellant. Frank R. Devlin, for respondent.

BUCKLES, J. This is an action for personal injuries suffered by plaintiff while in defendant's employ. The case was tried with a jury, and a verdict rendered for plaintiff for the sum of $2,500. Judgment was rendered accordingly, and the appeal is from the judgment.

The appellant states at the beginning of his closing brief that "the only question presented on this appeal is: Does section 625, Code Civ. Proc., as amended March 6, 1905 (St. 1905, p. 56, c. 62), and which requires a jury to give proper reasons for its verdict, impose a mandatory duty upon the trial judge to submit issues and questions of fact to the jury, whenever requested to do so by either party?" There are other errors alleged as having taken place at the trial, but as appellant relies only on the one that is the refusal of the court to direct the jury to find on certain special issues, we will consider no other.

The defendant owns and operates a large plant in Solano county for the manufacture of cement, and the plaintiff was a laborer employed in the buildings and about the said plant. On June 22, 1904, plaintiff was directed, as a part of his duty, to go to a certain elevated platform in the upper part of one of the buildings to perform certain work, the character of which he did not know until his arrival at said platform. "The only means of ascending to, and descending from, said platform was to pass over and across a plank walk about 15 feet long and 3 feet wide, and extending and suspended over a cement floor 19 feet below said walk, thence up a ladder standing perpendicularly, about 10 feet long, to said platform; that said walk had no rails, guard, or protection of any kind on either side thereof." The complaint then alleges the unsafeness of said platform, walk, and means of ascending and descending, etc., and then continues: "And immediately after plaintiff had arrived at said platform, and before being informed of the exact character of the work he was to perform, and while plaintiff was in the exercise of all due care and skill, and without any negligence on his part, defendant carelessly and negligently caused and suffered a great quantity of dense smoke to arise and envelop the space in and about said plank walk and said ladder and platform and the space in and about which plaintiff was standing, the said smoke rendering said space * * * dark and impenetrable to sight, and making it impossible for plaintiff to see, and causing partial suffocation of plaintiff and rendering it dangerous to his life to remain on said platform; that plaintiff by reason of said darkness and danger occasioned by said smoke, endeavored to descend from said platform, and did descend said ladder and was in the act of stepping on said plank walk to escape said danger from said smoke, when, by reason of said darkness and partial suffocation * * * and by reason of the absence of rails, guards, or other protection on said walk, plaintiff fell * * * to the said cement floor beneath said walk, a distance of 19 feet," and received the injury, to recover for which this suit was brought.

Before the defendant offered any evidence, he handed to the judge of the court the following: "The court is hereby respectfully requested to direct the jury to find a special verdict in writing upon the following issues in this case, to wit: First. Was the accident and injury complained of caused by the failure of defendant to provide rails or guards on the plank walk described in the pleadings and evidence? Second. Was the accident and injury complained of caused by a great volume and quantity of dense smoke arising and enveloping the space in and about the plank walk and ladder described in the pleadings and evidence? Third. If you answer the last interrogatory in the affirmative, was the smoke alone of such a character as to threaten plaintiff with great bodily injury, or justify him in really believing that he was threatened with such great bodily injury as to require prompt action on his part to escape such injury? Fourth. Did plaintiff see and know, when he first went upon the plank walk described in the pleadings and evidence, that there were no rails or guards on said plank walk?" The record shows that, before making the request of the judge, the defendant did not show said special findings to the attorney for plaintiff, Mr. Devlin; that five minutes before the argument of the case to the jury, the judge did show Mr. Devlin these special issues and he thereupon objected to them being presented to the jury because of their uncertainty and ambiguity, and because contradictory in form, and further because the jury could not render a verdict on the general issues and find on the special issues offered. Mr. Wilson, counsel for defendant, then rose and stated: "We take exception to the action of the court in submitting to counsel the special issues presented to the court on behalf of defendant, and we assert that, under the law, it is the duty of the court to submit to the jury all special issues that may be presented, and we also object to the action of counsel in presenting before the jury any objections to the special interrogatories that have been presented to the court." The cause was then argued and the court instructed the jury, but refused to direct the jury to find special verdicts as requested by defendant.

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*Opinion vacated and rehearing granted by Supreme Court September 13, 1906.

Defendant made the request for these special findings under the provisions of section 625, Code Civ. Proc., as amended in 1905. Prior to said amendment, the court might, or might not, direct the jury to find special verdicts, for the words "may direct" were used. By the amendment of 1905, the word "may" was changed to "must," and reads: "In all cases the court must, upon the request in writing of any of the parties, direct the jury to find a special verdict in writing upon all or any of the issues." It is contended by appellant that, as amended, the court has no discretion, but must direct the jury to find specially. The court is not bound to prepare such special issues, but "when requested in writing" must be taken to mean interrogatories prepared and set forth in such writing. But, even then, I apprehend the other side would have a right to offer amendments to such special interrogatories or special issues, and it would be the duty of the court then to settle the same and make them conform in an intelligent way to the real issues in the case. Unless the question the party desires the jury to answer as special verdict are questions and issues pertinent to the real issue in the case, he has no right to have the jury directed to answer them, and, as in all other questions submitted to the jury, it becomes the duty of the court to first determine whether it is pertinent to the issue the jury is called to try. Were it otherwise, and had the Legislature intended to have taken away all discretion of the court of saying whether matters parties may ask to have submitted to the jury are legitimate and pertinent, then a defendant in a damage suit with no legitimate defense could have such matters submitted to the jury as would so befog the minds of the jurors as to make it impossible to have a verdict that would stand. The Legislature never intended to take away such discretion. Under the section as it now stands, the court must submit the special issues formulated in writing by either party when the same are within the issues and subservient of the general issue in the case.

Now as to the special issues asked in this case. The complaint alleges that the fall which caused the plaintiff's injury was caused by said smoke and by reason of the absence of rails, guards or other protection on said walk. The injury was caused by both the smoke and the fact that there were no guards on the walk. Just how much each contributed to the fall is beyond the power of man to tell. In the first place, having such a walk 19 feet above the ground is an element of danger, but probably when the vision is in no wise blinded one might not fall. The smoke was only dangerous simply causing partial suffocation, but when it darkened the vision, the fact that defendant was standing on a plank walk 19 feet high and only 3 feet wide, and with no guards and no protection from the danger of falling, it, in conjunction with the smoke and the smoke in conjunction with the said walk, made the danger so great that the plaintiff was precipitated to the floor and seriously injured.

The first question the jury was called upon to answer as a special verdict would seem to limit the cause of the injury to but one thing—that of the absence of guards on the plank walk, while, in fact, that was but a contributory cause. The same may be said of the second special issue. The case was brought, and the trial was had, upon the theory that both these things combined to cause the injury, and not either the one or the other solely. If to the first special verdict the jury should answer "Yes," the effect would be to say the smoke was no factor in causing the injury. Should the jury answer the first with "No," and the second with "Yes," the result would be to eliminate the condition of the plank walk entirely. Special finding No. 3, being based upon the answer the jury might give to No. 2, which is not responsible to any issue, becomes immaterial. Special verdict No. 4 is responsive to an issue made by the pleadings. But, as these special issues were asked as a whole and not all being issues in the case, the court was not bound to direct the jury to find on any of them, without being specially requested so to do. The special issues could have been easily framed so that they would have correctly stated the issues and not been misleading or confusing had the plaintiff been given an opportunity to offer amendments thereto.

We think the refusal of the court to direct the jury as requested was within its power and the power was properly exercised. Therefore, in answer to the issue before us, we are of the opinion the requirements of section 625 of the Code of Civil Procedure, commanding the court to submit special issues to the jury are mandatory, and such special issues, when embodying the real issues in the case and not subject to other legal objections, must be submitted to the jury. But the court must pass upon their pertinency, their materiality and legality, as it is the court's duty to pass upon all other matters submitted to the jury. If such issues are in every way proper, the court has no discretion to refuse them.

The judgment is affirmed.

McLAUGHLIN, J. I concur in the order affirming the judgment. There can be no doubt that section 625 of the Code of Civil Procedure as amended in 1905 makes it the absolute duty of the court to direct the jury "to find a special verdict in writing upon all or any of the issues," and to instruct them, "if they render a general verdict, to find upon particular questions of fact" whenever a written request for such direction or instruction is made. But this is far from saying that the court in the case at bar was bound to direct the jury to fix upon some particular fact as the sole cause of the injury, or to find upon each evidentiary fact addressed to any of the several issues or questions of fact raised by the pleadings. The general issue, which might have been answered by a general verdict, involved the liability of defendant and the extent of such liability. And the several issues or particular questions of fact involved in this main inquiry, concerning which the court was bound to direct the jury to find specially, must be gleaned from an analysis of the pleadings, and not from a survey of the numerous incidental questions arising from conflicting evidence touching some auxiliary fact. Eliminating questions of law which are not properly a matter of pleading, the issues or questions of fact raised by the pleadings are: (1) Was the platform an unsafe, unsuitable, or dangerous place for plaintiff to work? (2) Should the defendant, in the exercise of ordinary care, have known that it was an unsafe and dangerous place for an employé to work? (3) Was the means of ascending or descending from said platform unsafe and dangerous, and should defendant, in the exercise of ordinary care, have known of its dangerous and unsafe character? (4) Did the defendant, immediately after plaintiff went upon the platform, cause or suffer a dense volume of smoke to envelop the same, rendering the space in and about the plaintiff and the platform dark and impenetrable to sight? (5) Did plaintiff, by reason of such darkness, in endeavoring to escape from impending danger of suffocation, through the absence of guard rails on said platform, fall and receive the injuries complained of? (6) Was the plaintiff damaged thereby in the sum of $10,000 or any other sum? (7) Were these injuries caused in whole or in part by the negligence of plaintiff himself? (8) Did the injuries suffered by plaintiff grow out of the risks assumed by plaintiff in his contract of employment? Wherever these questions include two or more propositions of fact they might properly be subdivided, and each question be made to include only one averment of fact disputed in the answer. Aside from such subdivision, however, the eight questions above enumerated include all of the questions of fact or issues which it was the duty of the court to consider in determining the propriety of directions or instructions requested.

Instead of submitting a request for a special verdict or finding on any one or all of these issues or particular questions of fact, the defendant submitted requests which it was no part of the duty of the court to grant. The requests numbered 1 and 2 are palpable attempts to compel the jury to fix upon one particular fact as the cause of the plaintiff's injuries, and are confusing and misleading. The complaint clearly and specifically charges that the accident was due to a combination of both causes, and the court was not bound to split an issue which the parties had made single, and which could not be divided without danger of confusion leading to incongruous and untoward results. For instance, the jury might answer both of these questions in the negative and still find that the injuries were caused by defendant's negligence in causing a smoke to envelop a platform, safe under ordinary conditions, but dangerous under the circumstances narrated in the complaint. The third request is based on an affirmative answer to the second, and as the latter was improper, the request was properly refused. The fourth request is an attempt to compel the jury to find on an auxiliary evidentiary fact pertinent to one of the several issues or questions of fact and was, for that reason, improper. Every law must receive a reasonable construction, and it certainly was never intended by the framers of this law that either party could by simple request compel a jury, through a direction of the court, to answer each collateral fact going to make up a single issue, or give a finding touching each disputed item of evidence. Such a practice would lead to intolerable confusion, not only in the minds of jurors, but in the trial of causes. The request must come within, and be confined to, the issues or questions of fact presented by the pleadings, and cannot be made to include a separate finding on every minor detail of an issue, and on every one of a series of facts going to establish or controvert averments from which these issues arise.

I concur: CHIPMAN, P. J.

On Rehearing.

BUCKLES, J. This is a petition for rehearing. We see no reason for granting it, and it is therefore denied.

I concur: McLAUGHLIN, J.

CHIPMAN, P. J. I concur in the order denying a rehearing. Upon a comparison of section 625 of the Code of Civil Procedure, as enacted in 1872 with the section as amended in 1905 (St. 1905, p. 56, c. 62), I see no substantial difference except that "upon the request in writing of any of the parties," if a general verdict is rendered, it is made mandatory upon the court to direct the jury "to find upon particular questions of fact"; whereas, the section formerly left it discretionary with the court. I cannot, therefore, see that the amendment has introduced any new practice aside from making it the duty of the court to do what it formerly had the discretion to decline to do. The scope and purpose of the section appear to be unchanged so far as they relate to the "particular questions of fact" upon which the jury must be directed to make written findings. I think it is the right of either party to submit any one single question material to the issue or any of the issues, whether or not he desires to submit other such questions of fact. He is not obliged, in other words, by his proposed questions of fact, to address questions to all the material issues of the case.

Counsel in their petition for rehearing claim that it is their right, under said section 625, "to interrogate the jury as to matters material to the issues, *yet not necessarily covering any of the issues.*" If counsel mean by the phrase italicized that the jury may be interrogated as to facts not related or pertinent to the issues or any of them, I cannot agree with them, and I agree with Justice McLAUGHLIN in what I understand to be his view of the meaning of the section, that it is not the right of a party to submit questions for the jury upon every evidentiary fact, though material to the issue. A wise discretion must be exercised by the trial court in determining to what extent questions of fact pertinent to the issues should, for their elucidation, be submitted to the jury. It is not easy to draw the precise line of demarcation between questions of fact which it would be the duty of the court to submit to the jury, and such as the court may properly refuse to so submit. An examination of the cases will show a somewhat wide latitude allowed under this section. See Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; McAulay v. Moody, 128 Cal. 202, 60 Pac. 778.

I agree with counsel for defendant that it is their right to submit questions of fact to the court for the jury without first having submitted them to opposing counsel, and the responsibility is then put upon the court to determine whether or not to place them before the jury. I see no controlling analogy between the practice under this section and the practice as to instructions. The discretion rests with the court either to submit or refuse the questions as requested, for, if it be held that the court may change or modify the questions as propounded, it would cease to be a request of the party asking it, and the statute would be no longer mandatory. This discretion, of course, is subject to review by the appellate court as is the exercise of discretion generally.

Upon further consideration of the case I agree with my associate, Justice BUCKLES, that the fourth question was responsive to an issue, and was a proper question of fact to be submitted to the jury. It was alleged in the complaint that the absence of rails guarding the walk in question was one of the causes leading to the injury, but the defendant submitted the series of questions and asked that they be submitted in their entirety, and, when the request, as made, was refused, it was the duty of defendant, if it desired any one of the questions to be submitted separately, to so request the court. It would certainly be of advantage to the profession if a comprehensive statement could authoritatively be given as to the complete rights of the parties to an action as matter of practice under this section 625. When such an exposition is made, however, it would be perhaps better that it should come from the Supreme Court. Here the case does not seem to call for such statement.

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4 Cal. App. 26

COPRIVIZA v. RILOVICH et al. (Civ. 90.)

(Court of Appeal, First District, California. June 25, 1906. Rehearing Denied by Supreme Court Aug. 23, 1906.)

1. TRIAL—QUESTION FOR JURY.

Where different conclusions may be reasonably drawn by different minds from the same evidence as to whether an account is a mutual account, the question is one for the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 336–343.]

2. LIMITATION OF ACTIONS—TIME OF ACCRUAL OF RIGHT OF ACTION—MUTUAL ACCOUNT—ADVANCING MONEY TO THIRD PERSONS.

Moneys which are advanced by a debtor to third parties at the request of a creditor, upon which demands arise by the debtor against the creditor, and which are charged on an account between them, render the account a mutual, open, current account, an action on which is not barred until the expiration of the period of limitation from the time of the last term thereof proved.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 295–298.]

3. SAME—EVIDENCE—SUFFICIENCY.

A bookkeeper to whom his employers were indebted testified, in an action based on a mutual account, that he requested his employers to buy and pay for certain goods for his sister, and notify him of the amount, that he might charge himself therewith. This was done, the credit appearing on the company's books as cash items, but, on a personal account kept by plaintiff, the goods purchased were specified. *Held* sufficient to justify a verdict based on the theory that the account was a mutual account, and therefore the action was not barred, having been brought within the period of limitation after the last item of the account proved.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by George Copriviza against Martin

Rilovich and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Dickerman & Torchiana and Lindsay & Netherton, for appellants. H. C. Wyckoff, for respondent.

HALL, J. Defendants appeal from a judgment in favor of plaintiff and from an order denying defendants' motion for a new trial.

Plaintiff sued for a balance alleged to be owing him from defendants upon a mutual, open, and current account. Defendants, among other matters, pleaded the bar of the statute of limitations, and the only questions involved in this appeal concern the correctness of an instruction given by the court upon the subject of what constitutes a mutual, open, and current account, and the sufficiency of the evidence to justify the finding that the account was mutual, open, and current, necessarily involved in the verdict of the jury. The only testimony given on the trial was that of the plaintiff, from which it appears that the defendants were engaged in the business of packing and shipping fruit, and that he was employed by them as bookkeeper. He loaned the defendants two sums of money ($500 and $1,000), paid for stationery supplies various sums of money, and was allowed a salary of $60 a month; the whole aggregating over $3,000. Against this were various cash payments made to plaintiff by defendants at different periods, and three items of credit relied on by respondent as making a case of mutual account, and which we will particularly notice further on in this discussion. Plaintiff, as the bookkeeper for defendants, kept an account with himself, in which he was credited with the money loaned and paid out for defendants, and was charged with cash paid him. Among the items in this account charged against plaintiff are the three items above referred to, and in the account as kept in defendants' ledger by plaintiff they do not appear to be anything but cash payments. Plaintiff also kept a private or personal account of his own of his transactions with defendants in all respects similar to the account kept in defendants' books, except that the three items relied on to sustain the finding of a mutual account are entered as follows:

1900.	Aug. 4, $46.35 sister's clothes, cash $5.00..................	$51 35
	Oct. 12, hat, dress made........	13 00
	Nov. 15, sister's waist..........	3 00

In regard to the item for $13, plaintiff testified: "My sister came out here, and I told Mrs. Martin Rilovich to go with my sister to the dressmaker's to fit her with a dress. She bought her something else that day. It was the hat. The Rilovich Bros. paid $13 to the dressmaker and for my sister's hat. They paid for the hat, and I charged myself with it. Martin Rilovich told me they bought $13 worth for my sister for the dress and hat. I requested Martin Rilovich to pay it, and told him to tell me how much it is so I will charge it to myself." As to the item "Sister's waist $3.00," he said: "My sister went to the store, and Rilovich Bros. paid for it, and told me to charge myself with it, and so I did." He also said that the item of "$46.35 sister's clothes" was a similar transaction. On cross-examination he testified that he told them (Rilovich Bros.) to buy all the clothes his sister needed, and whenever they spent anything to tell him, and he would put it down and charge it to his account. That at his request they paid $13 for a hat and dress for his sister. "The $46.35 item was a similar transaction. * * * All the other items in the account credited to me or charged against Rilovich Bros. are for cash which they paid me from time to time on account." Under this state of the evidence the court, after giving certain instructions requested by defendants, charged the jury as follows: "But if you believe from the evidence that there are credits on the account which are not payments to plaintiff, but are moneys advanced by defendants to third parties at the request of plaintiff, and upon which demands arose in favor of defendants and against plaintiff, and these moneys so advanced were credited on the account, then I charge you that the account between plaintiff and defendants is a mutual, open, and current account, and the plaintiff's demand would not be barred by the statute of limitations until two years after the time of the last item proved in the account on either side." The jury found a verdict for plaintiff in the amount prayed for, and thus must have found that the account was a mutual, open, and current account, for otherwise a large portion of the account would have been barred.

The real question in controversy was as to whether the three items of credits above referred to constituted payments, or were matters of set-off or counter demands upon which an action would lie against plaintiff in favor of defendants. Charges upon one side and mere payments upon the other do not make an account a mutual account. And payments need not be made in money only, but may be made in merchandise where by agreement the same is taken at a fixed value as payment. Mutual accounts are made up of matters of set-off where each party has a demand or right of action against the other. Norton v. Larco, 30 Cal. 127, 89 Am. Dec. 70; Millet v. Bradbury, 109 Cal. 170, 41 Pac. 865; Ross v. Ross, 6 Hun (N. Y.) 80. It is not necessary, to support a mutual account, that there be items of merchandise sold to each party. In Toponce v. Corinne, etc., Co., 6 Utah, 439, 24 Pac. 534, there were demands on plaintiff's side for services rendered and money paid out, and on defendant's side demands for money received on sales of livestock, money loaned, paid out, and expended for plaintiff, and it was held a mutual account, and not barred. See same case, Corinne, etc., Co. v. Toponce, 152 U. S. 405, 14 Sup. Ct. 632, 38 L. Ed. 493.

Where different conclusions may be reasonably drawn by different minds from the same evidence as to whether an account is a mutual account, the question is one for the jury. Abbott's Civil Trial Evidence, 386; Gunn v. Gunn, 74 Ga. 555, 58 Am. Rep. 447. In the case at bar it may be conceded for the purposes of this decision that the evidence would support a finding that the three items above referred to were matters of payment simply. But, on the other hand, we do not think that the evidence necessarily establishes the proposition that these three items of credit were payments simply, and not matters of set-off upon which a demand arose against plaintiff, in favor of defendants. It may be fairly urged that the evidence discloses, not three items of payment to plaintiff, but rather three items of money paid at his request for which demands at once arose in favor of defendants and against plaintiff. The word "payment" was never used by either party to the transactions. The effect of the evidence may be fairly said to be that the plaintiff authorized the purchase of goods for his sister on his account, and requested defendants to pay for the same for him. This, in connection with the testimony that the items were entered in the accounts kept by each party, would make the account a mutual account.

The difference between a payment of money by a debtor to his creditor, and the payment of money by a debtor to a third party at the request of the creditor, may be technical, but it is nevertheless substantial. While in the first case it is presumed to be a payment on the debt, in the second case it may be a payment on the debt if the parties so agree, or it may be a matter of set-off for which an action would lie. Under the evidence in this case it was for the jury to determine what was intended by the parties—whether the moneys paid to third parties for clothing for plaintiff's sister were intended to be payments to plaintiff, or were matters of set-off to be charged to plaintiff and credited to defendants pending the final settlement of the account.

We are therefore of opinion that the court in its instructions correctly submitted the question to the jury, and that there was sufficient evidence to warrant the verdict of the jury.

The judgment and order are affirmed.

We concur: HARRISON, P. J; COOPER, J.

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4 Cal. App. 213

PEOPLE v. KING.

(Court of Appeal, Third District, California Aug. 9, 1906.)

1. Criminal Law—Plea—Prior Conviction—Jurisdiction of Court.

Pen. Code, § 1093, provides that, where a defendant has confessed former conviction, the clerk, in reading the information, shall omit all that relates thereto. Section 1158 provides that, where defendant is found guilty, the jury must also, "unless the answer of defendant admits the charge," find whether he has been previously convicted. Section 1025, repealed by St. 1880, p. 19, c. 47, provided that, where the indictment alleged a previous conviction, defendant must be asked whether he has suffered such previous conviction. *Held*, that it could not be said that it was an act in excess of jurisdiction for the court, after the repeal of section 1025, to call upon defendant to plead to the charge of prior conviction contained in the indictment.

2. Same—Appeal—Harmless Error.

Since defendant would in no event confess the charge of prior conviction if innocent thereof, and since by confession, if guilty, he would derive a positive advantage before the jury by removing such charge from the consideration of the jury, the action of the court in calling upon him to plead to the charge, in the absence of the jury, was at most a harmless irregularity.

3. Same—Review—Credibility of Witnesses.

Though the character of witnesses may not indicate much moral discrimination, yet, where the jury have accepted their testimony, it is not the province of the Supreme Court to discredit them.

4. Burglary—Felonious Entry—Evidence—Sufficiency.

Defendant, about 2 p. m., went to a house occupied by the W. C. T. U., and having inquired for mail, though he had never before received any at such place, shortly thereafter left. A trunk which had been locked at 9 a. m. was standing in the hall. The owner of the trunk left the house about 9 p. m., and, returning about 10 p. m., missed the trunk. About 11 p m. defendant and another took the trunk to their room on another street, entering the house in haste through a narrow alley, broke it open, and appropriated the contents. *Held* sufficient to support a finding of felonious entry so as to justify a conviction of burglary.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 97.]

5. Criminal Law—Trial—Instructions—Repetition.

It is not error to refuse to give an instruction as to the conviction of crime on suspicion, which is covered by instructions already given.

6. Same—Matters of Fact.

In a burglary case, an instruction that there was no evidence of any conspiracy between defendant and another would be in violation of Const. art 6, § 19, forbidding a charge with respect to a matter of fact.

7. Burglary—Theft by Another—Instructions—Supporting Evidence—Sufficiency.

Where, in a prosecution for burglary, there is no evidence on which to base a hypothesis that defendant may have received from another, who had stolen it, property which was proved to have been in defendant's possession a short time after the theft, an instruction is properly refused to find for defendant, unless the evidence excludes the hypothesis that he received the property after its theft by another.

Appeal from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

Joseph King was convicted of burglary, and appeals. Affirmed.

Joseph King, in pro. per. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Information for burglary alleging also two prior convictions of burglary of the second degree. Defendant was found guilty by the jury and appeals from the judgment of conviction and from the order denying his motion for a new trial.

The transcript contains the following entries: "October 14th, 1902. Being called upon to plead, the defendant pleaded not guilty as charged in the information. * * *" The cause came on for trial October 27, 1902, and out of the hearing of the jury panel the district attorney withdrew one of the two charges of prior conviction. The minutes of the court then show: "Being called upon, the defendant, out of the hearing of the jury panel, pleaded guilty to the prior conviction of felony, to wit, burglary of the second degree. * * * Thereupon the defendant excepts to the order of the court requiring the said defendant to plead as to said prior conviction, upon the grounds alleged in the demurrer herein." Thereafter a jury was formed, and, being complete, "the information herein was read to the jury, no reference being made to the said prior convictions contained in said information when said information was read to the jury, and the plea of the defendant of not guilty as charged in the information was stated to the jury." It is claimed by defendant that it was prejudicial error for the court after arraignment (Pen. Code, § 1003) to call upon defendant to plead to the charge of prior conviction; that the court exceeded its authority, there being no statute authorizing the court to ask the defendant whether or not he had suffered a previous conviction; that the particular offense and the previous conviction constituted one charge, a plea of not guilty to which puts in issue every material allegation therein contained, and that the plea of not guilty, first offered by defendant, was the only one admissible under section 1017 of the Penal Code; and that he had a right to rest upon that plea and could be convicted only by a verdict of a jury that tried him—citing cases. The record fails to disclose the grounds of defendant's objection to pleading to the second conviction when called upon. Indeed the record does not show that he objected. It shows only that he excepted upon the grounds stated in his demurrer to the information, but the record does not contain the demurrer. There is nothing in the record sustaining defendant's contention that he was compelled, over his protest, "to either confess or deny the said prior conviction." So far as appears he voluntarily pleaded guilty when called upon. Waiving the apparent failure of defendant to affirmatively show error, we do not think the court exceeded its authority, or, if it did, that defendant was in any degree prejudiced thereby.

Defendant's argument is constructed chiefly on the fact that section 1025 of the Penal Code was repealed in 1880 (St. 1880, p. 19, c. 47), and that until re-enacted in 1905 (St. 1905, p. 773, c. 574) there was no law providing that the defendant "must be asked" whether he has "suffered such previous conviction." The condition of the statute on the subject is shown in People v. McNeill, 118 Cal. 388, 50 Pac. 538. It was held, in People v. Wheatley, 88 Cal. 114, 26 Pac. 95, that where the defendant has been charged with a prior conviction, and has pleaded not guilty, he may be permitted afterwards, in the discretion of the court, to withdraw his plea as to that charge and enter a plea of guilty thereof; "the object doubtless being to keep from the jury on trial all knowledge of the prior convictions, and thus secure a better chance for an acquittal of the main charge." People v. King, 64 Cal. 338, 30 Pac. 1028, relied on by defendant, has since been overruled. People v. Wheatley, supra. Section 1093, Pen. Code, provides that, where the defendant has confessed the charge of former conviction, the clerk in reading the information to the jury "shall omit therefrom all that relates to such previous conviction." Section 1158 of the same Code provides that, if the jury finds a verdict of guilty of the offense charged, the jury "must also, unless the answer of defendant admits the charge, find whether or not he has suffered such previous conviction." It seems to us that, even after the repeal of section 1025, it was within the power of the court, before the trial, to ascertain whether the defendant adhered to his plea of not guilty to the charge of prior conviction, and to give him an opportunity to "admit the charge" if willing to do so. If he "admits" or "confesses" the charge, the sections above referred to give him protection from any resultant prejudice with the jury, for his admission removes that part of the information from the knowledge of the jury. It is inconceivable that he would confess the charge if innocent of it, and by confession, if guilty, he derives a positive advantage before the jury. It was said, in People v. McNeill, supra: "No doubt it would be better for the record to show that the defendant formally made confession in the form of a plea entered upon the minutes contemporaneously with the making of the confession, but it cannot be said that the Code requires such procedure." But whether or not the court was authorized by any statute to "call upon" the defendant to plead to the charge of prior conviction, in doing so there was the exercise of no power that can be said to be in excess of jurisdiction. At most it was but an irregularity in procedure which plainly, not only worked no prejudice, but was a positive benefit to defendant. Besides the defendant could have stood upon his original plea of not guilty, or he could have again pleaded not guilty to the prior conviction. The re-enactment of section 1025, while not affecting the present case, makes the question no longer of importance, if it ever had a serious aspect.

Upon the facts: There was evidence tending to show that, some time between 2 p. m. and 4 p. m. of April 21, 1902, defendant went to a house at No. 132 McAllister street, San Francisco, in which the Woman's Christian Temperance Union had rooms. In going to these rooms he passed through a hall in which was a trunk containing sundry articles and belonging to one Mrs. Sheppard. He inquired at these rooms whether there were any letters for him, though he had never before received any there, and shortly after left the house. The trunk had been in this hall for some time, and its owner testified that she took some articles from it on the morning of the 21st of April and left it locked. She went out of the house about 9 o'clock that night and returned about 10 o'clock and then missed the trunk. The same night about 11 o'clock defendant and one Hamilton, a codefendant, took the trunk to their room, at 835B Howard street, entering the house in the rear by a narrow alley, running from Tehama street to the rear of the premises. The trunk was locked, but defendant opened it with a cold chisel and distributed some of the contents to inmates of the house to whom he said the trunk was his. The circumstances of his bringing the trunk to the house and breaking it open, his conduct two nights later when several police officers went to arrest him, his attempt to evade arrest, the hiding of the cold chisel with which he forced the trunk open, his final arrest in a dark place where he had concealed himself, and other facts tending to show guilty possession of the stolen property, were brought out by the testimony of the police officers and by two women witnesses who occupied part of the Howard street house.

It is strenuously urged that these women were self-confessedly immoral persons and were accomplices, and the rule as to the latter is invoked against their testimony. We find nothing in the record showing that they were accomplices. Their character for truth and veracity was not assailed, and, while their life was not of a character to indicate the possession of much discrimination as to their companionships or moral conduct, the jury must have accepted their testimony, and it is not the province of this court to discredit them.

It must be admitted that the evidence of a felonious entry to commit larceny is not strong, and the claim is made that there is an entire absence of evidence pointing in that direction. There is evidence, however, that defendant entered the McAllister street house and had an opportunity to steal the trunk and had it in his possession a few hours later under circumstances indicating its theft by him. There was sufficient evidence to justify the jury in its inference that the McAllister street house was entered by defendant with felonious intent. It has been held that, where the defendant entered a dry goods store during business hours, and while there was caught in the act of attempting to steal a garment, the jury were warranted in finding him guilty of burglarious entry. People v. Brittain, 142 Cal. 8, 75 Pac. 314, 100 Am. St. Rep. 95. The statute applies to a dwelling. Pen. Code, § 459. See People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Smith, 86 Cal. 238, 24 Pac. 988; People v. Lang, 142 Cal. 482, 76 Pac. 232. The brief of defendant is signed by himself and purports to be the work of his own hand. It possesses the professional earmarks of the lawyer and is clearly not the work of a layman. We are asked to scrutinize instructions, requested by defendant and refused by the court, numbered 29, 48, and 49, as "he feels that they should have been given," though no reasons are given for thus feeling. Instruction 29 was that the law does not permit a conviction of crime on suspicion. This was properly refused as covered by the other instructions, and particularly instruction 13 given at defendant's request. Instruction 48 was that there was no evidence of any conspiracy between defendant and any other person to commit the crime charged. This instruction, if given, would have been charging the jury on the matter of fact, which is forbidden (Const. art. 6, § 19), and would not have been responsive to any issue in the case. Instruction 49 was as follows: "If the evidence before you does not reasonably exclude the hypothesis that defendant might have received the trunk and contents after they had been taken by another from the premises, 132 McAllister street, then your verdict must be that the defendant is not guilty, unless the evidence satisfies your minds beyond all reasonable doubt that defendant aided and abetted the person who took the property." Much the same may be said of this instruction as has been said of No. 48. There was no evidence on which to base the theory of theft by any other person, or that defendant received it from some other person. The court gave instructions 46 and 47, at defendant's request, with some proper modifications, which were sufficient to direct the minds of the jury to the facts proven as to the possession of the trunk by defendant and their legal effect.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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7 Cal. Unrep. 297

NOBLE v. LEARNED et al. (Civ. 235.)

(Court of Appeal, Third District, California. July 31, 1906.)

1. JURY—RIGHT TO JURY TRIAL—LEGAL OR EQUITABLE—ACTIONS OR ISSUES.

A suit to determine title to stock in a building association, to cancel the certificate representing the stock, to restrain the payment of money on account of the certificate, and to require the issuance to plaintiff of a new certificate for the stock, is a suit in equity, and a jury trial is not demandable as of right under Code Civ. Proc. § 592, providing that, in cases other than actions for the recovery of specific real or personal property, etc., issues of fact must be tried by the court, subject to its power to order issues to be tried by a jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 35-47.]

2. GIFTS—ASSIGNMENTS OF CORPORATE STOCK—DELIVERY.

An owner of stock in a building association gave to the secretary thereof a list of the persons to whom she wanted the stock assigned, and assignments were made on the back of the certificates. The secretary was given possession of the certificates subject to the owner's order, and told to hold them until the owner's death, and then deliver them to the assignees. A few months afterwards the owner died. *Held*, that title did not vest in the assignees, but remained in the owner.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 9, 36.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Arthur M. Noble, as executor of Deborah H. Lee against D. A. Learned and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. H. Carpenter, for appellant. Plummer & Dunlap, for respondent. Budd & Thompson, for Building & Loan Association.

BUCKLES, J. This action was prosecuted to determine the title to certain stock in the San Joaquin Valley Building & Loan Association, and for the delivery up and cancellation of the certificate representing the same, for an injunction restraining the payment of money on account of said certificates, and for the issuance to plaintiff of certificates of said stock. Judgment was for plaintiff, and the appeal is from the judgment.

The first error assigned is that the court refused the defendants' demand for a jury. Whatever view may be taken of the case as to other matters, it is an equity case, and there was therefore no error in denying the defendants' demand for a jury. Code Civ. Proc. § 592; Meek v. De La Tour (Cal. App.) 83 Pac. 300; Ashton v. Heggerty, 130 Cal. 517, 62 Pac. 934. The complaint alleges that Deborah H. Lee died intestate March 12, 1903, and at that time she was the owner and entitled to 40 shares of the capital stock of the San Joaquin Valley Building & Loan Association, in a certificate numbered 465, and that one Gennis H. Learned, upon the death of said Deborah H. Lee, wrongfully and unlawfully took possession of said certificate of stock, had the same canceled and a new certificate issued to her in her own name for 39 shares and received $100 in money for the other shares. That said Gennis H. Learned died testate, and the said certificate of stock is now held by D. A. Learned, the executor of the last will of said Gennis H. Learned. Alleges demand made, and the value of the property to be $4,000. The prayer is that the certificate of stock No. 559 be delivered up by said defendant, that it be canceled and the San Joaquin Valley Building & Loan Association issue to plaintiff certificates in due form evidencing the ownership of plaintiff to said 39 shares, and also the return of the $100. The San Joaquin Valley Building & Loan Association answered by general denial. D. A. Learned answered by denying specifically, admitting the death of Deborah H. Lee and Gennis H. Learned and the proceedings taken to settle their respective estates, and, further answering, alleges that on October 17, 1902, Deborah H. Lee duly assigned by indorsement all said shares of stock to Gennis H. Learned, and then delivered the same so indorsed to A. M. Noble, to be held by him in trust for the said Gennis H. Learned as long as the said assignor should live, and at her death to me delivered to the said assignee; that said Noble accepted said trust; that the said trust was not revoked, and was in force when the said Deborah H. Lee died; that after her death, and on or about the 20th of March, 1903, Noble delivered said certificates of stock to Gennis H. Learned, and she then had said certificate for 40 shares canceled and the new certificate No. 559 issued to her for 39 shares in said association, receiving $100 in money. Prays that the said trust be declared valid, and defendant be adjudged the owner and entitled to the possession of said stock. The court found that Deborah H. Lee never made any gift of said shares of stock to Gennis H. Learned and "never created any trust therein, and never parted with any title, ownership, or control of said property during her lifetime, and the property and the whole thereof was, at the time of her death, the property of the said Deborah H. Lee, deceased, and at the date of her death constituted and still constitutes a part and parcel of the estate of said deceased."

This finding is based upon the testimony of Arthur M. Noble, of whom she purchased the 40 shares of the capital stock of the San Joaquin Valley Building & Loan Association. Mrs. Deborah H. Lee was sick, had about $1,600 which she wanted placed where she could have the income from it and use any part of the principal in case she needed it at any time. In negotiating the purchase of said shares of stock with the witness A. M. Noble, who was the secretary of the San Joaquin Valley Building & Loan Association, she informed him that this was the only money she had, and that she did not want to put it out of her control. This certificate of stock No. 465, with others, was issued to her with the assurance to her by Mr. Noble that she could retain control of them and draw money on them. The certificates were then issued in the name of Deborah H. Lee, and given to her. She assigned them to different persons, assigning No. 465 to Gennis H. Learned. They were then by Mrs. Lee returned to Mr. Noble, who testified in relation thereto as follows: "I left them [certificates] at the house with her. Two or three days subsequent to that she sent for me and wanted me to take these certificates and pass book and keep them for her, subject to her order—call. She said if she did not get well, and anything happened to her, to notify the people to whom these certificates had been assigned and send for them and deliver them to them. She said she would use more or less of it, and what was left at the time of her death was to be given to the people mentioned by her. In pursuance of that, I presume I took the certificates. I took certificate No. 465 which has been read in evidence. After this occurrence I had occasion to visit Mrs. Lee again. She sent for me, because she said she needed some money and wanted to surrender one of those certificates of stock she held. I took the certificate No. 480 for one share out with me." After this he went out to her house with said certificates as she desired to get money on them. He continues: "After the cancellation of the last certificate, on the 28th day of February, 1903, the remainder of the certificates were handed back to me. Mrs. Lee told me to take and keep them the same as I had done before—to keep them for her. There were 19 certificates of this stock, and all issued in the name of Deborah H. Lee. She afterwards, but on the same day, gave me a list in writing of the persons to whom she wanted the stock assigned, and the assignments were made on the back of the certificates."

It thus clearly appears that Deborah H. Lee did not and never intended to part with control of her title to said stock while she lived. On March 12, 1903, she died without having revoked said assignments, or any of them, The certificates were then in the safe in the possession of Noble, who afterwards delivered certificate No. 465 to Gennis H. Learned, she being the one named therein as assignee. The finding is warranted by the evidence. Noble v. Garden, 146 Cal. 225, 79 Pac. 883. This, then, disposes of the issue that Noble held the certificate as trustee, against the contention of appellant. A similar case to the one before us, and involving the same question as to delivery and title of others of these identical certificates of stock, was well considered and decided in Noble v. Garden, 146 Cal. 225, 79 Pac. 883. The court there held under the same state of facts that Deborah H. Lee retained control and dominion of these certificates; and that the title did not vest in the parties to whom the assignments were made because she expressly stated it should remain in deceased. Upon the authority of Noble v. Garden, supra, the judgment of the lower court must be upheld.

Judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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4 Cal. App. 225

PEOPLE v. McMAHILL. (Cr. 54.)

(Court of Appeal, First District, California. Aug. 15, 1906. Rehearing Denied by Supreme Court Oct. 4, 1906.)

EMBEZZLEMENT—INDICTMENT—CONVERSION.

Under Pen. Code, §§ 950-952, requiring an indictment to be direct and certain, and to contain such a statement of the facts that a person of common understanding may know what is intended, an indictment charging that an agent and servant did "willfully, unlawfully, and fraudulently," "appropriate to his own use" certain money of his employer does not charge an embezzlement under section 504, which requires the appropriation to be to a "use or purpose not in the due and lawful execution of his trust."

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 51, 52.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

I. B. McMahill was convicted of embezzlement, and appeals. Reversed, with directions.

C. F. Hanlon, G. W. Waldorf, E. Coolidge, and W. A. Bowden, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. The information charged as follows: "The said defendant, on or about the 25th day of April, A. D. 1905, at the county and state aforesaid, did willfully, unlawfully, and fraudulently, and while said defendant was the secretary, agent, and servant of the San José Chamber of Commerce, an association, appropriate to his own use the sum of $901.67 in lawful money of the United States, the property of said San José Chamber of Commerce, which money was on said date in the control and care, and had come into the control and care of said defendant solely by virtue of his said employment as such secretary, agent, and servant." To this information the defendant interposed a demurrer upon the grounds that it does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that the facts therein stated do not constitute a public offense. The demurrer was overruled, and defendant entered his plea of not guilty. After trial he was convicted and sentenced to a term of two years in the state prison. This appeal is from the judgment and order denying defendant's motion for a new trial.

The important and controlling question in the case is as to whether or not the demurrer should have been sustained. It is conceded that the district attorney in the information intended to charge the crime of embezzlement under section 504 of the Penal Code, which, so far as material here, is as follows: "Every * * * clerk, servant, or agent of any association * * * who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust * * * is guilty of embezzlement." The gist of the offense under the statute is the appropriation to a use or purpose not in the due and lawful execution of the trust. The information must charge the offense in ordinary language, so that a person of common understanding may know by reading it what is intended, and the facts stated in the information must necessarily charge a crime. If the facts stated may be true, under certain circumstances, and yet not constitute a crime the information will be held insufficient. The information in this case, when divested of the adverbs "unlawfully, feloniously, and fraudulently" simply states the fact that defendant appropriated to his own use $901.67, the property of the San Francisco Chamber of Commerce, which had come into his control and care by virtue of his employment as such secretary, agent, and servant. The conditions of the trust are not stated, nor is there any attempt to state them. The object and purpose for which the money came into defendant's possession is not stated. No attempt is made to state that defendant appropriated the money for a purpose not in the due and lawful execution of the trust. It may, for aught that appears in the information, have come into his control for his own use. There are many ways in which an agent might lawfully come into control of the money of his principal for his own use. We must presume that defendant is not guilty of any crime, and that he came into the control of the money for his own uses and purposes, and not for uses and purposes which may have existed in the imagination of the pleader. If the money was given to him for his salary, it was for his own uses and purposes. If it came into his control to reimburse him for moneys laid out and expended for his principal, it was for his own use. While it is ordinarily sufficient to charge a crime substantially in the language of the statute defining it, yet the information cannot be aided by inference or presumption. We cannot presume that the use of money which had come into the control of defendant was "not in the due and lawful execution of his trust."

In all the cases which we have examined under the section the informations which have been held valid allege that the money was appropriated to a use not in the due and lawful execution of the trust, or words of similar import. In People v. Gale, 77 Cal. 120, 19 Pac. 231, the indictment alleged that "defendant did then and there, as such administrator, fraudulently appropriate to his own use and purpose the sum of $94, which said money then and there belonged to the estate of the said Warren Polley, deceased." The ruling of the court below sustaining a demurrer to the indictment was upheld. In People v. Ward, 134 Cal. 301, 66 Pac. 372, where the words used were that defendant did "feloniously convert, embezzle, and appropriate to his own use, contrary to his said trust as such officer as aforesaid," the information was held sufficient upon the ground that "contrary to his trust" was the equivalent of "not in the due and lawful execution of his trust." In People v. Shearer, 143 Cal. 66, 76 Pac. 813, it was held that the charge that defendant fraudulently appropriated the sum of $105, the property of Sonoma county, which had come under his control by virtue of his trust as county physician was insufficient, because the term "county physician" did not show that defendant held any trust relation to the county. It is there said: "Embezzlement is purely a statutory offense. Under the provisions of our statute it is essential to the commission thereof that there should be a fraudulent appropriation of property to some use or purpose not in the due and lawful execution of his trust by one into whose possession it has come by reason of some relation of trust or confidence mentioned in the statute, and existing between him and another, and it is therefore necessary that an indictment or information for embezzlement should allege the trust relation, in order that it may be determined therefrom whether there has been any such violation of a trust or confidence reposed in the defendant." The rule is that it must clearly appear from the facts alleged that a crime has been committed. People v. Terrill, 127 Cal. 99, 59 Pac. 836.

The judgment and order are reversed, and the court below directed to make an order sustaining the demurrer to the information.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 184

GUTHRIE v. SUPREME TENT KNIGHTS OF THE MACCABEES OF THE WORLD. (Civ. 284.)

(Court of Appeal, Second District, California. July 31, 1906. Rehearing Denied by Supreme Court Sept. 28, 1906.)

1. INSURANCE—POWERS OF MUTUAL BENEFIT INSURANCE ASSOCIATION — CONTRACT—CONSTRUCTION.

A certificate of insurance provided for one assessment on the membership not exceeding $2,000 as a benefit to his daughter on satisfactory proof of his death, and, in case of total or permanent disability "or on attaining the age of 70 years," he would be entitled to receive one-half of the endowment as provided by the laws of the order. *Held*, that such contract should be construed to entitle the insured to one-half of the endowment in case of permanent disability, of which the attaining the age of 70 years was to be conclusive proof, and, as so construed, the contract was within the charter powers of the society, which was authorized to make payment of monthly and weekly sums in case of disability, etc.

2. SAME — BY-LAWS — CHANGE—RETROACTIVE OPERATION.

The act under which a mutual benefit insurance society was organized provided that the trustees should adopt by-laws, but that no by-laws adopted, affecting the rights and benefits belonging to or to be derived by the members of such corporation, should be changed by the trustees. *Held*, that by-laws adopted by trustees which materially changed the benefits to be derived under contracts written by the association would be construed not to apply to contracts made prior to their adoption.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1855.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Francis B. Guthrie against the Supreme Tent Knights of the Maccabees of the World. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Frank James and D. D. Aitken (De Vere Hall, of counsel), for appellant. E. M. Guthrie, for respondent.

ALLEN, J. Action upon a written agreement. Judgment for plaintiff and an order denying a new trial, from which judgment and order defendant appeals.

The defendant is a corporation created under a legislative act of the state of Michigan, which authorized the incorporation of associations for certain purposes, among which were that of "* * * securing a certain sum of money weekly or monthly to any member disabled by sickness or other disability." The act required that persons desiring to form such associations must file in certain public offices articles of association, which, among other things, should state the business of the corporation and the terms and conditions of membership. The act further provided that the trustees of such association named in the articles should adopt by-laws, but that no by-laws adopted affecting the rights and benefits belonging to or to be derived by the members of such corporation should be changed by such trustees. Pursuant to this act, certain persons, in the year 1885, filed with the proper officers the articles of association described, defining the purposes of the association, among other things, to be to give material aid to its members; to establish a benefit fund or funds from which, on satisfactory evidence of the death or disability of a member who has complied with all its lawful requirements, the sum of $2,000, in case of death, shall be paid to his family, orphans, dependents, or legal heirs, as such member may direct; and, in the case of total or permanent disability, such sum as may be designated in the endowment laws of such corporation. One of these endowment laws provides: "A total and permanent disability to perform or direct any kind of labor or business, or upon reaching the age of 70 years, shall entitle a member holding a certificate of endowment, so disabled or aged, to the payment of one-half of the endowment to which he would be entitled at death, provided, however, that in case of a total and permanent disability, satisfactory proofs must be submitted to the supreme medical examiner and board of trustees before payment is made, showing that such disability is permanent; and that it did not arise from his voluntary act, or from intemperance or any immoral or unlawful conduct on his part, or from the violation of the laws of the country; and provided further, that the member shall have paid all dues and assessments from date of initiation to date of disability, or upon reaching 70 years of age. From the date of such payment such member shall only pay pro rata or one-half as much at each assessment as prior thereto. On the death of such member his heirs or assigns shall receive his endowment, less the amount which may have been paid as provided above."

Plaintiff, during the year 1885, when this act and the by-laws and regulations above mentioned were all in force, became a member of the defendant, and there was issued to him a certificate of membership, which certified that he was a member and a beneficiary in good standing, and that, in accordance with and under the provisions of the laws governing the order, he is entitled to receive one assessment on the membership, not exceeding in amount the sum of $2,000, as a benefit to his daughter, upon satisfactory proof of his death and a surrender of the certificate, provided he shall have, in every particular, complied with all the rules and regulations of the order. In case of total or permanent disability, or upon attaining the age of 70 years, he will be entitled to receive one-half of the said endowment, as provided in the laws of the order. Under this agreement plaintiff continued the payment of all dues and performed all obligations devolving upon him thereunder; and in the year 1905, when he arrived at the age of 70 years, claimed payment of one-half of the endowment; and upon defendant's refusal to pay, instituted this action. It appears from the record that after this certificate was issued, without the consent or agreement upon plaintiff's part, the by-law hereinbefore referred to was changed in material respects, notably that instead of paying $2,000 when permanent disability should ensue, the defendant would pay 10 per cent. of the endowment fund annually during the existence of such permanent disability. It is found by the court that plaintiff and defendant both believed, when the certificate was issued, that the corporation possessed the power to issue the same in the manner of its issuance, and to enter into the contract thereby made, and that plaintiff, without knowledge upon his part that want of authority so to do was claimed by defendant, paid and defendant received, during the 20 years of his membership, all dues and assessments levied or assessed against him. The court further finds that plaintiff had no actual notice of any changes in the by-laws affecting his rights. The trial court also finds that the defendant corporation, from its organization up until 1899, provided for the payment of benefits to its members when they reached the age of 70 years; and further, that assessments had been made and funds existed out of which plaintiff's claim was payable, and that he was entitled under his contract to receive $1,000, with interest from February 15, 1905, and the sum of $6, assessments overpaid; for which it rendered judgment.

Defendant's principal contention upon this appeal is that the contract sued upon was ultra vires and void; that the stipulation therein that payment should be made at the age of 70 years was not authorized by the act under which the association was formed; and in support of this contention cites as authority certain decisions of the Supreme Court of Michigan, construing a similar act, in which it was held that a contract to pay a stipulated sum in a hundred months was ultra vires and void; and cites other authorities in support of the proposition that if the contract is ultra vires the corporation is not estopped to deny its character. This last proposition is a much controverted one, and the converse thereof has been held by our own Supreme Court in numerous cases. We are of opinion, however, that this question is not necessarily involved upon this appeal; for it is not apparent from the language of the agreement that want of authority existed.

Section 1643 of the Civil Code of this state provides: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties"; and section 3541, Civil Code, provides that "an interpretation which gives effect is preferred to one which makes void." The contract involved in this case is susceptible of two constructions: One that a payment is absolutely due when the age of 70 years is attained; the other, that payment is due when permanent and total disability ensues, and that the attainment of 70 years is an evidential fact of such permanent and total disability. Our general government, in its administration of the pension laws of this country, has, through its duly authorized officials, promulgated a rule based upon a statement that old age is an infirmity, the average nature and extent of which the Pension Bureau has established with reasonable certainty, that in the adjudication of pension claims which are payable on account of disability, "it shall be taken and considered as an evidential fact, if the contrary does not appear, and if all other legal requirements are properly met, that when a claimant has passed the age of * * * seventy years" he is entitled to the full pension for total disability. That this contract was made with reference to the intent that 70 years should be a conclusive evidential fact of permanent disability is obvious from the by-law of the corporation, adopted a fortnight before the statute was amended, in which are found provisions with regard to old-age disability as distinguished from disability arising from other causes, and further provisions in relation to permanent disability benefits, whether the same were from disease, accident, or old age, and that disability claimed before such age must be established by proof; and we think that a reasonable and proper construction of this contract, one which will give it effect and carry out the intention of the parties, is to say that, under this contract, total and permanent disability was the event which matured the claim, and that the 70 years mentioned therein was but a term employed as establishing by agreement an age when such condition was conclusively presumed to exist. This construction was not permissible in the cases before the Supreme Court of Michigan, and in many other cases referred to by counsel for appellant; for in those cases the sum was payable within less than 9 years from the issuance of the certificate, regardless of age or the physical condition of the member, and it was apparent that the intent was to make the expiration of a fixed time the event which should mature the claim, and not disability, total or partial. Entertaining these views, we are led to the conclusion that the act authorizing the payment of a sum when disability should arise, even though it limited such payment to monthly or weekly sums, is sufficient warrant, coupled with the other provisions of the act relative to the articles of association, and the by-laws authorized, to render this contract within the powers of the corporation. Certain it is that the power to contract with reference to a payment upon disability is given, and none of the authorities cited go to the extent of determining that where the general power to do the act is given, a corporation is not estopped when the manner of the exercise of the power only is involved.

Appellant next contends that the subsequent changes in the endowment laws had the effect to alter and vary this contract. We find nothing in the contract or record which would indicate an intention upon the part of either of the contracting parties to reserve, or to permit to be reserved, to the association the right to alter or modify the written agreement originally executed. Nor do we find anything in this subsequent change of the by-laws which of necessity changed previously existing contracts; in fact, the statute recognizes the trustees as alone having power to enact by-laws and by its previous by-laws such trustees are prohibited from making any change affecting the rights or benefits of members. A reading of these modifications of the by-laws would indicate that they only purport to be, and we think their only legal effect could be, to affect the relations of those contracting after their enactment. There is nothing suggested in the nature of the amendments or modifications of these by-laws which necessarily alters the terms of the written agreement, and it is not claimed that any executed parol agreement had such effect. The authorities cited in the appellant's brief, namely, Supreme Council v. M'Alearney, 135 Fed. 72, 67 C. C. A. 546, and Clymer v. Supreme Council (C. C.) 138 Fed. 470, to the effect that one contracting party must be presumed to have consented to the abrogation of the provisions in the certificate providing for the payment of a fixed sum, if no action was taken by him after notice of such change, even if accepted as correct expositions of the law, are not controlled in a case where the plaintiff had no knowledge that the defendant intended to dispute the validity or amount on maturity of his claim. In so far as any constructive notice is concerned, the notice in the statute that no by-law could be changed affecting plaintiff's rights should certainly operate as an assurance to him that changes made in such by-laws were not intended to affect his vested rights as to benefits due him from membership.

We find no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 228

BECKETT v. MORSE et al. (Civ. 193.)

(Court of Appeal, First District. California. Aug. 15, 1906. Rehearing Denied Sept. 13, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—PROPOSAL FOR BIDS—NOTICE—STATUTES—COMPLIANCE.

A resolution ordering a public work was passed by a city council December 16th. On the same day it directed its clerk to post for five days a notice thereof, with specifications, inviting sealed proposals, and to cause such notice to be published for five days. The notice was posted and published. On or before December 30th following several sealed proposals were presented, and the city council in open session examined the proposals and by resolution awarded the contract to one of the bidders. *Held*, that the council complied with Street Improvement Act, § 5 (St. 1891, p. 199), providing that, before the awarding of any contract by a city council for doing any work, it shall cause notice, with specifications, to be posted for five days and to be published in a newspaper published in the city, etc., and the fact that the council did not fix a day or hour prior to which, or at which, it would receive or open proposals for doing the work, nor direct its clerk to fix such day or hour, did not invalidate the assessment.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 857, 860.]

2. SAME—ACTION FOR STREET ASSESSMENT—EVIDENCE—BURDEN OF PROOF.

Where, in an action on a street assessment, the court found that the averments in the complaint of the making and recording of the assessment, warrant, and diagram, with the affidavit of demand and nonpayment, were true, plaintiff was prima facie entitled to recover, and defendant had the burden of showing a defect in the prior proceedings sufficient to overcome the prima facie case.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1282.]

3. PLEADING—CONCLUSION OF LAW.

An allegation, in an action on a street assessment, that the superintendent of streets did not make the assessment in the manner prescribed by law, without setting forth the particulars in which the assessment was defective, is but an averment of a legal conclusion, and not of a fact.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 19.]

4. MUNICIPAL CORPORATIONS — ACTION ON STREET ASSESSMENT—DEFENSES.

An averment that a lot was not assessed for a public improvement for any one of the separate sums stated in the complaint in an action on a street assessment is insufficient as a defense to an action for the aggregate of the sums, where such separate sums could have been properly assessed against the lot for its proportion of the costs of the entire work.

5. SAME—ASSESSMENT—VALIDITY—REVIEW.

Street Improvement Act, subd. 7 (St. 1891, p. 202), provides that, where a subdivision street terminates in another street, the expense of the work done on one-half of the width of the subdivision street shall be assessed on the lots fronting on such termination. A city ordered the construction of a sewer in an avenue. A lot against which an assessment was made was described as situated on the easterly side of the avenue. The lot was assessed to pay for frontage work and for termination work on the easterly half of the avenue opposite the termination of certain streets. *Held*, that the assessment was in accordance with the statute; but, if the facts were otherwise, or if by reason of the position of the streets the assessment for termination work was not authorized, the remedy was by appeal to the city council.

6. SAME.

Where a lot fronting on an improvement was assessed for more than its lawful proportion of the cost, whether by reason of an erroneous computation or an improper distribution of the cost on the lands assessable, error was waived by a failure to appeal to the city council, and in the absence of such appeal the objection could not be made for the first time in an action to enforce the assessment.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1269.]

7. SAME.

The validity of a street assessment is not impaired by the fact that the proportion of the cost for which a lot is chargeable is subdivided into several amounts; the cost of the entire work being apportioned in separate amounts to the several portions of the territory chargeable therewith in accordance with their relative position to the work, and the several amounts so apportioned being assessed against the lots within the respective territories chargeable therewith.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1109.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by John P. Beckett against Harry N. Morse and others. From a judgment for defendants, plaintiff appeals. Reversed.

Fitzgerald & Abbott, for appellant. R. M. F. Soto, for respondents.

HARRISON, P. J. Action upon a street assessment in the city of Oakland. Judgment was rendered in favor of the defendants, and the plaintiff has appealed therefrom upon the judgment roll without any bill of exceptions. The complaint is in the ordinary form and sets forth all the facts necessary to entitle the plaintiff to recover judgment. The court found that, with the exception of certain facts specifically found upon issues raised by the answer of the defendants, all of the facts alleged in the complaint are true.

1. In their answer to the complaint the defendants allege that the city council did not, by resolution or otherwise, fix a day or hour prior to which, or at which, it would receive or open or consider any proposal for doing the work mentioned in the complaint, and did not authorize or direct its clerk to fix such day or hour; and one of the special findings of fact made by the court was in accordance with this averment. Section 5 of the street improvement act, in force at the time these proceedings were had (St. 1891, p. 199), is as follows: "Before the awarding of any contract by the city council for doing any work authorized by this act the city council shall cause notice with specifications to be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work, inviting said proposals, and referring to the specifications posted or on file, to be published for two days in a daily, semiweekly or weekly newspaper printed and circulated in said city, designated by the council for said purpose, and in case there is no newspaper published in said city then it shall only be posted as hereinbefore provided. * * * Said proposals or bids shall be delivered to the clerk of said city council, and said council shall in open session examine and publicly declare the same." The council is not required by this section to limit the time within which the proposals may be delivered to its clerk, or to fix the day or hour at which it will open or consider them; nor is it required to direct the clerk to designate in his notice inviting such proposals any day or hour before or at which they shall be delivered to him. All that is required by this section is that, before a contract shall be awarded, the council shall cause a notice of the work ordered, with specifications, inviting sealed proposals for doing the same, to be posted conspicuously for five days, and shall also cause to be published for two days a notice of said work, inviting said proposals, and referring to the specifications posted or on file; and that, at an open session of the council held after the completion of the posting and publishing of said notice, it shall open, examine, and publicly declare the same. Thereupon it may award the contract to the lowest responsible bidder. Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Belser v. Allman, 134 Cal. 399, 66 Pac. 492. The resolution ordering the work was passed December 16, 1895, and on the same day the council directed its clerk to post and keep posted conspicuously for five days a notice thereof, with specifications, inviting sealed proposals for doing the work, and in like manner cause such notice to be published for five days. It is alleged in the complaint, and not denied in the answer, that such posting and publication were properly had, commencing December 21, 1895. On or before December 30th several sealed proposals were delivered to the clerk, one of which was so delivered by the assignor of the plaintiff, and on February 13, 1896, the city council in open session opened and examined all said proposals, and publicly declared the same, and afterwards on January 20, 1896, by its resolution, awarded the contract for doing said work to the plaintiff's assignor. As in these proceedings the city council strictly complied with all of the above provisions of section 5, the fact which is above alleged in the answer and found by the court had no tendency to impair the validity of the assessment.

2. The improvement ordered by the city council was the construction of a sewer in Newton avenue from the center line of Fourth avenue to the center line of Lester avenue produced—10 inches in diameter from the center of Fourth avenue to the center of Athol avenue produced, and 8 inches in diameter from the center of Athol avenue to the center of Lester avenue produced. The complaint alleges that the lot described therein was numbered in the assessment and diagram as No. 43, and was assessed to pay $96.63 for frontage work, $27.80 for Lester avenue termination work, $16.05 for Athol avenue termination work, and $31.90 for work opposite the termination of Watson avenue, making in the aggregate $172.98 for which the lien is claimed. The finding of the court that the averments in the complaint of the making and recording of the assessment, warrant, and diagram, with the affidavit of demand and nonpayment, are true, in the absence of any other evidence, entitled the plaintiff to a judgment in his favor, and threw upon the defendants the burden of showing some defect in the prior proceedings sufficient to overcome the prima facie effect of those facts. Belser v. Allman, 134 Cal. 399, 66 Pac. 492; Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21. "If the defendant would rely upon any error, defect, or irregularity that may have supervened in the proceedings subsequent to the ordering of the work, the burden is upon him, not only to allege such defect, but also to show the same by affirmative evidence." Belser v. Allman, supra. In their answer the defendants deny, upon their information and belief, that the superintendent of streets made the assessment referred to in the complaint, or that the said assessment had any diagram attached thereto, and in like manner deny that the said assessment was made in the manner or form prescribed by law, and deny that, by or according to said assessment or diagram, the lot described in the complaint and therein numbered as 43 was assessed for any one of the separate sums stated in the complaint or for any sum. Upon this issue the court found that the superintendent of streets made and issued the assessment, together with the warrant and diagram attached thereto, in the

manner and form as stated in the complaint, except that upon the assessment there was but one number, viz., 43, to represent the whole of the lot described in the complaint; that upon the diagram attached thereto said lot is exhibited as a single lot, and has but one number, viz., 43, to correspond with the same number on the assessment; and that upon the assessment there were assessed against said lot the four separate and distinct sums mentioned in the complaint. The allegation of the defendant that the superintendent of streets did not make the assessment in the manner or form prescribed by law, in the absence of setting forth the particulars in which it is defective, was but the averment of a legal conclusion and not of a fact. The finding of the court that it was made as alleged in the complaint with certain exceptions leaves only the character of these exceptions to be considered.

The averment that the lot was not assessed for any one of the separate sums stated in the complaint was insufficient as a defense to an action for the aggregate of these sums if such separate sums could have been properly assessed against the lot for its proportion of the cost of the entire work. The diagram in connection with which the assessment is made is not set forth in the record, and there is no averment in the answer of any fact tending to impeach the correctness of either of the several assessments against the lot numbered therein as 43 for a portion of the cost of the entire work. If there could be any circumstances under which such an assessment could be proper, it will be assumed that such circumstances existed in the present case. Subdivision 7 of the street improvement act (Stat. 1891, p. 202) provides that where a subdivision street or avenue terminates in another street or avenue the expenses of the work done on one half of the width of the subdivision street or avenue shall be assessed upon the lots fronting on such termination. Lot 43, against which the assessment herein was made, is described in the complaint as situated on the easterly side of Newton avenue; and it is in harmony with the terms of the assessment as set forth in the complaint that Lester avenue, Athol avenue, and Watson avenue are subdivision streets terminating in Newton avenue on its westerly side, and that the several amounts assessed against lot 43 for "termination" work were so assessed for the work done on the easterly half of Newton avenue opposite the termination of those streets. In such case the assessment would not be void upon its face, but would be in accordance with the provisions of said subdivision 7. If the facts were otherwise, or if, by reason of the position of such avenues, the assessment upon the lot for work done opposite their terminations was not authorized, that was a matter to be determined by evidence outside of the assessment, and could be remedied only by an appeal to the city council. McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Ryan v. Altschul, 103 Cal. 176, 37 Pac. 339; Bates v. Adamson (Cal. App.) 84 Pac. 51. The defendants' lot fronted upon the improvement, and was assessable for its proportion of the cost of the work. If it was assessed for more than its lawful proportion of such cost, whether by reason of an erroneous computation, or an improper distribution of the cost upon the lands assessable therefor (Wells v. Wood, 114 Cal. 255, 46 Pac. 96), the error was waived by their failing to appeal to the city council. In the absence of such appeal the objection cannot be made for the first time in an action to enforce the assessment.

The validity of the assessment was not impaired by the fact that the proportion of the cost for which lot 43 is chargeable is subdivided into several amounts as alleged. The cost of the entire work is apportioned in separate amounts to the several portions of the territory chargeable therewith in accordance with their relative position to the work, as is required by the provisions of the street improvement act, and the several amounts so apportioned are assessed against the lots within the respective territories chargeable therewith under the provisions of the act. The assessment does not cease to be a single assessment by reason of this apportionment, nor is the lot of the defendants charged thereby with more than its proportion of the cost of the entire work. In thus distributing portions of the cost upon lots not fronting upon the street on which the work was done the amount which would otherwise be assessed against the lot of the defendants is not increased or otherwise affected. See S. F. Pav. Co. v. Dubois (Cal. App.) 83 Pac. 72. It must therefore be held that the validity and correctness of the assessment was not impaired by the mode in which the court finds that it was made, and, inasmuch as the facts specifically found by the court have no tendency to impeach the correctness of the proceedings culminating in the assessment, it follows that the plaintiff was entitled to judgment, and that the court erred in rendering judgment in favor of the defendants.

The judgment is reversed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 249

BRACKETT v. MARTENS. (Civ. 213.)

(Court of Appeal, First District. California. Aug. 15, 1906.)

1. SALES—WARRANTY OF MERCHANTABLENESS—FRUIT TREES.

A statement by the seller of fruit trees after having explained to the buyer that they had not been very well taken care of and were of the cheapest grade, that they were good trees if taken care of, amounted merely to an expression of an opinion, and did not constitute a warranty of merchantableness.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 727-732.]

2. LIMITATION OF ACTIONS — ACCRUAL OF RIGHT OF ACTION ON WARRANTY—SALES.

Where plaintiff sued on an alleged warranty of merchantableness of certain fruit trees purchased from defendant, the cause of action, if any, arose on the purchase of the trees, and was barred after two years by Code Civ. Proc. § 339, subd. 1, requiring actions on a contract, obligation, or liability not founded on an instrument of writing to be commenced within two years.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 248.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Cora L. Brackett, as administratrix, of the estate of L. P. Brackett, deceased, against H. Martens. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Wm. P. Veuve, for appellant. J. B. Kerwin, for respondent.

COOPER, J. The complaint alleges that in February, 1896, the defendant sold and delivered to plaintiff 1,000 French prune trees, and, at the same time, warranted to the plaintiff that they were merchantable French prune trees properly budded on Myrobolan roots; that plaintiff relied solely upon said warranty, and paid defendant the price therefor, $45; that all of said trees were not merchantable French prune trees, properly budded, nor were either or any of them properly budded on Myrobolan roots, but that they were all and each of them budded in an improper manner on an inferior and worthless root, and of no value whatever to plaintiff. That plaintiff planted the said trees upon land owned by him in March, 1896, but that at no time subsequent to the sale did plaintiff discover, nor had he any means or opportunity by ordinary diligence of discovering, that said trees were not of the variety so ordered and paid for by plaintiff, to wit, merchantable French prune trees properly budded on Myrobolan roots, as represented and warranted by defendant, until the fall of 1899, when the said trees began rapidly to die. That plaintiff's land with said worthless and inferior variety growing thereon is worth less by $5,000 than it would be worth were the trees growing thereon the trees so ordered and paid for by the plaintiff, and that hence plaintiff has been damaged in the sum of $5,000. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered, denying the material allegations of the complaint, and also alleging that the cause of action is barred by the provisions of section 337, and the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The case was tried before the court and findings filed, upon which judgment was ordered and entered in favor of the plaintiff for $1,500 damages, besides costs.

Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion. The court found that defendant warranted the said prune trees to be merchantable French prune trees, budded on Myrobolan roots, but that they "were not merchantable French prune trees, though budded on Myrobolan roots, but were each and all unmerchantable French prune trees, and were not fit for the purposes for which they were sold." The court further found that plaintiff "did not know, and by the use of ordinary diligence did not and could not discover, that said 1,000 trees were defective and unmerchantable until the fall of the year 1899, when they began rapidly to die, and he then for the first time discovered that said trees were not as represented and warranted by defendant." The court found against defendant as to the statute of limitations. There is no finding as to whether or not the trees were properly budded, and as the court found that they were budded on Myrobolan roots, and that they were French prune trees, we must presume that they were properly budded. There is no finding that the trees were improperly budded, nor that they were budded on inferior roots, and we must therefore presume that they were properly budded on Myrobolan roots. The material finding, then, upon which the judgment must rest, if it can rest upon any finding, is that the trees were warranted to be merchantable and that they were not merchantable as warranted.

It is contended that there was an express warranty made by the defendant to the plaintiff at the time of the sale to the effect that the trees were merchantable, and the court so found. Upon a careful examination of the evidence we have concluded that it does not support the finding. It will not be necessary to decide the question as to whether or not the trees were merchantable, for the reason that if the defendant did not warrant them to be merchantable the question would be immaterial. It may, however, be said that there is slight evidence that the trees were not merchantable, except the fact that they began rapidly to die in the fall of 1899. They grew during the summer of 1896, 1897, 1898, and 1899 until fall, before the plaintiff, according to his own testimony, discovered or could have discovered that they were not merchantable. It is not a presumption of law or of fact that a fruit tree sold in February, 1896, was not then merchantable simply because it died in the fall of 1899. The reason why the trees began to die in the fall of 1899 is not clear. There is much testimony to the effect that the soil where the trees were planted is only 2 or 3 feet deep, and that beneath it there is a blue clay some 100 feet in depth that is not porous and through which water will not penetrate, and hence the sediment or top soil is not moistened or fed by capillary attraction from the clay below;

that there is a great amount of alkali in the soil, and that it is not proper soil for an orchard; that the roots of the trees when they reached the clay could go down no farther, and hence spread out along the clay underneath the soil, and being unable to get nutriment, the roots starved and perished. There is also testimony to the effect that the trees were poorly cultivated, not properly pruned, and crops grown in between the rows, which deprived them of the nutriment and moisture that they would otherwise have received. The fact that they grew for more than 3 years so that plaintiff could not discover anything wrong about them, would tend very strongly to corroborate the theory that when the trees arrived at the age when the roots needed more room to reach down and procure nourishment, and could go no farther, the starvation of the tree began. There is testimony which is not contradicted that an orchard had before been planted on this same land and perished. The trees died by what many of the witnesses call "pinch-off," which is the growing of the bud on top much more rapidly than the root or original stock, causing the trunk of the tree or new stock to be larger above the point where it has been joined or grafted than the stem of the original variety. The testimony showed that the union of bud and stock was good, and there was no weakness of the stem at the point of union except the overgrowth of the scion as described by the witnesses.

The testimony claimed to support the finding as to an express warranty is that of the plaintiff and the defendant and that of the plaintiff's father. Defendant's testimony shows without conflict that the trees were graded in three classes or grades. If they had made a growth of four feet or over at one year old, they were called first class and sold at ten cents each; from three to four feet, the second class, and sold at six cents each; and from two to three feet the third class, and sold at four cents each. Plaintiff testified: "Went to defendant's nursery and looked at his trees. My father bought some six-cent trees and I took the balance of them, two hundred. Then he (defendant) showed me some smaller trees, and said they were just as good only they had not been irrigated and forced along; took eight hundred of the latter. He said they were No. 1 trees, only they were not forced along by water like the balance. He told me I could have my choice of the four-cent trees. This is all he said." Plaintiff's father testified: "I went with my son to defendant's nursery to post him, to see that he got good trees. Defendant said they were good trees, but they had not had the care the others had. All that was said was this—that I wanted so many trees, and my son so many. I wanted then on Myrobolan root—would not take any other as a gift because I was afraid of the floods coming there and injuring them. I could not raise peach root, or peaches or apricots. I can't tell the words that were said, but the meaning was to get good trees—good roots. That is the manner and kind I did get. * * * Martens said they were good trees if taken care of—that they would make good, thrifty trees * * * he said they had not been irrigated and cultivated as the others had." Defendant testified: "I told him we had plenty of trees, but they were of different sizes and different prices. He asked me what the first-class were worth. I told him ten cents; that there was a nice size which we call No. 2, worth six cents; and there was a size which we call No. 3 worth four cents. * * * I told him there were four-cent trees, if he approved of them, but that they were not so large as he had been getting. He said the four-cent trees looked to him plenty good enough, and he would just as soon have them as any others for that price. So he accepted the trees shown to him. He pulled up and examined several bunches of the four-cent grade. They were satisfactory to him, he said, so long as he was getting them at that price. He came for them himself, and took his own choice of the lot. I was not present when he took the trees—the four-cent trees. This is all the conversation we had about the purchase of the trees. * * * When this purchase was made, some of the trees were drawn out of the piles, and Mr. Brackett examined them. In his case many trees out of many piles of the different grades were pulled out and inspected by Mr. Brackett. The trees I sold to Brackett were third-class trees, and I told him so. * * * I did not warrant these trees which I sold to Brackett, and the words 'warrant' and 'merchantable' were not used at all in our conversation." This is all the testimony on the question of warranty. The defendant did not say that he would warrant the trees, and while he said they were good trees he fully explained to plaintiff that they had not been very well taken care of, and that they were the cheapest grade. He also told the plaintiff that if taken care of, they would make good, thrifty trees. They were shown to plaintiff and he examined them, and picked them out of the grade shown him. They were French prunes on Myrobolan roots, properly budded. The defendant was asked for French prune trees on Myrobolan roots, and by the sale of the trees he warranted them as such. This warranty the court found to be true, but defendant, by stating that they were good trees if taken care of, was merely expressing his opinion. It was not understood that the language used was used as an undertaking that the trees were merchantable trees. They were sold as the smallest, lowest grade in the nursery. Plaintiff bought them as such. There was no undertaking by defendant that they would continue to grow three, five, or ten years.

A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction. Civ.

Code, § 1763. In this case plaintiff did not ask for merchantable trees, but for French prune trees on Myrobolan roots. The statement by the defendant that they were good trees if taken care of was not the assurance of a fact affecting the transaction. A warranty is defined in Benjamin on Sales, section 610, as a "collateral undertaking forming a part of the contract by the agreement of the parties, express or implied," and the American note to the same section, pages 606–8 says that a warranty "is an assurance of some fact, coupled with an agreement, express or implied, to make the assurance good or pay for the deficiency," and that all the authorities "agree that mere words of praise and commendation, or which merely express the vendor's opinion, judgment or estimate, do not constitute a warranty." In Byrne v. Jansen, 50 Cal. 627, the plaintiff claimed damages for breach of an alleged warranty in the sale of certain wool. The court said: "The conversation had between the defendant and the plaintiff's agent did not amount to a warranty. * * * There is nothing in the circumstance that the defendant expressed a somewhat favorable opinion of his wool, that he indulged an opinion that, while Mr. Conn's wool might be a little finer than his own, his was fully as profitable as Conn's for manufacturing purposes. This was mere praise of his own property—the simplex commendatio which is allowable in making a trade, and is not held by the rule of the common law to amount to a warranty." In Polhemus v. Heiman, 45 Cal. 579, a portion of the opinion in Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, is quoted with approval wherein it is said: "No expression of opinion, however strong, would import a warranty. But if the vendor at the time of sale affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such an affirmation, that we think is an express warranty." Saying to a buyer that a machine will do good work, or is a good machine, was held not to necessarily constitute a warranty. McDonald Mfg. Co. v. Thomas, 53 Iowa, 558, 5 N. W. 737. So the words "good excellent butter" were held to be merely descriptive, and not a warranty (Greenthal v. Schneider, 52 How. Prac. [N. Y.] 133); and a statement by a seller of guano "that it is a good fertilizer" was held not to amount to a warranty. (Farrow v. Andrews, 69 Ala. 96); and by the vender of a machine that it "was a very good machine, and will do very nice work" (Worth v. McConnell, 42 Mich. 473, 4 N. W. 198).

Counsel for respondent states in his brief, "It seems to us that in the sale of the prune trees there was an implied warranty, even if the language used was not an express warranty, that they were merchantable in that they should reasonably answer the purpose for which they were sold," and he cites in support of his theory of implied warranty sections 1769 to 1778 of the Civil Code. The sections referred to are under part IV, chapter II, article III of the Code. Section 1764 is as follows: "No implied warranty in mere contract of sale. Except as prescribed in this article a mere contract of sale or agreement to sell does not imply a warranty." The only section under the article claimed to be applicable is section 1769, which reads: "Manufacturers' warranty against latent defects. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein." It may be doubted whether the prune trees were an article of defendant's own manufacture within the meaning of the above section. The trees were purchased; that is, the original Myrobolan stock, by the defendant, and imported from France, and subsequently budded by defendant to French prunes. Defendant planted the young trees and budded them to a different stock. But if it can be conceded that the trees were "an article of defendant's own manufacture," there was no latent defect arising from the process of manufacture, because the only process was budding the French prune in the Myrobolan stock, which, as has been said before, was properly done, and proper materials were used.

The defendant alleged in his answer that the cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which provides that an action must be commenced within two years upon "a contract, obligation, or liability not founded upon an instrument of writing." The court erred in holding that the action was not barred under the section cited. The cause of action, if any, arose upon the purchase of the trees in February, 1896. If the defendant sold to plaintiff trees different from what he had warranted, they were different at the time they were sold. Section 338 cannot aid plaintiff, because the action is one for a breach of warranty, and not for relief on the ground of fraud or mistake. Upon the breach of any contract the statute begins to run at the date of the breach. See Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115, where the question is fully discussed. If the rule contended for by plaintiff be correct the trees might have lived 8, 10 or 15 years, and then have died, and plaintiff would not till then have discovered that they were not merchantable in February, 1896. If defendant had warranted in writing that the trees would live and grow, such warranty would not mean that they would live and grow forever.

The judgment and order are reversed.

We concur: HARRISON, P. J; HALL, J.

4 Cal. App. 245

FLINN et al. v. STRAUSS et al.

(Court of Appeal, First District, California. Aug. 15, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—CONTRACTS—FORM OF BIDS—AFFIDAVITS — SUFFICIENCY — SEVERAL BIDDERS.

Charter of San Francisco, art. 6, c. 1, § 16 (St. 1899, p. 289, c. 2), provides that every bid on a public improvement shall have thereon the "affidavit of the bidder" that the bid is not collusive or sham, etc. *Held*, that the affidavit of one of two persons uniting to make the bid does not satisfy the requirement.

2. SAME—SPECIFIC CASE.

An affidavit attached to a bid by two persons contained the purported signature of but one of them, nor was there a showing, either in the instrument or by extrinsic evidence, of the official character of the person before whom it purported to have been signed and sworn. The instrument was undated, and the name of the purported signer did not appear as affiant in the body thereof. *Held* not a compliance with the statute.

3. SAME — SPECIAL ASSESSMENTS — ENFORCEMENT—VALIDITY OF ASSESSMENT—PRESUMPTION—CONCLUSIVENESS.

In an action to enforce the lien of a street assessment, the introduction in evidence of the warrant, assessment, and diagram, together with an affidavit of demand and nonpayment, makes merely a prima facie case, subject to be overcome by evidence of defects in the prior proceedings.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1282.]

4. SAME — REBUTTING EVIDENCE—SUFFICIENCY.

In an action to enforce the lien of a street assessment, the proposal of plaintiffs, with a defective affidavit of good faith indorsed thereon, was produced from the records of the board of public works, and a deputy of that office testified that the indorsed affidavit was the one submitted by plaintiffs, and on which their contract was let and based. *Held* sufficient to overcome the prima facie case as to the validity of the proceedings made by plaintiffs' introduction of the warrant, assessment, and diagram, and, in the absence of further evidence, to authorize a finding that such affidavit was the only one given upon the proposal.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by James J. Flinn and another against Gaston Strauss and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

D. H. Whittemore, for appellants. E. G. Knapp and Chapman & Knapp, for respondents.

HARRISON, P. J. Action for the foreclosure of the lien of a street assessment in San Francisco. The plaintiffs have appealed from a judgment rendered in favor of the defendants, and have presented the appeal upon the judgment roll, including a bill of exceptions.

The charter of San Francisco (article 6, c. 1, § 16, St. 1899, p. 289, c. 2) provides that all proposals for public work, including street improvements, "shall be made upon printed forms to be prepared by the board and furnished gratuitously upon application, with a form for the affidavit hereinafter provided for printed thereon. Each bid shall have thereon the affidavit of the bidder that such bid is genuine and not collusive or sham; that he has not colluded, conspired, connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid; or that such other person shall refrain from bidding; and has not in any manner sought by collusion to secure any advantage against the city and county, or any person interested in said improvement for himself or any other person. All bids shall be clearly and distinctly written without any erasure or interlineation, and if any bid shall have an erasure or interlineation it shall not be received or considered by the board. Any contract made in violation of any of the foregoing provisions, and in case of improvements of streets, any assessment for the work done under such contract, shall be absolutely void."

The complaint herein is in the ordinary form, and alleges among other matters that the plaintiffs herein delivered to the board of public works their proposal to do the work for which it had invited sealed proposals, and that their said proposal had thereon the affidavit of each of the plaintiffs setting forth the matters required by the above provisions of the charter. Upon an issue thereon the court found that the alleged proposal "did not have therewith or thereon the affidavit as alleged, or any proper affidavit as required by law."

The bill of exceptions sets forth at length the alleged proposal of the plaintiffs for doing the work, together with the following, purporting to have been printed thereon, viz.:

Affidavit.

"State of California, City and County of San Francisco—ss: ———, being first duly sworn, deposes and says: That he is ——— the party making the foregoing proposal or bid; that this bid is genuine and not collusive or sham; that said bidder has not colluded, conspired, connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, or that such other person shall refrain from bidding; and has not, in any manner, sought by collusion to secure any advantage against the city and county, or any person interested in said improvement, for himself or any other person.

"Jas. J. Flinn.

"Subscribed and sworn to before me this ——— day of ———, 190—.

"H. J. Smith."

Although this instrument purports to have the signature of "Jas. J. Flinn," his name is not set forth in the body of the instrument as the affiant thereof, and the instrument itself is without date, and is not authenticated as being his affidavit by any official signature or seal. The official character of "H. J. Smith" is not shown, either in the body of the affidavit, or, by having any official description written after his signature, and it does not appear on the face of the instrument that he was an officer authorized to take an affidavit, nor was there any evidence given at the trial of the cause that he had such authority. The proposal of the plaintiffs to do the work purports to have been made by two persons, "Flinn and Treacy," and the complaint alleges that they were partners and made the proposal, and that it had thereon the affidavit of each of them; but the statement in the purported affidavit of Flinn "that he is the party making the foregoing proposal" is at variance therewith. The provision in the charter requiring "the affidavit of the bidder" is not satisfied by the affidavit of one of several bidders. The purpose of the provision is to prevent collusion and fraud, and to sift the conscience of the bidder, or of all of the bidders if there be more than one; but an affidavit of one of several bidders might be made in good faith notwithstanding a collusion on the part of one or more of his associates.

The above finding of the court was fully sustained by the evidence. Although by the introduction of the warrant, assessment, and diagram in evidence, with an affidavit of demand and nonpayment, the plaintiffs threw upon the defendants the burden of showing any defect in the proceedings prior thereto (Williams v. Bergin, 129 Cal. 461, 62 Pac. 59; Belser v. Allman, 134 Cal. 399, 66 Pac. 492), yet these documents are only prima facie evidence of the plaintiffs' right of recovery, and are subject to be overcome by any affirmative evidence of such defect. At the trial herein the contract of the plaintiffs, together with their proposal and the aforesaid purported affidavit, were produced from the records of the board of public works, and a deputy from that office testified that the purported affidavit indorsed upon the proposal is the paper that was submitted as an affidavit by the plaintiffs at the time the proposal was handed in, and that the contract with them was let and executed on that proposal. This evidence was sufficient to authorize the court to hold that the prima facie character of the documents introduced by the plaintiffs was overcome thereby, and to throw upon the plaintiffs the burden of showing that there was printed upon their proposal an affidavit sufficient to meet the requirements of the charter. In the absence of any further evidence the court was authorized to find that there was no affidavit of the bidder upon the proposal other than the one purporting to have been made by Flinn which was offered in evidence. By the express terms of the above section of the charter the failure to make the affidavit required by the section rendered the contract, and the assessment for the work done under such contract, absolutely void.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 240

PACIFIC PAVING CO. v. DIGGINS et al.

(Civ. 214.)

(Court of Appeal, First District, California. Aug. 15, 1906.)

1. Municipal Corporations—Enforcement of Assessments for Improvements—Trial—Findings—Construction.

In an action on a street assessment, the issue of fact on which plaintiff's right to recover depended was whether the board of supervisors had jurisdiction to pass the resolution ordering the performance of the work. Defendants' answer alleged that this resolution was not duly passed, which was deemed controverted by plaintiff, as provided by Code Civ. Proc. § 462. *Held*, that a finding that the resolution was "duly passed" was a determination that the board had jurisdiction to pass it.

2. Pleading—Legal Conclusions.

While an averment that an act has been "duly" performed is ordinarily but a legal conclusion, it will be, nevertheless, sufficient, in the absence of a special demurrer or objection on that ground, to authorize evidence on the issue.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 19, 20.]

3. Pleading—Objections—Waiver.

Where parties proceed to trial without an objection that an averment in the complaint is but a legal conclusion, and introduce evidence on the issue, they are precluded, after a decision thereon, to object that the issue was not before the court for decision; especially where the party making such averment supplements the same in his answer with an averment of the probative facts on which he relies to support his averment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1355-1360.]

4. Trial—Findings of Fact.

In an action on a street assessment, a finding that the board of supervisors passed each and every resolution with reference to the work mentioned in the complaint should be regarded as a finding of fact.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 958.]

5. New Trial—Errors of Law—Findings of Fact.

Where defendant claimed that the court erred in making a particular finding of fact, defendant properly disregarded the probative facts found by the court, and sought to correct the error through a motion for a new trial and a statement of the case, in which the evidence relevant to the issue was set out.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 165½.]

6. Same—Determination.

Where, in an action on a street assessment, the court found that the resolution of intention to make the improvement had been duly passed by the board of supervisors, but the evidence set forth in a statement of the case on a motion for a new trial clearly established that the board of supervisors was without any jurisdiction to order the improvement, and that the resolution therefor was not "duly passed," the court properly granted defendant a new trial.

7. Appeal—Discretion of Court—Dismissal of Motion for New Trial.

An application to dismiss a motion for a new trial for lack of diligence in prosecuting the same is addressed to the discretion of the court, whose action thereon will be affirmed, unless it affirmatively appears that the court's discretion was abused.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3861.]

8. NEW TRIAL—MOTION TO DISMISS—DELAY.

A statement of the case was settled and filed May 15, 1903, and on September 16, 1904, plaintiff gave notice of a motion to dismiss defendant's motion for a new trial for failure to prosecute with diligence. On the hearing the court's attention was called to the manner and times at which, under the rules, the motion could have been made, and to the periods of time since the filing of the statement during which the court was in vacation. *Held* that, in the absence of any definite showing that the motion could have been presented or heard at some time during the expired period, the mere lapse of time was insufficient to show an abuse of the trial court's discretion in refusing to dismiss the motion.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 312, 313.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Pacific Paving Company against J. C. Diggins and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Booth & Bartnett and W. J. Bartnett, for appellant. Knight & Heggerty and Wm. M. Madden, for respondents.

HARRISON, P. J. Action upon a street assessment in San Francisco. Judgment was rendered in favor of the plaintiff against the defendant Byron Diggins, and upon the motion of the said defendant the court granted a new trial. The present appeal is from this order.

The complaint is in the ordinary form, except that there is no averment therein that the board of supervisors had passed a resolution of intention to order the improvement for which the assessment was made. In his answer thereto the defendant, for a separate and special defense to the action, alleged that the resolution ordering the work referred to in the complaint was not duly passed by the board of supervisors; that it was passed by the board November 29, 1897; that more than six months prior to said date the board passed a resolution of intention to order such work, but that within 10 days after the expiration of the time of the posting and publication of the notice thereof the owners of a majority of the frontage of the property fronting on said proposed work made and delivered to the clerk of said board a written objection and protest thereto, upon which the clerk indorsed the date of its reception by him; that no further proceedings were had in relation to the doing of said work until November 29, 1897, when it passed the aforesaid resolution ordering the work; and that the board did not, prior thereto or relative to said order, pass a resolution of intention to order said work. Upon the trial of the cause the court found that all the allegations of the complaint are true, and that the board of supervisors did duly pass each and every resolution mentioned therein. It also found the aforesaid facts specially set forth in the answer of the defendant to be as therein alleged, and held as a conclusion of law that the plaintiff was entitled to the relief asked by it.

One of the grounds for a new trial specified by the defendant in its notice of intention therefor is the insufficiency of the evidence to justify the decision, and in the statement of the case it is specified as one of the particulars of such insufficiency that whereas, it appeared from the evidence that by reason of the protest of the property owners against the resolution of intention passed November 23, 1896, the board of supervisors ceased to have any authority to order the work, and could not order the same unless they should, after the expiration of six months, pass another resolution of intention to do so, there was no evidence that any other resolution of intention had been passed by the board, and that the finding of the court that the resolution set forth in the complaint was "duly" passed was not justified by the evidence.

The issue of fact upon which the plaintiff's right of recovery depended was whether the board of supervisors had jurisdiction to pass the resolution ordering the work to be done. The allegation in the answer that this resolution was not duly passed, which, under the provisions of section 462 of the Code of Civil Procedure, was deemed controverted by the plaintiff, presented this issue of fact to be determined by the court, and the finding of the court that it was "duly" passed was a determination that the board had jurisdiction to pass it. While the averment that an act has been "duly" performed is ordinarily but a legal conclusion, yet, in the absence of a special demurrer or objection on that ground, it will be held sufficient to authorize the court to receive evidence upon the issue; and if the parties proceed to trial without such objection, and introduce evidence upon the issue, they will not be permitted, after a decision thereon, to contend that it was not before the court for such decision (Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783); especially where, as in the present case, the party making such averment supplements the same in his answer with an averment of the probative facts upon which he relies in support of his averment that the act was not duly performed. In such a case the general averment may be held to be either the ultimate fact established by the probative facts, or as merely an equivalent for the legal conclusion raised by the law upon the proof of such facts, and therefore disregarded as surplusage. If there is any conflict between the ultimate fact that is found and the probative facts which are also found, the former will ordinarily control; "and although a finding of probative facts from which the ultimate fact conclusively follows is sufficient in the absence of a finding of such ultimate fact, yet, when the ultimate (issuable) fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the ultimate fact so found. In such case the only remedy of the party injured is to move for a new trial on the evidence. See Perry v. Quackenbush, 105 Cal. 305, 38 Pac. 740, and cases cited." Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62. Upon these principles the finding herein that the board of supervisors did pass each and every resolution mentioned in the complaint is to be regarded as the finding of a fact. The finding is a negation in identical language of the allegation in the answer of the defendant. "The only purpose of findings is to answer the questions put by the pleadings, and if the facts are stated in the findings in the same way that they are stated in the pleadings they are sufficient. Dam v. Zink, 112 Cal. 91, 44 Pac. 331; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14. See, also, City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666; Rauer v. Bradbury (Cal.) 84 Pac. 1007, filed March 16, 1906. Under the claim of the defendant that the court erred in making such finding, he very properly disregarded the probative facts found by the court, and sought to correct the error through a motion for a new trial and a statement of the case, in which he set forth the evidence in reference thereto. From the evidence thus set forth the aforesaid allegations in his answer are fully sustained, and it clearly appears therefrom that the board of supervisors was without any jurisdiction to order the improvement, and that its resolution therefor was not duly passed. City Street Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 762; Same v. Same, 139 Cal. 690, 73 Pac. 666. The court, therefore, very properly granted a new trial.

The statement of the case was settled by the court and filed May 15, 1903. On September 16, 1904, the plaintiff gave notice to the defendant of a motion to dismiss the latter's motion for a new trial, upon the ground that he had failed to prosecute the same with diligence, and in support of such motion presented an affidavit setting forth the dates at which the several steps in the proceeding prior thereto had been taken. Upon the hearing of the motion the attention of the court was called to the manner and times at which, under its rules, the motion could have been heard, and to the periods of time since the filing of the statement during which the court was in vacation. No fact in support of the motion, or tending to show that the motion could have been heard by the court, other than an inference to be drawn from the time that had intervened since the filing of the statement, was presented to the court. Upon the submission of the motion it was denied, and the plaintiff has also appealed from this order.

A motion of this nature is eminently addressed to the discretion of the court, and, unless it shall be made to affirmatively appear that there has been an abuse of discretion, its ruling thereon will be affirmed. In addition to the matters to which the attention of the court was called, the judge had personal knowledge of the extent and manner in which the time of the court had been occupied during this period, and from such knowledge, and its consideration thereof, could determine whether there had been any negligence in the prosecution of the motion. In the absence of any definite showing that the motion could have been presented or heard at some time during this period, it cannot be held that the mere lapse of time is a sufficient ground to overcome the presumption of the proper exercise of its discretion by the court.

The orders appealed from are affirmed.

We concur: HALL, J.; COOPER, J.

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4 Cal. App. 162

In re MAYHEW'S ESTATE. (Civ. 233.)

(Court of Appeal, Third District, California. July 23, 1906.)

1. APPEAL—NOTICE—APPEARANCE—WAIVER.

On petition by a legatee for distribution, conceding that it was necessary to serve notices of appeal on all legatees entitled to a share of the residue remaining after petitioner's demise, the written appearance, acknowledgment of service, and consent that any judgment rendered should bind them, filed in the cause by the parties not served, cured the omission, and gave the appellate court jurisdiction to determine the rights of all interested parties.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2184–2190.]

2. EXECUTORS AND ADMINISTRATORS—RIGHTS OF LEGATEES—PETITION FOR DISTRIBUTION—TIME.

Civ. Code, § 1663, provides that any legatee may present his petition for distribution at any time after the lapse of one year from issuance of letters testamentary. *Held*, that a legatee was entitled to file his petition at any time after the lapse of one year from the issuance of letters testamentary, though after the issuance of the letters a supplement to the will was filed and probated as a part thereof.

3. WILLS—INTERESTS CREATED—MONEY OR INCOME THEREOF—LIFE ESTATES.

Code Civ. Proc. § 1317, provides that a will must be construed according to the intention of the testator, and his intention given effect as far as possible. By section 1324 words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and section 1325 provides that the words of a will are to receive an interpretation which will give every expression some effect. Testatrix's will provided: "I direct that if my husband, M., provided he shall survive me, be paid for his use his lifetime, the sum of forty thousand dollars, or if he wishes he may have that much in value in whatever or wherever he may wish. I direct that my husband shall have the use of this money or the interest of it his lifetime. * * * I direct that whatever there may be left after my husband has the forty thousand dollars I wish to give him the use of that the remainder be equally divided between my four children. * * * I also direct that at the death of my husband that every dollar that is not used for his comfort and pleasure shall be equally divided between my four children as before mentioned. * * * As a supplement to this my last will and testament I wish to say I have deeded all my real estate to my husband, * * * but in that I do not wish him to keep and use that as his forty thousand dollars or any part of it unless he wishes to, but that is so he can deed the property so that it need not go into court, but that he can deed to any of the children the same as they want it or he wants to let them have it, but my husband is not to have forty thousand besides this real estate, that is to be sold as soon as convenient and turned into money as I have directed." *Held*, that the $40,000, and not merely the income thereof, was payable to the husband for his unrestricted use during his lifetime; any portion of such sum that remained on his death to go to the residuary legatees.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Petition by Horace Allen Mayhew for the distribution to him of a certain sum as a legatee under the will of Mary Jane Mayhew, deceased. From the decree making distribution, petitioner and another appeal. Motion to dismiss the appeal denied, and decree modified and affirmed.

L. T. Hatfield, for appellants. W. F. George and L. J. Hardy, for respondent Hardy.

McLAUGHLIN, J. Mary Jane Mayhew died in August, 1903, leaving an olographic will, the parts of which material to our inquiry, read as follows: "I direct that if my husband, Horace Allen Mayhew, provided he shall survive me, be paid for his use his lifetime, the sum of forty thousand dollars, or if he wishes he may have that much in value in whatever or wherever he may wish. I direct that my husband shall have the use of this money or the interest of it his lifetime, and at his death he shall have suitable interment and his grave marked as his children may deem proper, provided any of them shall survive him, in case they do not his grandchildren may attend to that as they deem proper. * * * I direct that whatever there may be left after my husband has the forty thousand dollars I wish to give him the use of that the remainder be equally divided between my four children. * * * I also direct that at the death of my husband that every dollar that is not used for his comfort and pleasure shall be equally divided between my four children as before mentioned. * * * As a supplement to this my last will and testament I wish to say I have deeded all my real estate to my husband Horace Allen Mayhew, but in that I do not wish him to keep and use that as his forty thousand dollars or any part of it unless he wishes to, but that is so he can deed the property so that it need not go into court, but that he can deed to any of the children the same as they want it or he wants to let them have it, but my husband is not to have forty thousand besides this real estate, that is to be sold as soon as convenient and turned into money as I have directed."

The will proper was admitted to probate in September, 1903, and the supplement thereto was also probated as part of the will on January, 1905. On May 29, 1905, Horace Allen Mayhew filed his petition for the distribution to him of $40,000 in cash, and in such petition set forth the will and supplement, the admission of the same to probate, the appointment and qualification of the executors, the return of the inventory showing the value of the estate to be more than $85,000, and alleged that there were no debts, and sufficient funds of the estate in the hands of the executors to pay the said sum. He further alleged that he had notified the executors of his election to take the $40,000, and had tendered and executed deeds conveying the real property to them, and persons who had purchased from them. Florence A. Hardy, a granddaughter of the deceased, and the only child of George H. Mayhew, a deceased son of Mary Jane Mayhew, filed an answer to said petition, in which she denied that petitioner had a right under the will to have more than the income of $40,000 for the period of his natural life. The court filed findings which are in substantial accord with the averments of the petition, save that as a conclusion drawn from the will it is found that petitioner "is entitled to have and receive of the moneys of said estate for his use for the term of his natural life the sum of $40,000, and on his death said sum shall go to Charles P. Mayhew and Frank J. Mayhew, the sons, to Mary E. Phipps, the daughter, and to Florence A. Hardy, the granddaughter of the said Mary Jane Mayhew, deceased, in equal shares." The distributive clause in the decree was identical with said finding, and the executors were directed to pay petitioner said sum for his use during the term of his natural life, with interest thereon at the legal rate from August 3, 1904. From this decree both petitioner and Florence Hardy appeal. The former contends that he is entitled to have said money distributed to him without restrictions, and the latter as stoutly contends that he was only entitled to the income or interest arising from said sum during his lifetime.

The motion to dismiss the appeal of petitioner must be denied. Conceding that it was necessary to serve notices of appeal on all legatees entitled to a share of the residue remaining after petitioner's demise, we think that the written appearance, acknowledgment of service, and consent that any judgment rendered shall bind them, filed herein by the parties not served, cures the omission, and gives this court jurisdiction to determine the rights of all interested parties. Piercy v. Piercy (Cal.) 86 Pac. 507; McLean v. Schartzer, 5 Cal. 70, 63 Am. Dec. 84; Hibernia S. & L. Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175.

The petition to distribute the legacy was not premature. It was filed 20 months after letters testamentary were issued, and the subsequent proceedings, through which the supplement was probated as part of the will, did not operate to compel delay in presenting such petition. The law expressly provides that any heir, devisee, or legatee may present his or her petition for the distribution of the share of the estate to which they are entitled at any time after the "lapse of one year from the issuance of letters testamentary," and, as this time had admittedly elapsed, the petitioner had a right to demand that his share be distributed to him. Code Civ. Proc. § 1663. The will must be so construed as to effectuate the intention of the testatrix, and to this end all parts thereof must be construed in relation to each other, so as, if possible, to make one consistent and harmonious whole. Civ. Code, §§ 1317, 1324. Another rule requires that words used in a will be taken in their ordinary sense, and that effect be given to every expression therein. Civ. Code, §§ 1324, 1325. Taking the will under consideration "by its four corners," and construing it in obedience to these rules, it seems clear that the testatrix intended that $40,000 should be paid to her husband for his unrestricted use during his lifetime. We are thoroughly convinced that the will can be given no other construction without thwarting the evident intention of the testatrix. It contains the direction that, if her husband survived her, he "be paid, for his use, his lifetime, the sum of forty thousand dollars." There is no room for construction of this language, for it is too plain to be misunderstood. If, however, further light is needed touching the intention of the testatrix, it is suppled by the clause immediately following the language just quoted, where she emphasizes her desire by saying "or if he wishes he may have that much in value, whenever or wherever he may wish." If this is not enough to bring conviction as to the dominant idea she was trying to express, cumulative evidence of her intention is found in the third subdivision of the will, where she directs that "whatever there may be left after my husband has the forty thousand dollars I wish to give to him the use of" shall be equally divided among her four children, who at the death of her husband shall also have "every dollar that is not used for his comfort and pleasure," and then in the supplement, as if to clinch the proposition, she says with reference to the realty, "but in that I do not wish him to keep and use that as his forty thousand dollars or any part thereof unless he wishes to," and then adds, by way of preventing possible misapprehension, "but my husband is not to have forty thousand dollars besides this real estate." The supplement, which must be taken as the latest expression of her will, taken alone, clearly indicates that her design was to give her husband the $40,000 as fully and completely as the land which she had already deeded to him. He is clearly given full rein to do as he pleased concerning the realty. At his option he might keep it "as his forty thousand dollars," or any part thereof, but he could not have the money and real estate both. This idea is in accord with the general terms of the will, and but for the two expressions "his use his lifetime" and "I wish to give him the use of," found, respectively, in the second and third clauses of the will, and the idea conveyed in the clause disposing of the residue which might remain at the time of her husband's death, no other construction would be possible than that she intended that he should take the money absolutely. But the supplement, referring, as it certainly does, to the bequest in the main will, must be construed with the latter unless there is a clear repugnance, in which case, the supplement must control. It is therefore necessary to give some effect to the expressions and residuary clause above mentioned, and to consider the expression upon which contestant places great reliance, where it is said, "I direct that my husband shall have the use of this money or the interest of it." Taking up the clause just quoted, and construing it in relation to the part immediately preceding it, we can hardly escape the conclusion that the words "or interest of it" were used in line with her evident purpose to give him his choice, and to consult his wishes in that and all other particulars. A construction that would confine the bequest to the interest on $40,000 would not only be repugnant to the preceding language, but in absolute conflict with the supplement, which clearly expresses the intention that he shall have the money. We must adopt the only construction which will give this expression some effect, and that is that he could have the use of the money or the interest on it, according to his wishes, which are clearly manifested in the petition herein. Any other construction would give undue weight to an isolated phrase as against oft-repeated and later expressions of testatrix, and be tantamount to making a new will. Clearly, her design was to give him the money to use, according to his judgment and discretion, for his comfort and pleasure as long as he lived. Analysis of the will as a whole leads to the inevitable conclusion that her dominant intention and idea was that her husband would be paid and would have the money, or that much in value, according to his selection and pleasure, for his untrammeled use; or, of he so desired, he could retain the land already his, and thus forego the payment of the money, which he was evidently to use, with as little restriction as the land. This being the central, controlling, all-pervading, and oft-repeated intention, her secondary or subordinate intention or idea as to what should be done with it after her main intention had been accomplished cannot be allowed to impair, modify, or nullify the dominant intention, perfectly manifest in every line of the will, and particularly in the supplement. The main precedent intention must be carried out, and then the secondary or subservient intention must be given such effect as the law may dictate. When a testator or testatrix gives positive directions that money or other personal property shall be paid or given to a legatee, and then directs the disposition to be made of it afterward, the latest direction is not only performable subsequently, but its performance is secondary and subordinate to, as well as dependent upon, the performance of the precedent and primary direction. Here there is no difficulty in determining what the intention of the testatrix was, and the only difficulty suggested arises from the alleged effect of rules of law on the secondary and subordinate intention if the main intention is given full effect. But this difficulty is more imaginary than real, for we are to effectuate the intention of the testatrix in sequential order, so far as rules of law will permit. We cannot violate, modify, change, or nullify the plain direction that the money shall be paid to the petitioner for his use as long as he shall live, and that he shall have it, unless he chooses to retain land previously deeded to him, or selects that much in value in other property, simply because he may use all or the greater portion in the pursuit of comfort and pleasure. The contestant, who is only entitled to her share of every dollar that is not so used, cannot complain of such distribution or its possible results, for the very excellent reason that by the terms of the will she is only entitled to share in what may remain at the time of petitioner's death. Neither can we refuse to recognize the positive direction that he shall be paid and shall have this money to use as "his forty thousand dollars" during life, because the legal effect of such payment may be to confer upon him an absolute right to do as he pleases in expending all or any portion of it for his comfort and pleasure. She has directed that he must be paid and have it. She clearly contemplated that he would use it as he pleased, for she recognizes his full right to do so by only attempting to dispose of what may be left after he has the unrestricted and uncontrolled use of it for his comfort and pleasure during his lifetime. In the very latest expression of her intention she places his right to use the money, and the manner in which he shall use it as his, on a par with his right to use the land, by placing the money in the scale with land already his, and giving him the selection of either. And in the clause where she directs that it be paid to him, she again manifests her intention as to the use he will be entitled to make of the money by giving him the right to waive the cash, and "have that much in value whenever or wherever he chooses." These plain and oft-repeated expressions of her intention and desire cannot be curtailed, ignored, or disregarded, and if he uses every dollar of the money for comfort or pleasure, according to his discretion, no right of contestant will be violated. As before stated, she is only entitled to share in what may remain, even if every clause in the will is given full effect, and hence she cannot complain, much less ask that he be deprived of his plain rights, to the end that she may have more than the testatrix intended.

In the case of In re Garrity, 108 Cal. 473, 38 Pac. 628, 41 Pac. 485, the facts were almost identical with the facts in the case at bar. In that case the will gave the surviving wife all of the property, consisting of land, money in bank, and chattels, for her use during her life, the remainder going to three children. The court distributed the estate by awarding her the share to which she was legally entitled as surviving wife, absolutely, and the balance of the estate, including $1,834.47 in money, was distributed to her for her use during her life. Upon appeal the very questions presented here were fully and carefully considered, and it was held that she was entitled to receive the corpus of the money and other property, for the reason, among others, that the will implied that the estate might be diminished while in her hands. And so it is here. The will clearly implies, and the testatrix evidently contemplated, that the sum might be diminished by petitioner, for only the unused portion remaining at his death is given to the children. Therefore, the cas cited applies with cogent force to the case at bar, and the principles of law therein declared are controlling here.

The decree of the court below was in full consonance with the aforesaid principles and with our construction of the will in every particular save one. The court found as a fact, and so decreed, that the full sum of $40,000 should go to contestant and her aunt and uncles, in equal shares, upon the death of petitioner. This finding being nothing more than a conclusion of law, it is unnecessary to send the case back for further proceedings. It is therefore ordered that the decree therein entered be modified by inserting before the words "said sum" on the fifth line of the distributive clause found at folio 74 of the transcript the words "the unused portion of," thereby distributing the portion of said $40,000 remaining unused at petitioner's death to the residuary legatees.

As so modified, the decree is affirmed.

We concur: BUCKLES, J.; CHIPMAN, J.

4 Cal. App. 235

BURKE v. BOARD OF TRUSTEES OF POLICE RELIEF & PENSION FUND OF CITY & COUNTY OF SAN FRANCISCO. (Civ. 200.)

(Court of Appeal, First District, California. Aug. 15, 1906.)

1. Pleading—Legal Conclusions.

In an action to recover a sum alleged to be due from a police pension fund, an averment that there was in the official custody and subject to the official control of the defendant more than sufficient money applicable to and with which to pay plaintiff's claim was but a legal conclusion, and was limited by the facts on which she based her claim and the provisions of law applicable to such facts.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 29.]

2. Municipal Corporations — Police—Pension Fund—Contributions.

Where two dollars a month was retained from the pay of a member of a police department, under San Francisco City Charter, art. 8, c. 10, § 11, subd. 9 (St. 1899, p. 334, c. 2), directing the treasurer of the pension fund to retain from the pay of each member of the police force two dollars a month for the benefit of such fund, such money was not voluntarily contributed to the fund, but was money of the state, retained in its possession to create the fund.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 518.]

3. Same—Statutes.

San Francisco City Charter (St. 1899, p. 241, c. 2), went into effect January 1, 1900, and created the police relief and pension fund. Article 8, c. 10, § 6 (page 333), declares that when any member of the department shall, after 10 years' service, die from natural causes, his widow, etc., shall be entitled to a sum equal to the amount retained by the treasurer from the pay of such deceased member, and paid into the relief and pension fund. Article 8, c. 10, § 11, subd. 9 (page 334), requires the treasurer to retain from the pay of each member of the police force two dollars a month for the benefit of such fund. *Held*, that the act was prospective only, so that on the death of a police officer his widow was only entitled to recover a sum equal to the amount retained from his pay for the benefit of the pension fund after the act took effect.

4. Mandamus—Right to Writ—Denial.

Where, prior to the institution of mandamus proceedings to compel payment of a portion of a police pension fund to petitioner, defendant had audited and allowed a demand in favor of petitioner for an amount greater than she was entitled to, and it did not appear that petitioner had demanded such money, or shown any reason why she had not received same, mandamus was properly denied.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 48.]

5. Municipal Corporation — Freeholders' Charter.

San Francisco freeholders' charter, when approved by St. 1899, p. 241, c. 2, became the organic law of the city and county by the express terms of Const. art. 11, §§ 6, 8, and superseded the existing charter and all laws inconsistent therewith, so that the city thereafter was not subject to nor controlled by general laws.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Hettie T. Burke against the board of trustees of the police relief and pension fund of the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

Jordan, Treat & Brann and Jordan & Brann, for appellant. P. V. Long, City Atty., for respondent.

HARRISON, P. J. The appellant seeks by this proceeding to obtain a writ of mandate, commanding the board of trustees of the police relief and pension fund of the city and county of San Francisco, the respondent herein to pay to her the sum of $596 from said fund, which she claims to be entitled to receive by virtue of certain provisions of the charter of said city and county. In her petition therefor she alleges that she is the surviving widow of John Burke, and that her husband was appointed a member of the police department of San Francisco, February 10, 1874; that on January 5, 1903, on his application to the board of police commissioners, and it having been made to appear to said board that he had become physically disabled by bodily injury received in the performance of his duty, he was retired from further service in the department; that in the resolution for his retirement it was provided that he be paid from the police relief and pension fund of the department a monthly pension, equal to one-half the amount of the salary attached to the rank which he held in the department for the period of three years preceding the date of his retirement; that after his said retirement he died from natural causes, February 26, 1903; that he was not paid any portion of said pension fund, but that on March 31, 1903, the defendant audited and allowed a demand on the treasurer of the city and county for the sum of $99.66, payable out of said pension fund, as for his pension for the quarter ending on that date. She also alleges that while her husband was a member of the police department he paid into said fund out of his salary the sum of $2 each month, from April, 1878, to and including January, 1903, amounting in the aggregate to $596. The superior court sustained a demurrer to the petition, and from its refusal to issue the writ of mandate prayed for, the petitioner has appealed.

The rights of the appellant are measured by the provisions of the charter of San Francisco, and these provisions alone can be considered in determining whether she is entitled to any relief, and, if so, the extent of such relief. She bases her claim upon the provisions of section 6, c. 10, art. 8, of the charter (St. 1899, p. 333, c. 2), which declares: "When any member of the department shall, after ten years' service, die from natural causes, then his widow, and if there be no widow then his children, of if there be no widow or children then his mother, if dependent upon him for support, shall be entitled to a sum equal to the amount retained by the treasurer from the pay of such deceased member and paid into the relief and pension fund; but the provisions of this section shall not apply to any member of the department who shall have received any pension under the terms of this chapter." Whatever money she is entitled to receive is to be paid to her out of this fund, and only such amount of the fund as the treasurer shall have retained from the pay of her husband and paid into the fund. The fund itself is provided for by section 1 of said chapter 10, art. 8 (page 332), which declares that "a fund is hereby created to be known and designated as the 'Police Relief and Pension Fund.'" The moneys constituting the fund are enumerated in section 11 of the chapter, subdivision 9 (page 334) of which directs the treasurer "to retain from the pay of each member of the police force $2 a month, which shall be forthwith paid into the police relief and pension fund."

The averment in the appellant's petition that there is in the official custody and subject to the official control of the defendant "more than sufficient money applicable to" and with which to pay her claim of $596 is but a legal conclusion, and is limited by the facts upon which she bases her claim and the provisions of law applicable to those facts (Pennie v. Reis, 132 U S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426; Nichols v Police Pension Fund Commissioners, 82 Pac. 556, 1 Cal App. 494); and although the appellant has alleged in her petition that her husband, while he was a member of the police department, paid out of his salary the sum of $2 each month, yet, as we said in the case of Nichols v Same Defendant, supra: "The 'two dollars per month' which the petitioner alleges was retained by the treasurer from Nichols' pay as a member of the police department, and paid into said fund, was not a contribution to the fund by Nichols, but, as was said in reference to a similar provision in the act of 1878 in Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426, 'was money of the state retained in its possession for the creation of this very fund.'"

The charter of San Francisco went into effect January 1, 1900, and the police relief and pension fund created by it had its birth at the same time. The provisions of the charter, as well as the duties of the officers created by it, are prospective. It is only such moneys as the treasurer should retain from the pay of the appellant's husband after that date that could be paid into the fund, and it is only to such an amount of money so paid into the fund that under the provisions of section 6 the appellant is entitled. As her husband died in February, 1903, less than 38 months after the charter took effect, the treasurer could not have retained from his pay and paid into the fund more than $78. Prior to the institution of this proceeding by the appellant, the defendant had audited and allowed a demand on the treasurer against the fund of a greater sum than this; and, as it does not appear that the appellant had demanded this money, or shown any reason in her petition why she had not received the same, the court very properly denied her application.

The act of March 4, 1889 (St. 1899, p. 57), is not available to the appellant. That act was a general law applicable to all counties, cities and counties, and towns in the state, whereas the charter of San Francisco is a freeholders' charter, and when approved by the Legislature in 1899 became by the express terms of the Constitution (article 11, §§ 6, 8) the organic law of the city and county, and superseded the existing charter and all laws inconsistent therewith, and thereafter the city and county was no longer subject to or controlled by general laws. There is no provision in the charter by which the fund created by the act of 1889 should be transferred to or placed under the control of the officers created by the charter. The fund was at all times subject to legislative disposition (Pennie v. Reis, supra), and as section 14 (page 60) of the act required the surplus thereof to be transferred to the general fund on the last day of June of each year, and declared that it should be "no longer under the control of the board, or subject to its order," there is no presumption that any portion of the fund thereby authorized was transferred to, or is under the control of, the respondent herein. See Nichols v. Police Pension Fund Commissioners, supra.

The proposition urged in the brief on behalf of the appellant that she is entitled to the sum claimed by her upon the ground that her husband never "received" any portion of the pension awarded him does not require discussion. Whatever right she has to any portion of the pension fund depends upon the provisions in the first portion of section 6. The concluding sentence of the section, upon which this argument is based, instead of conferring any rights, creates a limitation upon the rights which otherwise might exist, and whatever rights she has by virtue of the section she must establish under its other provisions.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

4 Cal. App. 201

DU BRUTZ v. BANK OF VISALIA. (Civ. 236.)

(Court of Appeal, Third District, California. Aug. 4, 1906. Rehearing Denied by Supreme Court Oct. 3, 1906.)

1. Insurance — Collateral Assignment of Policy—Rights of Assignee.

The insured and the beneficiary of a life policy providing for the issuance of a paid-up policy on nonpayment of premiums assigned it as collateral. The assignment transferred "all rights" under the policy and all benefits "accrued or to accrue" by virtue of its terms and covenants, and authorized the assignee to "receive" and "collect" any money "to become due" thereunder. *Held* to give the assignee power to demand and receive a paid-up policy, where insured paid neither the debt nor the premiums, and to receive any benefits accruing thereunder.

2. Banks and Banking—Loans—Collateral Security — Statutory Provisions—Insurance Policy.

Under Civ. Code, § 3054, providing that a banker shall have a general lien dependent upon possession on all property in his hands belonging to a customer for the balance due from such customer in the course of his business, a banker, in addition to rights granted by an assignment of a life policy by the insured and beneficiary, has a statutory lien for the insured's overdraft on a paid-up policy issued to the banker in lieu of the assigned policy.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 673.]

3. Pledges—Collateral Assignment of Insurance Policy—Rights of Assignee—Paid-Up Policy—Application on Debt.

An assignment of a life policy by the insured and beneficiary as collateral to the insured's debt gave the assignee a right, on insured's failure to pay the premiums, to receive a paid-up policy in lieu of the one assigned. Defendant failed to pay either the premiums or the debt, which amounted to more than the face of the paid-up policy, which the assignee demanded and received. *Held* that, though without the assignment the paid-up policy would have belong to the beneficiary, yet under it the assignee could treat such paid-up policy as so much money and apply it on the debt without attempting to make any sale of it as pledged property.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 130.]

4. Limitation of Actions—Security Already Applied—Effect.

A bank holding a paid-up insurance policy as security for an overdraft applied the face thereof as a credit on the overdraft within two years from the date of the last entry. After the expiration of the two years insured died and the assignee collected the money. *Held* that, even if the two-year statute applied to the overdraft, it did not benefit the beneficiary claiming the proceeds of the policy from the bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Sarah J. Du Brutz against the Bank of Visalia. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Charles G. Lamberson, for appellant. Hannah & Miller, for respondent.

BUCKLES, J. This was an action by the widow to recover from the bank $2,840 which had been paid to the bank on a life insurance policy on the life of Edward R. Du Brutz. Judgment was for the plaintiff. The appeal is from the judgment and from an order denying defendant's motion for a new trial. The policy was originally for $5,000, and was made payable to Sarah J. Du Brutz upon the death of her husband, Edward R. Du Brutz. The husband was indebted to the Bank of Visalia, and to secure such indebtedness and future advances these spouses joined in assignment of the policy to said bank. This assignment was made December 21, 1898. On the 13th day of November, 1901, on failure of assured to pay the premiums, this policy was by the company changed into a paid-up policy for $2,840, without the knowledge or consent of either husband or wife. The date of the last check drawn by Du Brutz on and paid by said bank was February 28, 1901, marked "Paid" March 1, 1901, and his indebtedness to said bank at that date was $3,982.26. On August 14, 1902, the bank credited Du Brutz's account with the amount of the paid-up policy, to wit, $2,840. Du Brutz died May 17, 1904, and the bank thereupon collected the $2,840 from the life insurance company.

The contention of respondent is that the statute of limitations of two years had run in favor of Du Brutz in his account with that bank prior to the commencement of this action. The last item of the account was March 1, 1901, and the action was commenced on October 5, 1904. That the account in the bank being balanced on February 28, 1901, and a statement thereof rendered, the account became an account stated and the statute began to run from that date.

Appellant contends that Du Brutz's indebtedness to the bank was founded on written instruments, to wit, the checks he drew upon the bank and which the bank paid.

There is still another contention of plaintiff, and that is that the paid-up policy was not the policy assigned. But we think this latter objection not well taken. In the written assignment the assignors, Du Brutz, and his wife say: "Do hereby assign said policy, and all our, and each of our, rights thereunder." One of their rights under said policy was to have a paid-up policy issued in lieu thereof. The written assignment continues: "And all benefits accrued or to accrue under and by virtue of the terms, covenants or conditions thereof, to the Bank of Visalia." This carried with it the assignment of the benefits to accrue under the paid-up policy as well as those under the original policy. Continuing further, the assignment provides: "And hereby authorize said Bank of Visalia to receive, collect and receipt for any money or thing of value which is now or may become due by virtue of said policy or the terms, covenants or conditions thereof, as fully and completely as we, or either of us, might or could do if this assignment had not been made." This assignment couched in the terms it is we think gave the bank power to apply for and receive a paid-up policy in lieu of the original. The policy was taken out December 7, 1886. Payments had been made up to November 5, 1901, and the premium then due was not paid. Premiums had therefore been paid for more than three years, and under the terms of the policy the life insurance company was bound to issue a paid-up policy. Under the assignment the bank might have paid the premium and kept the policy alive for the full amount of $5,000, but it chose not to do so. The paid-up policy for $2,840 is dated November 13, 1901, and presumably was issued on that day, but seems from the uncontradicted evidence of the cashier of the said bank that it was not received at the bank until August 14, 1902, and on that date the sum of $2,840, the amount named in said paid-up policy, was placed to the credit of Du Brutz's account, leaving a balance then due of $1,142.26, which balance was charged to profit and loss and the account closed. This paid-up policy represented a promise to pay a fixed, definite sum to become due and payable at the death of the insured, but the bank chose to treat it as so much money. At the most, the plaintiff had a right to have paid to her any balance of the $2,840 which might exist at the death of her husband after paying his account in full at the bank, for the bank had a statutory lien on the policy in addition to the assignment for security. Section 3054 of Civil Code: "A banker has a general lien, dependent upon possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of his business." But, as has been seen, the debt due the bank was much more than the policy, so that the plaintiff could not have been injured by the whole of the $2,840 being credited on the debt for which the assignment had been made.

It is claimed, also, that this paid-up policy was the property of plaintiff and not subject to the payment of her husband's debts. Had she not assigned all her rights under it to the bank, her contention would be correct. The policy being a security for the money owing when the assignment was made and for future advances, plaintiff would have no right to said policy or its proceeds until she had first tendered the debt due for which the policy was assigned. However, this seems not to have been made an issue in the case. Under the circumstances in this case, to wit, that the debt at the bank was very much larger than the policy, that the amount of the policy could never have increased and more than a year had passed since anything had been paid on the indebtedness to the bank, and the fact which occurred after the credit was given, that the husband dying on May 17, 1904, had not paid anything on said indebtedness, we think that the bank was justified in applying the policy as so much money on August 14, 1902, without attempting to make any sale of it is as of pledged property. The debt was due, and to have put the policy up and sold it would have been an idle thing, as it could not have brought more than its face value, the assured being still alive. Even could it be said that the two-year limitation in which to collect the debt was the proper period, the credit of the policy on the debt was made before the lapse of the two years. But we think the indebtedness was based upon instruments in writing, to wit, the check given by Edward R. Du Brutz as follows: "Pay to the order of ——— $———. E. R. Du Brutz." A check on a bank, if the drawer have money deposited therein to be checked out, is a demand on such bank for the payment of a specific sum of money. If there be no funds on deposit, then it is a request for credit and becomes an overdraft. A check is under our Code (section 3254, Civ. Code) a bill of exchange and is negotiable. But whether it is a demand or a request it is always the written instrument on which the payment of a sum mentioned therein is founded, and is the foundation of any suit growing out of the payment of such money or a refusal to pay the check. The statute of limitations pleaded here provides that an action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state may be commenced within four years after the right of action accrues. Section 337, Code Civ. Proc. There is in every check two implied promises: (1) That the money is in the bank with which to pay it; and (2) that, if the money is not there, the drawer of the check will repay the money to the bank. Everything implied in a writing is as much a part of it as though it were expressed therein. Bancroft v. S. F. Tool Company, 120 Cal. 228, 52 Pac. 496. As there is here a written contract into which the law imports a promise to repay, and this promise created by law, being an element of the contract, enters into and forms a part of this written check, the statute of limitations governing written contracts to pay money is the only one that applies. Long v. Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87. In an action to recover the money paid on an overdraft, the check or overdraft, and not oral testimony, would be relied upon as the proof. In Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272, one Ambrose bought property at a constable's sale, paid part cash and gave a check for the balance, but afterward had payment thereon stopped. The check was dated October 24, 1891. Suit was brought against Ambrose for the amount of the check on September 28, 1895, and the court said this was "less than a month prior to the date when an action on the check would have been barred by the statute of limitations."

The obligation of the maker of a note to reimburse his security for having paid the note is not founded upon the note, but upon the new promise made when the security pays the note (Chipman v. Morrill & Webster, 20 Cal. 131; Thomas v. Pacific Beach Company, 115 Cal. 136, 46 Pac. 899); and therefore the authorities presented on that point have no bearing on the question here.

Judgment reversed.

We concur in the judgment: CHIPMAN, P. J.; McLAUGHLIN, J.

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4 Cal. App. 201

DU BRUTZ v. BANK OF VISALIA. (Sac. 1,458.)

(Supreme Court of California. Oct. 3, 1906.)

In bank. Action by Sarah J. Du Brutz against the Bank of Visalia. Judgment for plaintiff, and defendant appeals to the District Court of Appeal, where the judgment was reversed. 87 Pac. 467. Proceeding to transfer from District Court of Appeal to the Supreme Court. Transfer denied.

PER CURIAM. In denying a transfer of this cause to the Supreme Court for hearing and decision, we desire to qualify the order by saying that we do not approve that portion of the decision of the District Court of Appeal which holds that an action by a bank to recover the amount of an overdraft is not barred by the statute of limitations short of four years. The case is not to be deemed a precedent upon that point.

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7 Cal. Unrep. 316

JONES v. WATERMAN. (Civ. 158.)

(Court of Appeal, Second District, California. Aug. 17, 1906. Rehearing Denied Oct. 11, 1906.)

1. Appeal—Findings of Court—Conflicting Evidence—Review.

A finding of a trial court based on conflicting evidence will not be disturbed on appeal where there is sufficient evidence in the record to support it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

2. Principal and Agent—Agency—Evidence.

In an action to recover an agreed rent for certain reamers used by a well driller in drilling a well under contract with defendant, the memorandum of agreement between defendant and the driller, and evidence of the oral agreement between them, by which the driller agreed to furnish all tools necessary for the work, was admissible to show that no authority could be implied from the transaction by which the driller was authorized to obtain the reamers on defendant's credit.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 402–412.]

3. Same—Unauthorized Acts—Ratification.

Where defendant employed a well driller to drill a well on his ranch and to furnish all required tools, the fact that one of defendant's employés paid the expressage on certain reamers hired by the driller from plaintiff for use in drilling the well, and agreed to pay $30 toward such hire, without defendant's knowledge, was insufficient to establish that the driller had authority to contract for the reamers on defendant's behalf.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 412.]

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Fred W. Jones against Isaac G. Waterman. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. Griffith, for appellant. Canfield & Starbuck and H. C. Booth, for respondent.

ALLEN, J. Action for money. Judgment for defendant, and a motion for new trial denied. Plaintiff appeals from the judgment and order.

The action was brought in the court below by plaintiff to recover a sum for the hire of two certain under reamers, alleged to have been furnished by him to defendant for use in drilling a well. The complaint is based upon an express contract upon the part of defendant to pay for the reasonable value of such hire. The answer denies the contract and also the hire or the use by defendant of said tools. The court finds in favor of defendant upon all of the issues.

There is no evidence in the record tending to support the issue as to the express promise to pay for such hire, and were we to assume that under the issues evidence was admissible to show an implied agreement to pay therefor, the record discloses a conflict in such evidence, and that there is sufficient in the record to support each and every finding of the court below, and under the well-established rule such findings will not be disturbed.

There was no error in admitting in evidence the memorandum of agreement between defendant and the well driller, nor in admitting the oral agreement between the parties in reference to the driller's obligation to furnish all tools necessary in the prosecution of the work. It was competent as tending to show that no obligation rested upon defendant to furnish such tools, and that no authority could be implied from the transaction between defendant and the party who made the order. The order for such under reamers was made by the driller, and he did not, in terms, represent that he was acting for defendant. He simply ordered the tools, and directed them to be shipped to defendant's ranch, where he was then employed, and defendant is not shown to have had any knowledge of such order, or to have acquiesced therein; and it was competent for him to show that he gave no authority for the order, but, on the contrary, that the tools were to be furnished by the driller, and the driller's use thereof in no wise established any implied promise on defendant's part to pay for the hire. The mere fact that one of defendant's employés paid the expressage, and had, without authority from defendant, agreed to pay $30 toward such hire, would not render defendant liable on account of such hire, he having no knowledge either of the payment of expressage nor of the arrangement between the driller and his employé.

We perceive no prejudicial error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

4 Cal. App. 276

BASHORE v. MOONEY et al. (Civ. 217.)

(Court of Appeal, Third District. California. Aug. 30, 1906.)

1. Quieting Title—Issues and Proof.

Though, in a suit to quiet title to an irrigation ditch, the complaint alleged plaintiff to be the owner of the ditch in fee, it did not preclude the court from finding a right or ownership in the nature of an easement.

2. Waters and Water Courses—Irrigation Prescription.

One who constructed an irrigation ditch on the land of another might acquire title to the ditch by adverse use for the statutory period.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 144.]

3. Same.

One might acquire a prescriptive right to use an irrigation ditch to convey a limited quantity of water to his land, while another retained the right also to use the ditch for his own purposes to the extent of its remaining capacity.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 149, 150.]

4. Same—Elements of Right.

In a suit to quiet title to an irrigation ditch, a finding that it had been used by the persons constructing it, openly, continuously, adversely to the titles of all others and under a claim of title exclusive of any other right, as their own, and notoriously and uninterruptedly for a period of more than five years, prior to the commencement of the action, and that they had paid all the taxes levied or assessed against the ditch, and the right of way therefor, sufficiently showed a prescriptive right.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 150.]

5. Same.

Where one constructed an irrigation ditch across the lands of another and used the ditch adversely for the statutory period, he was not prevented from acquiring a prescriptive right by the fact that he took the water for his ditch from another ditch instead of from a natural stream.

6. Frauds, Statute of—Interests in Real Estate—Irrigation Ditches.

A right of way for an irrigation ditch is an interest in real property within Code Civ. Proc. § 1971, providing that no interest in real property can be created, assigned, etc., otherwise than by a conveyance in writing subscribed by the grantor, etc.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 84.]

7. Waters and Water Courses—Prescription—Evidence.

In a suit to quiet title to an irrigation ditch, evidence considered, and *held* sufficient to warrant a finding that plaintiff had acquired a prescriptive right to the ditch.

8. Evidence — Admissions — Ownership of Property.

Where, in a suit to quiet title to an irrigation ditch, plaintiff claimed that it had been so constructed and used over the lands of defendant by plaintiff's predecessor, and that plaintiff had a prescriptive right to it, it was proper to admit conversations between plaintiff and defendant, wherein plaintiff inquired as to the ownership of the ditch and defendant made no claim to it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 771, 772.]

9. SAME.

In a suit to quiet title to an irrigation ditch, claimed by plaintiff by prescriptive right acquired by his predecessor, it was proper to admit in evidence testimony of the predecessor as to his efforts to sell the ditch to defendant, and that defendant did not dispute the witness' ownership.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 771, 772.]

10. TRIAL—ORDER OF PROOF.

Where, in a suit to quiet title to an irrigation ditch, plaintiff claimed that his predecessor had acquired a prescriptive right to it, there was no error in admitting in evidence deeds from plaintiff's predecessor to him before the introduction of evidence tending to show that plaintiff's predecessor acquired any title.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 138, 139, 141, 143.]

11. EVIDENCE — RELEVANCY — MATTERS EXPLANATORY OF EVIDENCE.

Where, in a suit to quiet title to an irrigation ditch, plaintiff claimed that his predecessor had acquired a prescriptive right to it, and evidence was introduced tending to show adverse use by a third person, it was proper to admit evidence of certain leases made by plaintiff's predecessor to such third person to show that he used the ditch under lease from the predecessor.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 134, 135.]

12. APPEAL — HARMLESS ERROR — EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION.

In a suit to quiet title to an irrigation ditch, plaintiff claimed that his predecessor had acquired a prescriptive right to maintain the ditch over defendant's land and a witness testified that he had frequently worked the ditch on defendant's land, and was then asked by defendant if he did not get defendant's permission, and an objection to the question was sustained, but the witness subsequently testified that defendant directed him about the work. *Held*, that any error in sustaining the objection was cured.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4200–4205.]

Appeal from Superior Court, Tulare County; H. Z. Austin, Judge.

Action by John Bashore against H. M. Mooney and others. From a judgment in favor of plaintiff, and from an order denying a new trial, certain defendants appeal. Affirmed.

Hannah & Miller and Alfred Daggett, for appellants. Chas. G. Lamberson, for respondent.

CHIPMAN, P. J. Action to quiet title to a certain water ditch known as the "Zumwalt Extension of the Tulare Irrigation Company's Ditch," and the right of way therefor. Two of the three original plaintiffs conveyed to the third after the complaint was filed, and the latter filed a supplemental and amended complaint as sole plaintiff in the case. There were numerous defendants, as to some of whom the court found that they had no interest in the ditch; as to others the court found that they had a certain interest therein; as to the defendant Tulare Irrigation Company it was found that it was the owner of said ditch to a certain point, connecting with the portion of said ditch found to belong to plaintiff, with "the right at all times to turn into said portion of said ditch owned by plaintiff as aforesaid, all the surplus water of said defendant which it shall desire to turn therein." None of these defendants appeal. As to defendants, appellants, the court found that they are the owners of the right to maintain certain drops and headgates in the ditch and certain side ditches leading therefrom on certain land by them owned, situated in section 7, township 19 south, range 25 east, through which plaintiff's ditch runs, in part, and to take therefrom water sufficient to irrigate 100 acres of land on said section, but that they have no other right to or interest in plaintiff's said ditch. Plaintiff was found to be the owner of the ditch and right of way in question, except as above indicated and judgment passed for plaintiff accordingly. The defendants last above referred to appeal from that part of the judgment which adjudges plaintiff to be the owner of so much of said ditch and right of way as passes over said last-named defendants' lands in said section 7 with the right to enter thereon at proper times to repair and operate the same; also from that part of the judgment which limits said defendants' rights as above stated. After judgment was entered and notice of appeal served, defendant and appellant J. J. Mooney died, and defendant H. M. Mooney was substituted, as administrator. In their brief appellants do not question that part of the decree or the findings which relate to the Tulare Irrigation Company and that interest will not be noticed farther. Indeed, by their answer they seem to concede the rights of the irrigation company. The appealing defendants in their answer denied plaintiff's ownership of the portion of said ditch which passes over defendants' said land, and alleged that the Tulare Irrigation Company is the owner of the portion of said ditch from the east line of said section 7 for a distance of one-quarter of a mile, and that the remaining portion of said ditch situated on said section 7 is owned by defendants. In the answer of some of the many remaining defendants it is alleged that the entire ditch from its point of commencement to its end was constructed for the use and benefit of the owners of the land lying along the same, "and as a neighborhood ditch to supply water for irrigation to and upon said lands from the system of the Tulare Irrigation Company and from other irrigation systems * * * and has been since its construction appurtenant to the said lands of defendants." Other defendants claimed part ownership in the ditch. The Tulare Irrigation Company was made a defendant upon a demand of several of the defendants. Appellants challenge the sufficiency of the evidence to support the findings upon which the interests decreed to plaintiff and appellants are based. It is also urged that the findings do not, nor does the complaint, support the judgment.

The judgment and its support: The contention is: (1) That the complaint is insufficient to support the judgment, because based upon the allegation that the plaintiff is the owner in fee of the ditch in question, while the findings show simply a tenancy in common with appellants. (2) That the findings show that the ditch is constructed upon land owned by appellants, and plaintiff never acquired any title to the ditch from the owner by conveyance or agreement. (3) That the findings fail to show that plaintiff acquired title by prescription as required by the statute of limitations. (4) That the findings are so uncertain that it cannot be ascertained therefrom to what extent plaintiff is the owner of a right of way for the ditch referred to in the findings and judgment.

1. The point that the findings are insufficient as to the extent of plaintiff's title, because of the allegation in the complaint of ownership in fee, is not well taken. That plaintiff claimed title in fee did not preclude the court from finding a right or ownership in the nature of an easement; the greater title alleged included the lesser. The judgment may not exceed the demand of the complaint, but there is no rule that would prevent the court from granting less relief than that demanded. Plaintiff's right had its inception in the act of constructing the ditch, and if it ripened into title by adverse use for the statutory period this was sufficient.

2. It was not necessary that the prescriptive right should have its origin in a grant from the owners of the land or by agreement with them. Code Civ. Proc., §§ 324, 325. The rule requiring entire possession by one claiming land under a prescriptive right is inapplicable to rights of way for roads and ditches. Otherwise it would be practically impossible to acquire similar easements by prescription. It was said in Humphreys v. Blasingame, 104 Cal. 40, 44, 37 Pac. 804, 805: "Plaintiff's use of the way under claim of right was necessarily hostile, but it need not amount to an ouster or exclusion of the defendant from a right to use the way. The use of the way, if without right, is a trespass, which would have given the defendant a right of action, and that is all that is necessary to set the statute running, so far as a right of action is concerned." Of course there must be occupancy of so much of the land as is sought to be taken for the right of way.

3. The prescriptive right which the court found to have ripened in plaintiff and his predecessors in interest was initiated as early as 1879 and is the right referred to in the findings and, as presently shown, continued until the filing of the complaint, except as to defendants' interest. Defendants' prescriptive right was found by the court to have been initiated about the year 1890, long after the five years adverse use by plaintiff's predecessors had elapsed. That defendants could acquire a prescriptive right to use the ditch to convey a limited quantity of water to their lands while plaintiff or his predecessors retained the right also to use the ditch for his own purposes to the extent of its remaining capacity, we have no doubt. We so held substantially in the recent case of Smith v. Hampshire (Cal. App.) 87 Pac. 224. See, also, Abbott v. Pond, 142 Cal. 393, 396, 76 Pac. 60. "Every interest created in favor of several persons in their own right is an interest in common," unless acquired in a way not involved here. Civ. Code, § 686.

4. It is also contended that the findings are insufficient to show a prescriptive right. The particular finding attacked is the following: "That ever since the construction of said ditch as aforesaid (which the court found was in 1879) it has been used by the said persons who constructed the same as aforesaid, and by their grantees, openly, continuously, adversely to the titles to all others, and under a claim of title exclusive of any other right, as their own, and notoriously and uninterruptedly for a period of more than five years prior to the commencement of this action, and they have paid all the taxes levied or assessed against said ditch and the right of way therefor." This finding, in our opinion, covers every element mentioned in Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100, as requisite to a perfect title by prescription. This case has been frequently cited approvingly as authority on this point. The title there involved was to a city lot and the court said: "There are five elements required to make out an adverse possession sufficient to constitute a defense under the statute of limitations. (1) The possession must be by actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action, not, however, necessarily next before the commencement of the action. (5) Since the passage of the proviso to section 325 of the Code of Civil Procedure in 1878, payment of taxes." Appellants cite Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052, and claim that it is there held as necessary that it must appear that the use was exclusive. The point there decided was that the pleading failed to show "that the use was exclusive or adverse to plaintiff * * * or that it was adverse to any one." Section 324 of the Code of Civil Procedure is as follows: "Where it appears that there has been an actual, continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely." Section 325 of the same code declares that adverse possession is not established, "unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons,

* * * have paid all the taxes * * * which have been levied and assessed upon such land." The courts have added some explanatory words in formulating the elements which are deemed necessary, under the statute, to constitute prescriptive title, but they do not and could not materially change its requirements. When these requirements of occupancy are fully met, a title is conferred, "denominated a title by prescription, which is sufficient against all." Civ. Code, § 1007. We are unable to discover any element lacking in the finding referred to which is necessary to meet the statutory requirements or the decisions of our Supreme Court.

5. There is no radical or other uncertainty in the description of the ditch such as is contended by appellants. It was commonly known as the "Zumwalt Extension Ditch," sometimes called the "Mooney Ditch," and its location was well known. There would be no difficulty in finding it from the description given, and a map was made part of the bill of exceptions, by defendants, which locates the ditch definitely.

Appeal from the order: In discussing this branch of the case appellants appear to attach importance to the fact that the ditch in question is not used to divert water from a natural water course but from the canal of the irrigation company, and to the further fact that the land over which the ditch runs belongs to defendants. It is immaterial whence plaintiff gets the water for his ditch, whether from another ditch or from some natural stream. The ownership of the land by defendants is also, as we have already shown, equally immaterial. It is also argued, and may not be disputed, that a ditch or right of way is an interest in real property and can be granted only by an instrument in writing (Code Civ. Proc., § 1971; Smith v. O'Hara, 43 Cal. 371; Hayes v. Fine, 91 Cal. 396, 27 Pac. 772) and if the evidence in the opinion of the trial court, had established simply a parol license, as claimed by appellants, founded in personal confidence or favor, no interest in the land would have been created that was not subject to revocation. Jensen v. Hunter (Cal. Sup.) 41 Pac. 14, is cited by appellants, to the point. The evidence shows that the ditch in question from its point of connection with the Tulare Irrigation Company's ditch to its terminus is four or five miles long, constituting a continuous ditch, and from it several defendants at different points have obtained water to irrigate their land for various crops ever since its completion. It was constructed in the spring of 1879, as found by the court, and, as the evidence establishes, by D. K. Zumwalt, J. B. Zumwalt, Samuel Fowler, and A. J. Fowler. It was an extension and known as the "Zumwalt Extension of the Tulare Irrigation Company's Ditch" and was designed to irrigate the lands situated west of defendants' lands. There was some controversy with this irrigation company as to the starting point, but by stipulation it was agreed that it began 15.54 chains west of the east line of section 7, above described, and ran thence southwesterly across said section of which the south half and the southwestern quarter of the northwestern quarter was then owned by Michael Mooney. He died in November, 1881, and defendant John J. Mooney became the executor of his will and administered his estate and managed the property until February, 1890, when it was distributed, including the said lands in section 7, to defendants (appellants), the heirs at law of Michael Mooney. The map shows that the ditch passes over the lands of defendants J. J. Mooney and H. M. Mooney.

The contested and vital issue, reduced to its simplest form, is whether the right of way and ownership of the ditch, claimed by plaintiff, ripened into a prescriptive title. Some testimony given by witness Samuel Fowler was offered by these defendants tending to establish the fact that the ditch was built by consent of Michael Mooney, and that he agreed to pay Fowler $100 if he, Fowler, would bring it through Mooney's land, and hence that Mooney became its owner. It would require strong evidence to show that a ditch of the length and cost of this one, made to serve so many interests, would be left to the absolute control of Mooney by the sole ownership and control of the section connecting the ditch with the water system of the Tulare Irrigation Company. Similar evidence would be called for to convince the ordinary mind that such a ditch would be constructed under a mere license subject to revocation at any moment.

As appellants place much reliance on Fowler's testimony, coming from one of the ditch builders, it may as well be here noticed as elsewhere. He testified that he met Michael Mooney at the time the ditch was projected. He was asked what was said about the ditch between him and Mooney and answered: "I told him I wanted to build a ditch down through his place. I asked him how much he would be willing to assist me in building the ditch, how much he would pay me. He said he would give me $100 if I would bring water through there. Q. Did he say he would give you $100 if you would bring water through there, or if you would bring the ditch across his land? A. Well, it was $100 for helping construct the ditch. He was to give $100 if I was to build the ditch through there. That is about all I can recollect of it." On cross-examination he testified. "I think I had gone up there and located where I wanted the ditch before I saw Mooney. I and D. K. Zumwalt, J. B. Zumwalt, and my son Jack had agreed that we should build the ditch. I certainly would have built the ditch whether Mooney had offered to pay me anything or not. It was my intention to go and build the ditch, provided I was not interfered with by any one." He testified that there was nothing said between him and

Mooney to the effect that, when built, the ditch was to belong to Mooney. It appeared that witness did not call upon Mooney for the $100, nor did he present a claim against his estate therefor. But some time after it was too late to present claims he was given some hay by J. J. Mooney, value not stated, on account of this claim, but whether it was "in satisfaction of the debt his father owed" the witness, the latter could not recollect.

Witness D. K. Zumwalt testified: "J. B. Zumwalt, Sam Fowler, Jack Fowler, and myself constructed that ditch. I made no arrangements for any leave or license to make that ditch through the Mooney land." In reply to the use made of the ditch he testified: "Running water through it for irrigation purposes, stock, and irrigation purposes. The men who helped make the ditch, I mean J. B. Zumwalt, Samuel Fowler, and Jack Fowler, who assisted me in building the ditch used it in conjunction with me, and afterwards our neighbors, we permitted them to use water from the ditch. Jack Fowler's proper name was A. J. Fowler. Samuel Fowler continued to use the ditch somewhat, but not regularly, until the time he sold to me. J. B. Zumwalt continued to use it up to the time of his death, which occurred about December, 1891, and I continued to use it more or less each year up to the present time. From the time I acquired all the title to that ditch I used it for the purpose of conveying water up to the time I sold it, and have been using water through the same ditch since, but not exercising control. I continued to run water through there, and, whenever repairs or anything was necessary, it was done through my men, or others along the ditch using water. I never at any time asked the permission of the Mooneys or any of them, to run water through that ditch, and I never at any time asked permission of the Mooneys, or any of them, to go upon their land for the purpose of repairing the ditch. Whatever I did in connection with running that water through the ditch was done without any reference to the rights or claims of the Mooneys, or any of them, or in relation to anything I did to the ditch. The Mooneys did not, nor did any of them, ever at any time interfere in any way with my operation of that ditch." He testified to having been along the ditch on the Mooney land and clearing the ditch, and that he had sent his men there to make repairs on the ditch, and that to his knowledge the Mooneys made no objection. He testified also to having proposed on several occasions to sell the ditch to the Tulare Irrigation Company while J. J. Mooney was president of the company, and in 1891, just before the death of J. B. Zumwalt, who joined with him for that purpose; that J. J. Mooney was present at the meeting of the board of directors when the matter was talked over, and that he made no objection on the ground that witness was not the owner of the ditch. Witness stated, however, that some one objected to buying the ditch "because of the adverse claim of Stufflebeam and the Bashores"; that the directors, including Mooney, went with witness along the entire line of the ditch to examine it and witness went for the purpose of showing the property he proposed to sell, and it included the ditch over the Mooney land. He testified that most of the work done in constructing the ditch was by hired men; that some time in "the latter part of the 80's," about 1886, J. J. Mooney asked permission to use the ditch to irrigate some land and to put in a headgate to turn out the water and witness stated to him that there was no objection. Witness did not recollect that permission was afterwards asked, but he testified: "The Mooneys, H. M. and J. J., have used that ditch every year and up to now, every year to irrigate their lands through which it flows, and they have not come to me to get my permission to do that."

There was evidence that owners of land along the ditch below the Mooney land, including, among others, the ditch builders, were users of the water coming through the ditch from the time of its completion, and that they exercised the right of repairing and controlling the ditch from its head down. There was more or less controversy among these users with D. K. Zumwalt as to the right to the ditch and in some instances litigation ensued. The evidence tended to show that these contested rights did not involve the Mooneys, and that the latter made no claim to the ditch itself beyond the right to use a certain amount of the water running through it, of which the extreme claim proven was a right to use the water necessary to irrigate 100 acres of their land, as found by the court, and there was evidence that the Mooneys made no claim to the ditch itself until about the time this action was brought. The evidence was abundant to establish the prescriptive right as found by the court to be in appellants. Touching plaintiff's right to the ditch there was more or less conflict in the evidence, but there was sufficient to support the findings. It is not the office of the reviewing tribunal to attempt a reconciliation of the conflicting evidence, or to say what witnesses are to be believed and what ones to be distrusted, or to determine where the preponderance of evidence lies. This is peculiarly the function of the trial judge.

Appellants assign numerous errors in the admission or exclusion of evidence. Some of these will be noticed; all of them do not call for comment. Plaintiff was interrogated as to certain conversations with J. J. Mooney concerning this ditch. That occurring in 1880 need not be noticed as the testimony was withdrawn. The witness testified as to conversations with Mooney in 1884 and some other times, the object of which seems to have been, not to show a transfer by Mooney or create an estoppel, as suggested by appellants, but to show that the witness was inquiring as to the ownership of the ditch right, and that Mooney made no claim to it. As a circumstance bearing upon the issues the evidence was admissible.

It would require a recital of much evidence to show its bearing as to the witness having turned water out of ditch on the Higbee land above the Mooney land. Conceding its irrelevancy it was harmless.

The testimony of witness Zumwalt as to his efforts to sell the ditch to the Tulare Irrigation Company while Mooney was president was admissible as tending to show Zumwalt's claim of ownership, and Mooney's acquiescence in the claim by his conduct at that time.

The deeds placed in evidence by plaintiff, showing that the title claimed by the original builders of the ditch had been conveyed by them to D. K. Zumwalt and through him finally to plaintiff, were admissible. The objection urged is that there was as yet no evidence, introduced when these documents were offered, tending to show that Zumwalt ever had any title to the ditch by adverse use or otherwise. The order of proof is not ground for error. We must consider these conveyances and other documentary proofs in connection with all the other evidence of which there was some supporting the findings as to the Zumwalt title by prescription. The case of Hayes v. Fine, 91 Cal., 391–398, 27 Pac. 772, is not in point. There the claim made was under an instrument in writing, and the effort to establish the claim by proof of labor done would be inadmissible because in the nature of parol proof where something higher is required. Here the claim is not based at all upon a written instrument, but upon adverse use, and that having been established the subsequent conveyances were admissible to show ownership in plaintiff.

Certain leases made by Zumwalt in 1885 and 1886, by which he agreed that one Adlesbach might use the ditch, were admitted. This was in plaintiff's rebuttal and was for the purpose of meeting certain evidence which concerned defendants Peter and Marie Adelsbach. There was some evidence tending to show adverse use by the Adelsbachs, and counsel stated that the purpose was to show that they used the ditch under lease from Zumwalt, whose interest plaintiff had acquired. We cannot see that the evidence injuriously affected appellants under the offer.

Defendants' error marked 13 was cured by their subsequently drawing out the facts sought. Witness Fay was a defendant and, when called as a witness for defendants, testified that he had gone frequently into the Mooney field to work on the ditch. He was asked by defendants if he did not, before doing this work, get permission from John or Hugh Mooney. The question was objected to and objection sustained as irrelevant, incompetent, and self-serving. He subsequently testified that J. J. Mooney directed him about the work. This answer appears to us to have met the point defendants were making. If Fay was working under direction of Mooney, the latter's permission would seem to follow.

Certain objections were made to evidence which appears to have concerned defendants other than appellants and was admitted not so much as bearing upon appellants' interests as upon the interests of other defendants or as tending to contradict certain of their witnesses. We cannot see that appellants were injuriously affected by this testimony.

Discovering no prejudicial error in the record, the judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

4 Cal. App. 269

ANDERSON v. ANDERSON. (Civ. 208.)

(Court of Appeal, First District. California. Aug. 24, 1906.)

1. DIVORCE—NEW TRIAL—GROUNDS—IRREGULARITIES IN CONDUCT OF TRIAL.

Where, in an action for divorce, after the evidence on behalf of the plaintiff had been given, the defendant was called as a witness and testified in her own behalf, but before she concluded her testimony, she was interrupted by the court, and informed that she had testified enough, and the court then, before she concluded her testimony or left the witness stand, granted plaintiff a divorce and denied the prayer in the cross-complaint, this constituted an irregularity entitling the defendant to a new trial.

2. APPEAL—PRESENTATION OF QUESTION IN LOWER COURT—AFFIDAVITS FOR NEW TRIAL.

Where objections to affidavits for a new trial were not supported by any facts presented to the court either when the affidavits were presented, or when the motion for a new trial was heard, and the bill of exceptions, authenticating the affidavits, was subsequently settled by the court without reference to the objections they cannot be considered on appeal.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by John Anderson against Johanna Matilda Anderson for divorce. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. Morgenthal, for appellant. Jos. Rothschild, for respondent.

HARRISON, P. J. In his complaint, the plaintiff alleges as his cause of action the extreme cruelty of the defendant, setting forth divers acts thereof, all of which were denied by the defendant in her answer, and in addition thereto she filed a cross-complaint, charging the plaintiff with extreme cruelty, for which she asks a decree of divorce in her favor. Upon the trial the court found that "all of the allegations and averments in the complaint as to defendant's cruelty are true, and all the denials, allegations, and averments in the answer and cross-complaint having reference to plaintiff's cruelty towards defendant are untrue," and directed an interlocutory decree of divorce to be entered in favor of the plaintiff and against the defendant. The defendant moved for a new trial upon the grounds of irregularity in the proceedings of the court, by which she was prevented from having a fair trial, and that the evidence was insufficient to justify the decision of the court. This motion was presented and heard upon a statement of the case and affidavits of the defendant and her daughter properly authenticated in a bill of exceptions. The motion for a new trial was denied, and from this order and from the judgment the defendant has taken the present appeal.

It is shown by the affidavits that after the evidence on behalf of the plaintiff had been given the defendant was called as a witness, and testified in her own behalf, and that before she had concluded her testimony, and while she was still on the witness stand she was interrupted by the court, and informed by him that she had testified enough; that the court then and there, before she had concluded her testimony or left the witness stand, granted the plaintiff a divorce, and denied the prayer in the cross-complaint; that upon her counsel objecting thereto, and informing the court that he had other witnesses in court, the judge informed him that he had the privilege to appeal to the Supreme Court. In the statement of the case which was settled by the judge it is shown that after the plaintiff had rested his case the defendant offered herself as a witness on her own behalf, and after having given testimony in contradiction of much of the testimony of the plaintiff, and before her testimony was concluded, the judge interrupted her saying: "That is enough. Let an interlocutory decree for the plaintiff be entered"; and upon her counsel stating to the court "We have other testimony here," the court replied, "I do not care for it at all. Take your exception. Take your interlocutory decree."

In her affidavit the defendant also recounted in detail the testimony which she intended to give for the purpose of overcoming the testimony on behalf of the plaintiff and in support of the denials in her answer and the allegations of her cross-complaint, and which testimony appears to have been clearly relevant to the issues therein; and in the affidavit of her daughter the latter states similar testimony which she would have given if she had been permitted so to do. The matter set forth in these affidavits was not contradicted, nor were there any counteraffidavits filed on behalf of the plaintiff. That these proceedings constituted an irregularity of the court is not open to dispute, and that, by reason thereof, the defendant was prevented from having a fair trial is equally clear. Whatever weight the testimony of the plaintiff might have with the court in support of the allegations of his complaint, it was clearly irregular for the court to determine the issues before it upon that testimony without giving to the defendant a full opportunity to present her testimony, and to give to it proper consideration in connection with that of the plaintiff. And it was equally erroneous for the court, after refusing to permit the defendant to give any testimony in support of the averments in her cross-complaint in reference to the plaintiff's cruelty, to find as a fact that those averments were untrue.

The bill of exceptions, authenticating the affidavits, contains a subscript by the attorney for the plaintiff that it may be settled by the court "plaintiff saving the objection that said affidavits were served and filed in violation of law and in violation of section 659 Code Civil Procedure, and on the further ground that all the matters therein contained are set out in the answer and cross-complaint of defendant, and present no new or further evidence to justify the court granting a new trial." No facts in support of this objection were stated or presented to the court, nor does it appear that any objection to the affidavits was made at the time they were presented, or when the motion for a new trial was heard; and as the bill was subsequently settled by the court without reference thereto the objection cannot be considered. The fact that the matters contained in the affidavits are set forth in the answer and cross-complaint was not a matter of objection. It was still necessary for the defendant to establish the same at the trial of the cause by competent evidence.

The judgment and order are reversed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 272

DAWSON v. CERF. (Civ. 212.)

(Court of Appeal, First District. California. Aug. 30, 1906.)

LANDLORD AND TENANT—RECOVERY OF POSSESSION BY LANDLORD — UNLAWFUL DETAINER.

Where the term of a lease expired on March 15, 1904, but the lessee holding over continued to pay rent monthly in advance on the first day of each calendar month, and the lessor served notice that an increased rent would be demanded from January 15, 1905, and, on January 3d, served on the lessee a demand for a half month's rent at the former rate and a half month's rent at the increased rate, which was refused, but the lessee tendered a month's rent at the former rate, the lessor could not maintain forcible entry and detainer, since, conceding his contention that the lessee's month expired January 15, 1905, so that his notice was sufficient under Civ. Code, § 827, providing that in a lease from month to month, the landlord may, by giving notice at least 15 days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month, no part of the rent for the month beginning January 15th, would be due before that date.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by George Dawson against Myrtile Cerf. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. J. Burt, for appellant. B. L. Quayle, for respondent.

COOPER, J. Action of unlawful detainer. Findings were filed, upon which judgment was ordered and entered for plaintiff for the restitution of the premises described in the complaint, besides rent and costs. This appeal is from the judgment on the judgment roll with a bill of exceptions. The facts, so far as necessary to be stated, are as follows: In February, 1903, the plaintiff was in possession of a lot on the south side of California street, east of Sansome, having a frontage of 23 feet on California street by a uniform depth of 66 feet, together with the building thereon, 321 California street, under a lease from the Mutual Life Insurance Company of New York, which lease, by its terms, was to expire on the 15th day of March, 1904. During said month, and while plaintiff was so in possession of the premises, he leased or sublet a portion thereof known as the "cigar stand" to the defendant for the term of 1 year and 1½ months, from February 1, 1903, to and including the 15th day of March, 1904, which was the time when the plaintiff's lease from the insurance company would terminate. The lease to defendant provided that the rent should be $80 per month, payable monthly in advance. The lease contained the following clause: "If said lessor shall hold said premises at No. 321 California street, as tenant or otherwise, after March 15th, 1904, it is hereby agreed for the parties hereto, their respective heirs, executors and assigns, that said lessee shall have the privilege of retaining the premises hereby demised upon the same terms and conditions as are herein expressed, for such term as said lessee may elect, however not to exceed the term for which said lessor, his heirs, executors or assigns may hold said premises as aforesaid; and in no event to exceed a period of twenty years from date hereof." Defendant entered into possession and paid his rent according to the terms of his lease up to the termination thereof, and there is no question raised as to the written lease during the time it was in force. Before the written lease expired, on March 1, 1904, defendant paid to plaintiff the sum of $80, and received from him a receipt of which the following is a copy: "Rent must be paid in advance. Mch. 1, 1904. $80.00. Received from M. Cerf eighty 0-100 dollars rent of cigar store 321 Cal. St. S. F., from March 1st to April 1st, 1904. George Dawson." The defendant continued in possession and paid his rent to plaintiff, receiving similar receipts for every month thereafter up to January 1, 1905. During this time no other or different lease had been made. The rent was paid monthly as before and at the same rate provided in the original lease. On December 22, 1904, the plaintiff served defendant with a notice in writing, of which the following is a copy: "San Francisco, Cal., December 22, 1904.—Mr. Myrtile Cerf: You will please take notice that on and after January 15, 1905, the rent for the cigar stand at 321 California street, San Francisco, which stand you now occupy, will be one thousand dollars per month, payable, as heretofore, in advance. [Signed] George Dawson, 321 California, street San Francisco." On January 3, 1905, the defendant tendered to plaintiff $80 as rent for the month of January, being the amount of rent he had paid under the written lease and the amount he had paid each and every month thereafter, but plaintiff declined to receive the rent so tendered. On the last-named day plaintiff served a written demand upon defendant for $540, rent for January, 1905, consisting of the following items:

January 1st to January 15th at $80 per month	$ 40 00
January 15th to and including January 31, 1905	500 00
	$540 00

The demand stated that the defendant was required to pay the said sum of $540 as rent for the month of January, otherwise to surrender possession of the premises. After the expiration of three days, and on January 9, 1905, this action was commenced.

It is not necessary to pass upon the defendant's contention that he had the right, under his written lease, to continue it for such term as he might elect, nor upon the plaintiff's contention that defendant waived his right to another or fixed term by not exercising his right to elect before, or at the time of, the expiration of the written lease. It may be conceded for the purposes of this case that the plaintiff's contention is correct to the effect that defendant was holding under a tenancy from month to month, and that his month would expire January 15, 1905, and yet the plaintiff cannot recover in this action. It is provided in section 827 of the Civil Code that in a lease from month to month the landlord may, by giving notice in writing at least 15 days before the expiration of the month change the terms of the lease to take effect at the expiration of the month. In this case the plaintiff, in his notice, took the position that defendant's month would expire, and now contends that it did expire, on January 15, 1905. By the notice the terms of the lease were to be changed from and after January 15th to "one thousand dollars per month payable, as heretofore, in advance." It is therefore evident that, until the 15th day of January, 1905, the defendant did not owe $1,000 rent for the month commencing January 15, 1905. Nor did he owe $500 for one-half of the month. The terms of the lease were not to be changed until January 15th, at which time the $1,000 was to be due for the month commencing at that time. According to the demand made here $500 was claimed of the defendant before plaintiff claims that the lease had been changed, and not only this, but the suit was commenced before the change of the lease was to take effect. If the notice had stated that the rent would be $1,000 per month payable semimonthly in advance, the $500 for the latter half of the month of January and the first half of the month, under the changed terms of the lease, would not have been due until the 15th day of January, 1905. At the time this action was commenced the plaintiff had been tendered more than the amount that was due under the tenancy by which the defendant was holding. He could not recover under the changed terms of the lease until it took effect as changed.

The judgment is reversed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 264

CALEGARIS v. CALEGARIS. (Civ. 159.)

(Court of Appeal, First District, California. Aug. 24, 1906.)

DIVORCE—DECREE—MODIFICATION.

Where plaintiff in a suit for divorce prayed for the custody of her four children and one-half of the community property, she could not have a decree granting all of her prayers subsequently modified, so as to include directions to defendant to pay plaintiff a certain sum monthly for the care, custody and education of the children, notwithstanding Civ. Code, § 138, providing that the court may, before or after judgment, give such direction for the custody, care, and education of the children as may seem necessary and proper, and may at any time vacate or modify the same.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 803.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Petition by Elvira Calegaris against Joseph Calegaris to modify judgment in divorce action. From an order modifying the judgment, defendant appeals. Reversed.

P. F. Dunne and O'Connor & Hirsh, for appellant. John J. Barrett, for respondent.

COOPER, J. This appeal is from an order purporting to modify a judgment and decree of divorce by directing defendant to pay to plaintiff the sum of $60 per month for the future care, education, and support of four minor children.

The action was brought by plaintiff for a divorce on the ground of desertion. She asked in the complaint for the care, custody, and possession of the minor children—Mario, aged 12 years, Inez, aged 10 years, Marguerite, aged 8 years, and Hugo, aged 6 years—and for one-half of the community property, alleged to have been of the value of $60,000. The court made findings, and caused to be entered a decree on the 17th day of April, 1902, granting plaintiff a divorce, the custody of the minor children, and awarding her the sum of $30,000 as permanent alimony for her support, being the amount prayed for in the decree, and which was one-half of the community property. This decree gave no directions as to the education of the minor children, and made no provision for their maintenance or support, but gave to plaintiff their "sole care, custody, control, and possession." It is has never been appealed from, and has become final. On August 25, 1902, but a little over four months from the date of the decree, plaintiff filed her petition, in which she set forth that the original decree made no provision for the maintenance, support, care, custody, or education of said minor children, or any of them, and that they are still minors. The petition further stated that each of the said minors was without means, but contained no statement as to the plaintiff's means, or as to the $30,000 she had received from the defendant under the decree, and concluded with a prayer that the court order the defendant to pay the plaintiff the sum of $50 per month each for the care, custody, and education of said minors. It appeared at the hearing that the minors were all in plaintiff's custody, living in her house, and attending the public schools. It also appeared that the defendant married after the decree, and now has another family to support. After the hearing, and on the 13th day of October, 1902, the court made an order modifying the judgment and decree of divorce by directing the defendant to pay to plaintiff the sum of $15 per month each from said date "for the future care, custody, and education of each of said four above-named minor children."

The respondent relies upon the provisions of section 138, Civ. Code, and the order must find support, if it can be supported at all, under the provisions of this section, which at the time it was made provided as follows: "In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." Under this section the court may, after the judgment, vacate or modify any provision therein which gives a direction for the custody, care, or education of the minor children of the marriage. The primary purpose of this section is that the children of the marriage shall be properly cared for, and the authority thereby given is to be exercised in their interest. Crater v. Crater, 135 Cal. 634, 67 Pac. 1049. If no provision in reference to the children is made in the original judgment, but, by reason of their necessities, or for the protection of their interests, any judicial action is required in their behalf, it may be sought in an independent proceeding therefor. By the terms of the original decree herein, the care, custody, and control of the children were given to the plaintiff, and in the order appealed from no modification or change of the judgment in this respect has been made; and in awarding to her $30,000 of the community property, estimated at one-half thereof, and making no provision that the defendant shall contribute to the support or education of the children, it must be assumed that the court intended that he should not contribute to the plaintiff any portion of the expense incurred by her in caring or providing for them. See Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9. The failure to provide in the original decree that defendant should pay any money to plaintiff for the care, custody, and education of the children had the legal effect of an adjudication as between them that he should not be required to make any payment therefor (Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; Lamb v. Wahlenmeier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66); and section 138, Civ. Code, above quoted, confers no authority upon the court to declare such obligation. "If the decree of divorce makes no provision for the maintenance of the children of the marriage, the court is without jurisdiction subsequently to make any order compelling either party to pay to the other for such maintenance." Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45. Section 196, Civ. Code, declares: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances." When a parent is deprived of the custody of his child, and therefore of the right to its services and earnings, by summary proceedings, he is no longer liable, as a general proposition, for its support and education—per Temple, J., Ex parte Miller, 109 Cal. 643, 42 Pac. 428.

The order herein does not, however, in any way modify or purport to change the provision of the original decree relative to the care or custody of the minor children, nor does it give any "direction" as to their future care, custody, or education, except in so far as it orders the defendant to pay to the plaintiff $60 per month therefor. Not only does it fail to give any direction as to the education of the minors, but it does not even provide that the money which it requires the defendant to pay shall be expended in their education. It merely directs that the defendant shall pay to the plaintiff $60 per month for their "care, custody, and education," thus imposing upon him a pecuniary obligation from which he had been exonerated by virtue of the original judgment in the cause. The order directs the money to be paid to the plaintiff. No direction is given as to the education of the minors, but a direction for the education of minor children means something more than a mere order to pay money. The plaintiff is not even directed to send the minors to school, nor is it directed that they shall attend any school, or that they shall receive any education. As to whether or not they shall be sent to school, or educated in any manner, or at all, is discretionary with the plaintiff. The Code does not contemplate that a father may be directed to pay a monthly allowance for the education of a minor child to the mother, who receives no direction and is not by the order required to educate such child. The order, if it had made the allowance to the plaintiff for her own use and support, or for the use and support of the minors, would have been void as beyond the jurisdiction of the court, and it is none the less so although called by a different name. The plaintiff made no showing that any expense would be incurred in the education of said children, or in any way except for their support and maintenance, nor did she make any showing that she had not ample means therefor.

We are further of the opinion that the court, under the circumstances of this case, abused its discretion in making the order. The court, in view of all the circumstances, had given the plaintiff, by the decree of divorce, all the money and property that she asked for. It had also given her the custody of the minor children. The defendant had the right to suppose that the decree would end the litigation, and settle the property rights as between himself and the plaintiff. The plaintiff should have acted in good faith, and should have been satisfied with a decree giving her her just rights and all that she asked. There was nothing in the pleadings or proceedings in the original case to cause the defendant even to suspect that the financial matters between himself and the plaintiff had not been fully settled. He did not have any reason to believe that, before the time for appeal from the judgment would expire, the plaintiff would bring him into court again for more money. The plaintiff did not, at the time she procured the decree, have it in her mind to ask for more money, or, if she did, and did not disclose such intention, she was not acting in good faith. If the conditions of the parties had changed materially after the decree, or if the means allowed to plaintiff had been exhausted, or if the circumstances had been such as to call for aid from defendant to assist in the education of the minors, the question would have been different. As was well said in McKay v. McKay, 125 Cal. 65, 57 Pac. 677: "But the changes which may thus be made are limited to the cases and conditions expressed in the statute by which they are authorized."

The order is reversed, with directions to the court to dismiss the petition.

We concur: HARRISON, P. J.; HALL, J.

4 Cal. App. 257

RODRIGUE v. ROGERS et al. (Civ. 142.)

(Court of Appeal, First District, California. Aug. 24, 1906.)

MUNICIPAL CORPORATIONS—EMPLOYÉS—APPOINTMENT—CIVIL SERVICE RULES.

An appointee, having taken the examination for ordinary clerks under a classification established by the civil service commission, as provided for in article 13 of the charter of the city and county of San Francisco, who was appointed to a temporary position in the office of the board of elections under article 11 of the charter, giving the board a right to appoint such clerical assistants as might be necessary, and later to other temporary positions in the office of the tax collector and auditor, under article 4 of the charter, providing for the appointment of extra clerks in such offices, was merely an extra clerk, whose employment ended when his services were no longer required, and on the termination of such employment the placing of his name on the register of eligibles, according to the relative excellence of his examination, without regard to the priority thereof, along with persons taking the examination after his appointment to the position in the office of the board of elections, was not a discharge, in violation of the provisions of article 13 of the charter relating to the appointment, term of employment, and discharge of civil service employés.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Petition for writ of review by Michael J. Rodrigue against John W. Rogers and others as civil service commissioners of the city and county of San Francisco. Judgment for plaintiff, and defendants appeal. Reversed.

P. V. Long, City Atty., and John T. Morris, Asst. City Atty., for appellants. Chas. W. Slack, for respondent.

HALL, J. Plaintiff filed in the superior court of the city and county of San Francisco his petition for a writ of review as to certain proceedings taken by the civil service commissioners of the city and county of San Francisco, and upon the return thereto and hearing thereon judgment was rendered, annulling the action of the civil service commissioners in the respect complained of, and this appeal is from such judgment.

In the month of February, 1900, the civil service commissioners, in accordance with the provisions of the charter of the city and county of San Francisco, classified all the places of employment in or under the offices and departments of the said city and county mentioned in section 11 of article 13 of the charter, with reference to the examinations provided for by said article. Among the classes established was one designated as "ordinary clerks," from which the extra clerks authorized by the charter to be appointed by certain officers are to be selected. Subsequently, in June, 1900, an examination was held for ordinary clerks, which was taken by plaintiff, and as a result his name was placed upon the register of eligibles for appointment as ordinary clerk. Subsequently, September 19, 1900, the board of election commissioners, in accordance with the provisions of the charter, requested the civil service commissioners to certify to the department of elections the names and addresses of persons standing highest upon the register of eligibles. Plaintiff's name and one other were certified, and he was appointed to a position in the department of elections on the 20th day of September, 1900, and continued to perform the duties thereof until the 13th day of October, 1900, when his duties in the said department of elections were fully performed and completed. It is alleged in the petition "that the plaintiff, since his said certification and appointment, has performed, when his services as such ordinary clerk have been required, the duties of such ordinary clerk in said department in the office of the tax collector and in the office of the auditor," but by the return to the writ it appears that each employment has been by virtue of a new certification and appointment. In May, 1903, another examination for applicants for positions as ordinary clerks was held, and thereafter the names of the successful applicants at the second examination were placed upon the register of eligibles with the names of those who had successfully passed the first examination, all the names of applicants—those passing the first and those passing the second examination—being placed on the one register of eligibles in the order of the relative excellence of their examinations, without regard to priority of examinations. It is this action of the civil service commissioners that is complained of by plaintiff. His name on the consolidated register came lower than on the first register, and his contention is that by virtue of his appointment to a position he was removed from the register of eligibles, and became a permanent employé of the city in the position of ordinary clerk. This contention was sustained by the trial court, and the correctness of this action is now before us for review. Section 2 of article 13 of the charter provides that: "The commissioners shall classify all the places of employment in or under the offices and departments of the city and county mentioned in section eleven of this article, with reference to the examinations hereinafter provided for. The places so classified by the commissioners shall constitute the classified civil service of the city and county, and no appointment to any such place shall be made except according to the rules hereinafter mentioned." Section 7 of the same article provides that: "From the returns of the examiners, or from the examinations made by the commissioners, the commissioners shall prepare a register for each grade or class of positions in the classified service of the city and county of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the commissioners and who are otherwise eligible. Such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination, without reference to priority of time of examination." Section 9 of the same article provides: "The head of the department or office, in which a position classified under this article is to be filled, shall notify the commissioners of that fact, and the commissioners shall then certify to the appointing officer the name and address of one or more candidates, not exceeding three, standing highest upon the register for the class or grade to which the position belongs, but laborers shall be taken according to their priority of application. * * *" Section 10 of the same article is as follows: "The appointing officer shall notify the commissioners of each position to be filled separately, and shall fill such position by the appointment of one of the persons certified to him by the commissioners therefor. Such appointment shall be on probation for a period to be fixed by the rules of the commissioners; but such rules shall not fix such period at exceeding six months. The commissioners may strike off names of candidates from the register after they have remained thereon more than two years. At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed, may, by and with the consent of the commissioners, discharge him upon assigning in writing his reason therefor to the commissioners. If he is not then discharged his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this article, can be made." The period of probation provided for in the above section was fixed by the commissioners at six months. Section 12 provides that: "No deputy, clerk or employé in the classified civil service of the city and county, who shall have been appointed under said rules, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense."

The plaintiff contends that by having been appointed to a position as ordinary clerk in the department of elections he becomes such an employé as could only be removed in the manner provided for in the above-quoted sections, and that the action of the civil service commissioners in placing his name upon the list of eligibles according to the excellence of his examination, without regard to the priority of the examination, was in violation of his rights and of the said provisions of the charter. To properly interpret the foregoing sections, especially sections 10 and 12, they must be read in connection with other sections of the charter. At the outset of our examination of the charter we find that there is no such position as ordinary clerk known to the charter. The term "ordinary clerk" is used by the civil service commissioners to designate an arbitrary class established by them, from which various extra clerks allowed to various officers and departments must be appointed. A further examination of the charter discloses that various positions are provided for, which by the law of their creation are not continuous or permanent, but are intended by the law to be for limited periods. Thus, article 11 provides for the organization of the department of elections, and, after providing for the appointment of a registrar of voters, it is, in section 4 thereof, provided as follows: "The board may appoint such other clerical assistants as may be necessary, at a salary not to exceed one hundred dollars a month each for the time actually employed. The board shall, by resolution adopted by a majority vote of all its members and entered upon its minutes, designate the service to be rendered by such assistants and the time for which they shall be employed. The time of employment of such assistants shall not be extended except by like resolution of the board, and when a salary shall have been once fixed it shall not be increased. This section is subject to the provisions of article 13 of this chapter." The appointment pleaded in plaintiff's petition was an appointment as one of the clerical assistants provided for in the above section. No other positions are provided for in the department of elections, except that of registrar. If the law was complied with, the resolution authorizing the employment of plaintiff in the department of elections limited the time of his employment. When that time expired, it is difficult to see why his employment did not end. He was not discharged in violation of any provision of the civil service provisions of the charter, but the term of his employment or office expired by the law of its creation.

There is no warrant in the charter for the position that by an appointment to a position in the department of elections plaintiff became entitled to hold a similar or any position in any other office or department of the municipal government. On the contrary, it is perfectly apparent that the head of each department may appoint his own subordinates and assistants, after requisition by the head of such department and certification by the civil service commissioners.

Plaintiff pleaded that after his appointment to the position in the department of elections, and after his duties therein were fully performed and completed, and, as we must assume, after the expiration of his term of employment as fixed by the resolution authorizing his employment, he performed the duties of ordinary clerk in the department of elections, in the office of the tax collector, and in the office of the auditor; but by the return to the writ it appears that he performed such duties by virtue of separate appointments following requisitions and certifications, as required by the civil service provisions of the charter. As we have already seen, he could not under the charter perform duties in either the office of the tax collector or auditor by virtue of any appointment by the department of elections. There is no such position under the charter as ordinary clerk that may be floated from department to department. The charter authorizes the tax collector to appoint one chief deputy, one cashier, and fifteen deputies; "and extra clerks who shall be paid at the rate of not more than one hundred dollars a month during the time of their employment." Article 4, c. 5, § 1, Charter of San Francisco. This clearly indicates that the term of employment of such extra clerk is limited, and not continuous or permanent. Besides various deputies, the auditor "may employ such number of extra clerks during the time their services may be necessary for the lawful discharge of his official duties, as the board of supervisors may designate. Such extra clerks shall each receive a salary not to exceed one hundred dollars a month for the time they shall be actually employed." Article 4, c. 2, § 2, Charter. Here, again, the positions are created of limited duration. It was to such positions only that plaintiff was appointed. The assessor is also authorized to employ, during four months of each year, 100 clerks "who shall each be paid at the rate of not more than one hundred dollars a month during the time of their employment." These various extra clerks were appointed from the class designated as "ordinary clerks" in the classification adopted by the commissioners; and, by the method adopted by the commissioners when the term of employment ended, or the services of such clerk were no longer required, he was treated as no longer an employé, and his name was again placed on the register of candidates according to the relative excellence of his examination, without regard to the priority of the examination.

We think this course of action accords with the letter and spirit of the civil service provisions of the charter. It makes a workable system. Plaintiff has not been discharged in violation of any provision of the charter, or discharged at all. He was employed for a limited term, and upon the expiration of the term of his employment he ceased to hold office, or to be an employé of the municipality. By again placing his name on the register of candidates according to the relative excellence of his examination, without regard to the priority of the examination, the commissioners complied with the charter (article 13, § 7), and accorded to plaintiff his full rights.

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

(7 Cal. Unrep. 301)

Ex parte WILLIAMS. (Civ. 287.)

(Court of Appeal, Third District, California. July 31, 1906.)

1. GAMING—OFFENSES—STATUTES.

It is not a crime, under Pen. Code, § 330, making it an offense to operate any banking or percentage game played with any device "for money, checks, credit or other representative of value," to set up and operate a slot machine on which games are played, unless played for money, checks, credits, or other representative of value, and, if played for something not included in these words, it is not a crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 137, 138.]

2. SAME — OFFENSES — STATUTES — CONSTRUCTION.

Pen. Code, § 330, making it an offense for any one to operate any banking or percentage game played with any device for money, checks, credit, or other representative of value, adopted in 1872, prior to the existence of cigar slot machines, when considered in connection with section 331, prohibiting the use of any house for gambling, prohibited by section 330, and section 4, providing that the Penal Code is to be construed according to the fair import of its terms, does not make it an offense to operate a slot machine on which games are played for cigars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 161, 198.]

Application by C. C. Williams for a writ of habeas corpus for his discharge from imprisonment on conviction of an alleged criminal offense. Petitioner discharged. Transferred to Supreme Court. See 87 Pac. 568.

T. J. Butts, for petitioner. C. H. Pond, Dist. Atty., for the People.

BUCKLES, J. The petitioner was engaged in the saloon business, also selling cigars and tobacco in the city of Petaluma, and had therein a slot machine used by his customers in gambling for cigars. The complaint on which the petitioner was charged, arrested, tried, and convicted was as follows: "On the 4th day of December, A. D. 1905 * * * did willfully and unlawfully open, carry on, and conduct, at his saloon and place of business at 319 Main street, in the city of Petaluma, Sonoma county, state of California, a certain banking game, played by means of a slot machine, for money, checks, and other representatives of value, to wit, cigars and tobacco." While the complaint charges "for money, checks, etc.," there is no pretension that either money or checks were played. It does appear from the return and record in the case that the crime charged and intended to be charged was using the slot machine for "other representatives of value," and that such representatives of value were cigars and tobacco. The petitioner was sentenced to pay a fine of $100, and to be imprisoned until such fine be paid, etc. The fine was not paid, and the petitioner was imprisoned. This answer to the return made by the sheriff contains the following, to wit: "That the slot machine mentioned in said complaint is operated by dropping a nickle or slug in the slot in the right-hand side of said machine, and then pressing a lever, and, if the proper combination of cards showed upon the cylinder, the party putting the nickle in the slot was entitled to a certain number of cigars, according to the combination of cards. If a royal flush was made to show upon the cylinder, the party playing the machine was entitled to 40 cigars; for 4 aces, 15 cigars; for 4 kings, 14 cigars; for 4 queens, 13 cigars, and under queens, 10 cigars; full hand, 8 cigars; a flush, 6 cigars; for three queens, 3 cigars, and under queens, 2 cigars; and 2 pairs, jacks up, 2 cigars; and 1 pair, aces, kings, or queens, 1 cigar; and any other combination would not win anything. That said machine was played for cigars, and nothing else, and that these facts were established and proved at the trial of this case." These facts are not controverted, and are set forth with above particularity for the sole purpose of showing that the entire charge made and the crime complained of was running the slot machine, not for money, checks, or credits, but for "other representatives of value." The slot machine is a device or thing where the person who plays it must, of necessity, play at a chance game, the owner or operator thereof paying when the person who has put in his nickle wins, and taking the nickle when there is a loss, and it is thus a banking game. People v. Carroll, 80 Cal. 153, 22 Pac. 129. It is not a crime, under section 330 of the Penal Code, to set up and run such a device as a slot machine described here, unless played "for money, checks, credits, or other representatives of value." If played for something not included in these, it is not a crime.

As it is here admitted that it was not played for either money, checks, or credit, but for cigars, we are therefore called upon to determine what the Legislature intended to include within the words, "or other representative of value." The respondent contends they can have but one meaning, and that anything of value, and therefore includes all kind of property having a value; while the petitioner claims they can refer only to some similar thing—to money, checks, or credit. If the Legislature was intending to prohibit all gambling with banking devices or by banking games played with cards, dice, or any device, it seems to us there would have been no limitation as now to money, checks, or credits, but the statement would have been for anything of value or that represents value. Gambling such as it is sought to prohibit by section 330 is carried on almost exclusively for money, or some obligation or promise which calls for money, and not other property. The very language of the section precludes any other idea. Then, if this be so, we must keep this in view in trying to determine to what the words "or other representative of value" were intended to apply. There is a general rule in construing statutes, either penal or otherwise, which forbids the adoption of any construction that will defeat the purpose for which the statute was obviously intended, and our Code (Pen. Code § 4) provides that all of the provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice. These rules apply here. If we take into consideration, as the people contend we must, the fact that the chapter in which section 330 is found is headed "Gaming," we are furnished no aid, no light by which to arrive at the meaning of the words "or other representative of value," for there is no pretense that the section contains a prohibition against all kinds of gaming, but is limited to the kinds therein mentioned. Courts have no power to legislate, and if the Legislature intended to simply prohibit banking and percentage games where played for money, checks, credits, and other things similar to money, checks, and credits, this court has no power to add a further prohibition, and say that it will be a crime if such banking or percentage game is for other kinds of property, such as grain, fruit, horses, cattle, lumber, and all other things of whatever kind which may have a value. The rule seems to be well established in the interpretation of statutes and clauses like the one under consideration that where general words follow particular ones, the former are construed as applicable to persons or things of the same kind, class or nature. The rule has been further stated as follows: "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the class embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as of the same kind, class, or nature, with and not of a quality superior to, or different from, those specifically enumerated." 21 Am. & Eng. Ency. 1012. In New York, where a statute exempted from taxation every building erected for the use of a college, incorporated academy, or other seminary of learning, it was held, as all those enumerated were corporations, that the general words "or other seminary" required that such institution should also be an incorporated one in order to have the benefit of the exemption. Chegaray v. N. Y., 13 N. Y. 220. In the Illinois Criminal Code the words "or other instrument of writing" is held to include only instruments of the same kind as those previously specified; that is, bills, notes, checks, etc., for the payment of money, and not to apply to the case of a contract under which it was wholly uncertain whether the money would ever become payable. Shirk v. People, 121 Ill. 61, 11 N. E. 888. So in Kentucky, where the statute read: "Section 1. Whoever with or without compensation, shall set up, carry on, or conduct, or shall aid and assist in setting up, carrying on, or conducting, a keno bank, faro bank, or other machine or contrivance used in betting whereby money or other things may be won or lost, etc.," the indictment charged that the defendant "unlawfully and feloniously set up, carry on, and conduct a machine and contrivance used in betting, to wit, a game of oontz played with dice and upon which money was won and lost." It was held that other machine or device must be of the same kind or nature with the keno bank or faro bank, under the rule above stated. In that case the evidence showed that the game played was that commonly known as "craps" or "oontz," in which no machinery or implements are used save two ordinary dice. Commonwealth v. Kammerer (Ky.) 13 S. W. 108. Many other cases may be cited which uphold this rule, but we deem this sufficient. But the rule is not inflexible, for where it is plain from the whole act, document, or subject-matter that the real intent was different, then such manifest intent, and not the above rule, prevails. As in the definitions given in the Code of degrees of murder: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing * * * is murder in the first degree." One who administers poison to another with intent to kill, and death results therefrom, is at once guilty of murder in the first degree, because the deliberation, premeditation, malice aforethought, and all have been established. So when the killing follows from lying in wait or from torture, but there are many other ways than these by which murder in the first degree may be committed. People v. Bealoba, 17 Cal. 389. The killing may be accomplished by pushing one from a high wall or into a deep well, or by any means which shows willful, deliberate, and premeditated killing. Such statute needs no interpretation, for the intent of the lawmaker is seen at once. The betting on elections, on horse racing, and the gambling in stocks and in grain are kinds of gambling not included within section 330. The very language of the statute itself shows that the gambling which the Legislature was attempting to prohibit was that sort of gambling usually carried on at a fixed place of business, where those seeking to play at games of chance could come, and where money is the thing usually wagered, or its representative, such as checks or anything which is a demand to be paid in money. It would hardly be considered reasonable that the Legislature had in mind that the games and devices eunmerated were played in the general markets where grain, animals, and stocks are bought and sold. The intent of the Legislature to legislate against games set up and carried on at a fixed place and in houses or rooms is shown by section 331 of the Penal Code, which attempts to prohibit the use of any house for the gambling prohibited in section 330. Neither is it plain that the Legislature had in mind any kind of property other than money, the thing most common for use in such games, and its representative such as checks and demands for the payment of money. Neither would it be a reasonable supposition that in 1872, when the act was passed, any banking game would be set up or carried on in gambling for anything but money and the instruments representing money, and therefore the Legislature could not have had in mind the cigar slot machine, and could not have prohibited its use. The ingenuity of man, however, has devised a banking game in the cigar slot machine by which gambling may be carried on for property not included within "money, checks, credits or other representatives of value." There is nothing in section 330 which prohibits gambling for cigars. It follows that the petitioner must be discharged.

The prisoner is discharged.

McLAUGHLIN, J. I concur. Section 330 of the Penal Code provides that: "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, tan, fan-tan, stud horse poker, seven-and-a-half, twenty-one, hokey pokey, or any banking or percentage game played with cards or dice or any device, for money, checks, credit, or other representative of value," is guilty of a misdemeanor. It is clear from the language of this section that it is a misdemeanor to conduct or carry on a slot machine or any other device played for money, checks, or credits, but we are here called upon to determine whether a person who conducts or carries on such a device played for cigars and tobacco is likewise guilty of an infraction of the law. Such acts as those enumerated in this and similar statutes are crimes only because they are prohibited by law, and unless the act charged against the petitioner is so prohibited, he is entitled to his discharge. If it is forbidden by law at all, it must be because cigars and tobacco are representatives of value, within the meaning of the section quoted. The words "or other representative of value" found in the section must be construed in connection with the preceding language in the same sentence, for the word "other" is a correlative and specifying word, meaning "different from that which has been specified; not the same; not this or those; different." Hyatt v. Allen, 54 Cal. 357. In other words, the word "other" will "generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated." Am. & Eng. Ency. of Law, vol. 21, p. 1012; Stroud's Judicial Dict., p. 1359 et seq.; Lewis Sutherland, Statutory Constitution, §§ 423–430. A study of the innumerable cases supporting this doctrine or dealing with the proposition under discussion, found in the notes in works above cited, will show that in nearly every instance where this rule was not followed the word was used in a different connection or sense from that apparent in the statute before us. In a recent case the Supreme Court of this state said that there was little, if any, controversy as to the rule in its application to the Penal Statutes. Matter of La Societe Francaise, 123 Cal. 531, 56 Pac. 458. Applying this rule, and adopting the meaning of the word "other" when used in exactly the same connection and sense as in section 330 of the Penal Code, declared in Hyatt v. Allen, supra, we cannot escape the conclusion that conducting a slot machine played for cigars and tobacco is not within the prohibition of that section of the Penal Code.

But, aside from this, there is another rule commanding that words not plainly used in a technical sense shall be taken in their ordinary, general sense, and if this is applied to the word "representative," as used in the section, it seems quite clear to my mind that cigars or tobacco cannot be considered as representative of value. The word "representative" as used in the statute certainly means "typifying"; "presenting by means of something"; "standing in the place of"; "that which represents anything." Cigars and tobacco are things of value; they have a value. This is beyond cavil. But in my opinion it could hardly be said that they represent their own inherent or market value. A certain coin or check or bill will represent the value of any quantity of cigars or tobacco, and these in turn will be inherently worth the price obtainable for them. But it would hardly be contended that because they have a certain value, measured by current mediums of exchange, they represent the value of the coin or currency paid for them, any more than they represent any other commodity which might be exchanged for them in the course of trade. Every commodity has a value measured according to fixed standards, but the various commodities sold and bought in many markets and transactions do not represent the value of the gold, silver, or currency paid for them. On the contrary, the medium of exchange established by law or recognized in business dealings represents their value. Thus we are led to the conclusion that the words "representative of value" do not mean that cigars and tobacco or any other commodity represents its own intrinsic or market value. A similar statute was before the Supreme Court of Montana in a recent case, and the decision of that court illustrates this distinction. There the statute read "for money, checks, credits or any representative of value, or for any property or thing whatever," and the court held that this language included cigars and tobacco, and in so holding said: "The enumeration includes every species of property of classes to which the particulars belong. 'Money' includes all money; 'checks' includes all kinds of articles embraced under that designation; 'credits' is a term of universal application to obligations due and to become due; and when we consider the expression 'any representative of value' there is nothing left of any of the classes of property enumerated; and unless the words 'any property or thing whatever' were designed to include merchandise such as cigars and similar articles, then it must be rejected as of no import whatever." State v. Woodman (Mont.) 67 Pac. 1120. It will be noted that the statute there construed was much stronger than ours. It not only contained the comprehensive language "any property or thing whatever," but it was far more emphatic, in this, that it included "any representative of value," and hence the maxim ejusdem generis could not apply. And yet no person reading the decision can doubt that if the words "any property or thing whatever" had been omitted the decision would have been the other way. And so it must be here, for had the Legislature intended to place the ban of the law on slot machines played for cigars or any other class of merchandise, the natural, ordinary common sense, and in fact the only way to do so, would have been to use the phrase "anything of value," or some similar and equally comprehensive expression. Not having done so, we cannot extend the scope of the statute by giving it a construction at variance with rules of law and the accepted and established meaning of words employed. If the legislative department of government desires to prohibit this character of gaming, that result may easily be accomplished; but until they do so, every citizen is entitled to immunity from punishment for acts which are neither mala in se nor mala prohibita.

I concur: CHIPMAN, P. J.

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7 Cal. Unrep. 309

Ex parte WILLIAMS. (Cr. 1,364.)

(Supreme Court of California. Sept. 25, 1906.)

COURTS—COURTS OF APPELLATE JURISDICTION —TRANSFER FROM DISTRICT COURT OF APPEAL TO SUPREME COURT.

The constitutional provision with reference to the transfer of a case from the District Court of Appeal to the Supreme Court has no application in matters of habeas corpus.

Application by C. C. Williams for a writ of habeas corpus for his discharge from imprisonment on conviction of an alleged criminal offense. The District Court of Appeal discharged petitioner. 87 Pac. 565. Application for an order transferring the cause to the Supreme Court for determination. Denied.

PER CURIAM. The application for an order transferring the above-entitled cause from the District Court of Appeal to the Supreme Court for hearing and determination after judgment in the said District Court of Appeal, is denied; a majority of the justices of this court being of the opinion that the constitutional provision with reference to the transfer of cases from the District Court of Appeal to the Supreme Court has no application in matters of habeas corpus.

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149 Cal. 722

HOYT v. HART. (Sac. 1,374, 1,454.)

(Supreme Court of California. Sept. 24, 1906. Rehearing Denied Oct. 23, 1906.)

1. Waters and Water Courses—Irrigation—Actions for Injuries—Judgment.

In a suit to restrain defendant from interfering with the waters of an irrigation ditch, and for damages for trespass on plaintiff's rights, it was found that the water to which plaintiff was entitled was only one-eighth of that flowing in the ditch, which one-eighth at no time exceeded 75 inches. She was awarded by the decree a right to carry her share of the water over defendant's land through the waterways in which she claimed a right to carry it. The decree permitted defendant to use the waterways without infringing plaintiff's rights, and he was restrained from reducing the same so that their carrying capacity would be less than 75 inches or from diminishing the supply of water to which plaintiff was entitled. *Held*, that there was no inconsistency between the portion of the decree declaring that plaintiff had an easement in the waterways and the portion which granted to defendant the right to use them jointly with plaintiff; the easement being a right to use the land of defendant for conducting the water to her own land.

2. Same.

In a suit to restrain defendant from interfering with the waters in an irrigation ditch, it was found that the water to which plaintiff was entitled was only one-eighth of that flowing in the ditch, which one-eighth at no time exceeded 75 inches. The decree awarded plaintiff a right to carry her share of the water over defendant's land through the waterways in which she claimed a right to carry it and gave defendant a right to use them subject to the proviso that he should not interfere with the flow to which plaintiff was entitled. *Held* that, if the waterways were reduced to a capacity of 75 inches, defendant would be entitled to use them only when plaintiff's one-eighth share of the waters of the ditch amounted to less than 75 inches, and then only to such extent as would not prevent plaintiff from receiving her full one-eighth share.

3. Trial—Adoption by Court of Verdict of Jury—Effect.

Where, in a suit to restrain a defendant from interfering with the waters of an irrigation ditch, and for damages for past interference, the issue raised by the allegation in the complaint and the denial in the answer that defendant trespassed on plaintiff's easement to his damage was determined by the verdict of the jury, and the court adopted the verdict, there was no necessity for any further finding by the court.

4. Same—Finding of Trial Court—Determination of Issues—Sufficiency.

Where, in a suit to restrain defendant from interfering with the waters in an irrigation ditch, plaintiff in his answer to the cross-complaint alleged a former judgment in his favor which declared plaintiff's title to an easement, consisting of the right to use waterways over defendant's land to take water from the ditch without determining whether defendant had a right to use the waterways, and the court awarded to plaintiff the easement claimed, the failure to find that the former judgment was in force did not affect plaintiff's rights.

5. Judgment—Pleading—Construction.

An allegation in a plea of a former judgment that it had been adjudged that plaintiff was the owner of a waterway across the lands of defendant, for the purpose of conveying water from an irrigation ditch, means no more than that plaintiff owned an easement to carry waters over defendant's land through a waterway.

6. Costs—Persons Entitled to.

A suit for damages for trespass to an easement to use a waterway over defendant's land to carry waters from an irrigation ditch, and for an injunction to restrain defendant from interfering with the waterway involves title to real estate within Code Civ. Proc. § 1022, subd. 5, declaring that costs are allowed to plaintiff on a judgment in his favor in an action involving title to real estate, and plaintiff, on obtaining a judgment, is entitled to costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 138.]

7. Same.

Code Civ. Proc. § 1022, subd. 5, declares that costs are allowed to plaintiff on a judgment in his favor in an action involving the title or possession of real estate. Plaintiff brought suit to restrain defendant from interfering with his easement to carry water from an irrigation ditch in waterways through defendant's land. Defendant filed a cross-complaint, asking the court to divide the waters of the ditch according to the rights of the parties. The decree determined the rights of the parties. *Held*, that it was not error to divide the costs between the parties where it did not appear what portion of the costs was properly attributable to the trial of the original action and what portion to the trial of the cross-action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 272, 274.]

8. Appeal — Errors in Judgment — Correction.

The error in a judgment in a suit asking for an injunction, and for damages which omits to give plaintiff judgment for $1 damages awarded by the jury is too trifling to require a modification.

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Elizabeth Hoyt against E. C. Hart. From a judgment granting insufficient relief, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

R. S. Taylor, for appellant. Gillis & Tapscott and James F. Farraher, for respondent.

SLOSS, J. The plaintiff prosecutes two separate appeals; one from the judgment, and one from an order denying a motion for new trial. Both may be considered in a single opinion.

The plaintiff and the defendant are owners of adjoining tracts of agricultural land in Siskiyou county, the plaintiff's holding lying to the west of the defendant's. On the easterly side of the defendant's land there runs an irrigating ditch, variously designated in the record as the "Miller, Hoyt, and Casedy Ditch" and as the "Burgess Ditch," and each of the parties claims an interest in a portion of the waters flowing through it. The complaint alleges that the plaintiff is the owner of 200 inches, measured under a four-inch pressure, of the waters flowing through such ditch, which is stated to have a capacity of 800 inches. It is alleged that for 40 years the plaintiff and her predecessors have conducted their share of the waters of the Burgess ditch over the lands of the defendant through a certain ditch and waterway, the course of which is described, and that they have so conducted such waters continuously, adversely, and under a claim of right. The complaint further sets forth that in May and June, 1903, while the plaintiff was on defendant's land, cleaning out the ditches and waterways connecting with her land, the defendant drove off her workmen, and filled up the ditches, to her damage in the sum of $2,000. The prayer is for judgment for the damage sustained, and for an injunction restraining the defendant from preventing plaintiff from entering upon his lands and cleaning out the ditches across the same, and restraining the defendant from filling up said ditches or interfering with the flow of plaintiff's waters therein. A temporary injunction, restraining these acts was granted. The answer denies that the Burgess ditch is capable of carrying more than 600 inches of water, denies that plaintiff is the owner of 200 inches of the water carried in it, and alleges that the Burgess ditch does not carry a steady and uniform flow of water, and that its owners are entitled, not to a definite or fixed amount measured in inches, but only to a certain proportion of the water flowing in said ditch, the plaintiff's share being one-eighth of such water. It is alleged that the defendant owns five-eighths of the water flowing through the Burgess ditch, and that he has an interest in the other two-eighths, subject to the right of C. Henry Haight to first use them for irrigating his lands. The answer denies that plaintiff has received her share of the water through any defined channel or water course across his lands, but asserts that he, the defendant, has used certain ditches to spread water from the Burgess ditch over his own property, and that plaintiff's water has come to her partly through these ditches, and partly by overflow on the surface of the soil. The defendant alleges, further, that plaintiff had come upon his land and torn out of his ditches a number of dams and gates, and had dug new ditches, deepened the old ones and so prevented defendant from using his irrigating system. The plaintiff's allegation of damage is denied. In a cross-complaint the defendant sets up substantially the same matters pleaded in the answer, asks that the court divide the waters of the Burgess ditch according to the rights of the parties, that plaintiff be required to conduct her waters by a route to be directed by the court, outside of defendant's irrigated premises, and that plaintiff be enjoined from interfering with defendant's dams or ditches. Plaintiff's answer to the cross-complaint asserts that the Burgess ditch has a capacity of 1,600 inches, denies the commission of the wrongful acts charged against her in the cross-complaint, and sets up a prior judgment by which it was determined that the plaintiff was the owner of a ditch and waterway across the lands of defendant for the purpose of conveying her waters through said lands of defendant. This judgment is asserted as an estoppel precluding defendant from asserting that plaintiff is not the owner of said ditch and waterway. By order of the court, C. Henry Haight was brought in as a party, and filed a pleading asserting a claim to two-eighths of the water of the Burgess ditch. As his rights are not here in dispute, they need not be further considered. The cause was tried before a jury, which returned a general verdict in favor of the plaintiff, assessing her damages at $1, and in addition, specially found as follows: "(1) We find that Mrs. Hoyt owns one-eighth of the Miller, Hoyt, and Casedy ditch. (2) The said one-eighth to be delivered over the premises of E. C. Hart and through what is known as the 'B ditch.' (3) Water to be measured at the point taken from the Miller, Hoyt, and Casedy ditch between one foot and 100 feet north of where the back ditch leaves the Miller, Hoyt, and Casedy ditch. (4) Measuring box to be placed in the west end of the B ditch between one foot and 100 feet from the fence or Hoyt line. (5) Mrs. Hoyt to pay one-eighth of the expense for keeping up the said waterway and not to interfere in any way with the irrigating water system of the defendant." The court made its findings of fact, in which it set forth the foregoing verdict and special findings of the jury, and, as it recites, "after fully considering the verdict and findings of the jury," it found that the full capacity of the Burgess ditch is not more than 600 inches, that the water actually carried in it during the irrigating season varies from time to time, at times getting as low as from 40 to 60 inches; that the plaintiff and her predecessors owned an undivided one-eighth of these waters, and the defendant Hart five-eighths, Haight having a first right to the remaining two-eighths, that plaintiff's proportion at no time exceeds 75 inches; that plaintiff and her predecessors have for many years conducted their one-eighth part of the waters of the Burgess ditch over defendant's land through ditches and waterways in a described course, that since the commencement of the action the plaintiff has materially enlarged and deepened one of the ditches running through defendant's land, and has torn out defendant's dams and turnouts, that said ditch has been so enlarged that stock cannot cross it safely, and wagons or farming machinery cannot be driven over it, that these operations have prevented defendant from using for irrigation his share of the waters. It is found that these ditches through defendant's land were constructed by him and his predecessors, and that for 40 years said ditches have been used for irrigating the Hart premises. Following these findings, there was a decree or judgment, which after setting forth the rights of the parties to the waters of the Burgess ditch, and the plaintiff's easement over the premises of the defendant, Hart, as described in the findings, declares that said easement of plaintiff is held by her in common with defendant, Hart, "and he has the right to conduct his waters through said ditches, etc., jointly with plaintiff and to the extent hereinafter specified." The decree then provides for a division of the waters of the Burgess ditch by means of a dividing box, and enjoins the defendant Hart from damming or filling up the ditches in which plaintiff has an easement so as to reduce their carrying capacity to less than 75 inches, "or from in any way or manner interfering with or arresting or diminishing the flow of water therein to which the plaintiff, Elizabeth Hoyt, is at any time entitled to have and receive as her proportionate share of the waters of said Burgess ditch; Provided, however, that said defendant, Hart" shall be permitted to fill up said ditches so that they shall be as they were before plaintiff deepened them, and to use said ditches, in common with plaintiff for carrying his own waters "provided, however, that he at no time prevents the one-eighth of the waters of the said Burgess * * * ditch from flowing down through said ditches." The plaintiff is by the decree enjoined from interfering with Hart's premises or his irrigating system except for the purpose of cleaning out and repairing the ditches and waterways in which she has an easement. The costs are evenly divided between the parties, and judgment is given to plaintiff for $23.60, the excess of her costs, as taxed, over one-half of the costs of both.

It has seemed necessary to make this somewhat extended statement of the pleadings, and the proceedings culminating in the decree, in order that the points made by the plaintiff on her appeals may be clearly set forth and discussed. The appellant's principal objection is directed against the provisions of the decree which declare her right to an easement across defendant's land. It is claimed that the decree, in authorizing the defendant to use the ditches running over his land in common with the plaintiff, deprives the plaintiff of the fixed and definite easement claimed by her. But we fail to see that these provisions of the decree fall short in any degree of securing to the appellant her full rights. It having been found that the water to which she is entitled is only one-eighth of that flowing in the Burgess ditch, and that this one-eighth at no time exceeds 75 inches, she is awarded by the decree a right to carry her share of the water over the defendant's land through the ditches and waterways in which she has claimed a right to carry it. It is true that defendant is also permitted to use these waterways, but his use can never, under the terms of the decree, infringe upon her rights. He is restrained from reducing these ditches so that their carrying capacity will be less than 75 inches, or from diminishing the flow of waters to which plaintiff is entitled, and his right to use the ditches is expressly made subject to the proviso that he at no time prevents plaintiff's one-eighth of the waters of the Burgess ditch from flowing through the connecting ditches. There is no inconsistency between the portion of the decree declaring that plaintiff has an easement in these ditches, and that portion which grants to defendant the right to use the ditches jointly with plaintiff for the purpose of carrying his waters. The easement is a right to use the lands of the defendant for conducting her waters to her lands. It can coexist with a right in the defendant or any one else to use the same waterways, so long as such use does not restrict or interfere with the right owned by the plaintiff. It would not be claimed that merely because A. has a right of way over B.'s land, B. cannot, under any circumstances, use the portion of his land affected by the easement in a manner which does not infringe upon the exercise of such easement. It is well settled, as a general proposition, that the owner of the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement. "Thus in a case of a way the owner of the servient estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way. He may himself use it as a way * * * unless the rights of the owner of the easement are exclusive." 14 Cyc. 1208, and cases cited. In the case at bar there is no allegation that the plaintiff's right was exclusive. The court found, and the evidence fully supported the finding, that for 40 years the defendant and his grantors had used these ditches as a portion of the irrigating system of the Hart lands. This finding, which was within the issues, necessarily called for the adjudication that Hart might continue to use these ditches, provided that he so used them as not to interfere with plaintiff's right. It is suggested that as defendant is permitted to reduce the capacity of the ditches to 75 inches, and to use them in common with plaintiff, the plaintiff may be restricted to one-half of the capacity of a ditch which, when full, is only large enough to accommodate the flow to which she is entitled, viz., 75 inches. In answer to this, it is sufficient to say that defendant's right to use the ditches is always subject to the proviso that he shall not interfere with the flow to which plaintiff is entitled. If the ditches be reduced to a capacity of 75 inches, defendant will be entitled to use them only when plaintiff's one-eighth share of the waters of the Burgess ditch amounts to less than 75 inches, and then only to such extent as will not prevent plaintiff from receiving her full one-eighth share.

There is no force in the contention that the court failed to find upon material issues. The issue raised by the allegation (and denial) that defendant trespassed upon plaintiff's easement, to her damage, is determined by the verdict of the jury, which, from the findings and the judgment, appears to have been adopted and accepted by the court. Such adoption obviated the necessity of any further finding. Goldman v. Rogers, 85 Cal. 578, 24 Pac. 782; Morrison v. Stone, 103 Cal. 94, 37 Pac. 142. There is no finding upon the issue tendered by the answer to the cross-complaint, alleging a former judgment in favor of plaintiff, but the absence of such finding is immaterial. Plaintiff relied upon this judgment merely for the purpose of establishing her right to an easement for conveying her water across defendant's land. She has been awarded the easement claimed, and would be entitled to no greater rights if the court had expressly found that such easement had been established in her favor by a prior judgment. As we have seen, plaintiff's ownership of an easement over defendant's land is in no degree inconsistent with the use, by defendant, of the servient tenement, so long as such use is subordinate to the easement and does not restrict or limit its exercise. The former judgment declaring plaintiff's title to such easement did not purport to determine whether or not defendant had a right to use the ditches. It merely determined that plaintiff had a certain right in them. This right is secured to her by the present decree. A finding that the former judgment was in force would not have entitled her to any greater relief than she received. The absence of such finding cannot therefore affect the judgment now complained of. Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213. In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a "ditch and waterway" across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such we think is the proper construction of the language quoted. For reasons above stated, it is of no importance that the court did not find that defendant threatened to continue to commit the acts complained of. The purpose of the allegation to this effect was to entitle plaintiff to an injunction restraining such acts, and this relief was granted her.

The appellant contends that the court erred in dividing the costs between the parties. The general rule is undoubtedly that in suits in equity the costs may be apportioned according to the discretion of the court. But the rule has been modified in this state by statutory provisions regulating the allowance of costs. Section 1022 of the Code of Civil Procedure declares that "costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases: * * * (5) In an action which involves the title or possession of real estate. * * *" We think this action, in which the main issue was whether or not the plaintiff was the owner of an easement over defendant's land involved the "title or possession to real estate" within the meaning of this section. An easement is real estate; and its possession or title is involved in an action seeking damages for past trespasses and a restraint against future trespasses upon such easement, where the defendant puts in issue the existence of the easement. Many cases holding that such actions come within the terms of similar statutes are cited in 11 Cyc. 49, 50, and the same result must follow from the former adjudications of this court. Schmidt v. Klotz, 130 Cal. 224, 62 Pac. 470; Sierra Union, etc., Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038; Gibson v. Hammang, 145 Cal. 454, 78 Pac. 953. See, also, Kelly v. Central Pac. R. R. Co., 74 Cal. 565, 16 Pac. 386, 5 Am. St. Rep. 470. And, if the action involves the title or possession of real estate, it is immaterial what the form of action may be, or whether the relief sought is, in whole or in part, equitable. If the plaintiff recovers, even though only as to a portion of the title or possession involved, the right to costs follows of course under the terms of the statute. Sierra Co. v. Wolff, supra; Gibson v. Hammang, supra. So far, therefore, as concerned the trial of the issues arising on the complaint and the answer thereto, the plaintiff, having prevailed, was entitled to costs. But there was also a cross-complaint, involving, in like manner, the title or possession of real estate. As to this, the defendant was plaintiff, and he succeeded in establishing, in part, the right claimed, and was granted relief. If the questions raised by the cross-complaint and the answer thereto had been litigated in a separate action, the defendant herein, who would have been plaintiff in such action, would have been entitled to his costs. We think his right thereto is not affected by the fact that he prosecuted his claim as plaintiff in a cross-complaint. On the record before us, it does not appear what portion of the total costs were properly attributable to the trial of the original action, and what portion to the trial of the cross-action. So far as we can see, the division of the costs made by the court may have resulted in giving to each of the parties the exact amount of costs which he or she had the right to recover. Error will never be presumed, but must be made to affirmatively appear, and this court cannot say that any right of the plaintiff was injuriously affected by the apportionment of costs directed by the judgment.

The decree, probably through inadvertence, omits to give plaintiff judgment for the $1 damages awarded her by the verdict of the jury. This oversight we regard as too trifling to require even a modification of the judgment.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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149 Cal. 712

In re CAMPBELL'S ESTATE. (L. A. 1,791.)

CAMPBELL v. CAMPBELL et al.

(Supreme Court of California. Sept. 21, 1906.)

1. WILLS—CREATION OF TRUST.

A will authorized the executrix to sell any property of the estate at public or private sale, with or without notice and without any order of court, but directed that different pieces of property should be held for certain prices, until the testator's daughter should arrive at the age of 21 years, or, in case of her death before that time, until she would have arrived at that age if she survived, unless said property were sold before that time at the prices stated. It further provided that when said daughter arrived at the age of 21 years, or would arrive at such age, then all of such properties that might be undisposed of at that time should be disposed of by the executrix for the best price obtainable, and the proceeds divided as specially directed. It further provided for the division of the proceeds of the property. *Held*, that the power to sell was a naked power, not coupled with an interest, and therefore no trust was created.

2. PERPETUITIES — POWER OF ALIENATION — SUSPENSION.

A will, authorizing the executrix to sell any of the property of the estate at public or private sale, with or without notice, and without any order from the court, but directing that different pieces of property should be held for certain prices until testator's daughter should arrive at the age of 21 years, or, in case of her death before that time, until she would have arrived at the age of 21 years if she had survived, merely enlarged the legal power of the executrix so that she could sell without previous authority, the condition being a limitation solely upon the express power of sale given by the will, and it did not apply to or restrict the statutory powers of the executrix to sell under an order of court whenever it should be necessary, and it was not in violation of Civ. Code, §§ 715, 716, prohibiting the suspension of the absolute power of alienation of property for a period longer than the lives of persons in being at the testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

3. SAME.

A will, authorizing the executrix to sell any of the property at public or private sale, with or without notice, and without any order of the court, and directing that the property should be held for a certain price until the testator's daughter should arrive at the age of 21 years, or, in case of her death, before that time, until she would have arrived at that age, unless the property was sold before that time at prices stated, did not suspend or affect the power of the legatees or beneficiaries to alienate their respective interests, within Civ. Code, §§ 715, 716, prohibiting the suspension of the absolute power of alienation of property for a period longer than the lives of persons in being at the testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

4. SAME.

Where no trust is created and the legal effect of a will is to vest the present title to the entire fee in persons ascertained and in being, although different interests or rights therein are given to each of such persons, the interest of each person can be conveyed immediately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

5. SAME.

Civ. Code, §§ 715 and 716, prohibiting the suspension of the absolute power of alienation of property for a period longer than the lives of persons in being, relate to suspension of power by the terms of the instrument by which the estate is created, and the fact that some of the interested persons are minors, incapable of executing a valid conveyance, except by the intervention of the court, does not bring the case within the prohibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 45.]

6. WILLS — INTERESTS CREATED — VESTED ESTATES.

A will authorized the executrix to sell any of the property of the estate without any order from the court, but directed that it should be held for certain prices until the testator's daughter should arrive at the age of 21 years, or, in case of her death before that time, until she would have arrived at that age if she had survived. It further provided that the money received after the testator's death from each of the groups of properties mentioned, either from payments made after his death upon sales made by him before death or from sales made after his death should "be divided and paid over as follows:" Of the first $600,000, four-sixths to three of his children, one-sixth to another son, and one-sixth to his nephew; of the next $200,000, one-half to certain nephews and nieces, and one-half to a university; the next $100,000 was bequeathed to the testator's wife, and the remainder was given to his wife in trust for their three children. *Held*, that the interests created by the will were vested estates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1464, 1470, 1471.]

7. JUDGMENTS — FOREIGN JUDGMENTS — CONSTRUCTION OF WILL—CONCLUSIVENESS.

A judgment of a court of another state in ancillary administration proceedings, distributing the proceeds of property in that state, is of no binding force as a general judicial construction of the will to be applied and enforced in this state in the administration of assets within the jurisdiction of its courts.

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Charles Rufus Campbell against Eleanor Campbell, and others. From the judgment rendered, certain defendants appeal. Reversed.

Hayden & Hayden, Crane & Woodburn Bros., and Miguel Estudillo, for appellants. A. H. Stuttsman, Collier & Carnahan, and Purrington & Adair, for respondent.

SHAW, J. This is a proceeding under section 1664 of the Code of Civil Procedure to obtain a decree declaring the succession to the estate of Allen G. Campbell, deceased. The court below held that certain provisions of the will of the deceased, purporting to dispose of a large part of the estate, operated to suspend the absolute power of alienation of the property for a period longer than the lives of persons in being at his death, that they were, therefore, contrary to sections 715 and 716 of the Civil Code and void, and that, in consequence, he died intestate as to this property and that it descended to his legal heirs. The soundness of this conclusion is the particular question in the case. The appellants are beneficiaries claiming under the provisions of the will thus declared to be inoperative. By the terms of the will the executrix was authorized to sell any property of the estate, at public or private sale, with or without notice, and without any order from the court. The provisions in controversy are as follows:

"Item 8. I hereby direct that all my coal and iron mines, situate in Iron county, Utah, shall be held for the price of $300,000: that all my lead, silver and gold mines, situate in Beaver county, Utah, shall be held for the price of $150,000; that all my now patented lead, silver, gold and copper mines, situate in Yellow Pine Mining District, Lincoln county, Nevada, be held for the price of $200,000, and my Brick Consolidated Gold Mines, situate in Vanderbilt Mining District, San Bernardino county, California, be held for the price of $500,000 until my said daughter Caroline Neil Campbell shall arrive at the age of twenty-one years, or in case of her death before that time, until she would have arrived at the age of twenty-one years if she had survived, unless said properties are sold before that time at the prices herein stipulated; and said properties as groups, shall be sold, separately or together, when the price herein mentioned or more can be obtained.

"Item 9. When my said daughter, Caroline, arrives at the age of twenty-one years, or would arrive at such age, then all of such properties that may be undisposed of at that time my said executrix shall dispose of, for the best price obtainable and divide the proceeds as hereinafter specially directed. In no case, however, shall such bequests be paid unless derived from the proceeds of such properties as herein mentioned, and the bequests shall be paid fully in the order herein mentioned."

It was further provided by item 12 that the money received after the testator's death from each of the groups of properties mentioned in item 8, either from payments made after his death upon sales made by him before death, or from sales made after his death, should "be divided and paid over as follows": of the first $600,000, four-sixths to his three children by his wife Eleanor, one-sixth to his son, Charles Rufus, and one-sixth to his nephew, William B. Stanley; of the next $200,000, one-half to certain nephews and nieces and one-half to Campbell University. By item 13 the next $100,000 of such money was bequeathed to his wife Eleanor, and by items 14 and 4, taken together, the remainder, and all other property not otherwise specifically disposed of, was given to his wife, in trust for their three children, to be held by her for their use until his daughter Caroline reached the age of 21 years. Caroline was born in October, 1898, and, hence, will not be 21 years of age until October 1919. It is claimed that the effect of these provisions of the will is to prevent an absolute disposition of the property until after the latter date, unless in the meantime, it can be sold at the prices fixed in the will. We cannot accede to this proposition.

The will does not devise the lands to the executrix in trust with power to sell in execution of such trust, nor create any trust in her, except such as pertains to her office as executrix (Bank v. Rice, 143 Cal. 272, 76 Pac. 1020), nor does it, with relation to the supposed suspension of power, create any trust in the land in question here. No estate or property whatever is given to the executrix, and without an estate as its subject there can be no trust. The power to sell is given to the executrix in her representative capacity, and is a naked power not coupled with an interest. Estate of Delany, 49 Cal. 85; Auguisola v. Arnaz, 51 Cal. 435; Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091; Bank v. Rice, supra; Chaplin on Suspension of Power of Alienation, § 96. The only effect of conferring such a power by will is to enlarge the legal power of the executrix so that she can sell without previous authority from the court, although not without subsequent confirmation. The condition that, prior to October 1919, such sales shall not be made unless certain prices are obtained, is a limitation solely upon the express power of sale given by the will to the executrix. It does not and could not apply to or restrict the statutory powers of the executrix to sell under an order of the court whenever it is shown to be necessary to sell, or beneficial to the persons interested in the estate to do so. Estate of Pforr, 144 Cal. 126, 77 Pac. 825. Nor does it suspend or affect the power of the legatees or beneficiaries of the fund to be created under the will, to alienate their respective interests in the fund. It does not purport to operate in any manner upon the interests of the beneficiaries and, therefore, they are left free to dispose of their rights and interests in any lawful mode. The giving of this power of sale with the limitation annexed suspending its full exercise for any period, is not that character of suspension of the absolute power of alienation which is forbidden by the Code. The prohibition of the Code is directed toward the suspension of the power when exercised by those who hold or control the estate, or some interest therein, and not to provisions limiting the naked power to sell given to one without any interest whatever, such as an executor or agent. The testator was at liberty to either give or withhold the special power to sell, and if given, to attach to it such limitations as he saw fit. But in whatever form he chose to leave it, it would not affect the general power of alienation of the estate, either by the executrix under order of the court, or by the persons to whom the property was given. If there is any infraction of the rule forbidding such suspension, it does not arise from the limitation upon the power of the executrix to sell.

The contention of the respondents appears to be that the disposition of the property made by the will, is of such a character that it of necessity prevents the alienation thereof by the persons interested, except for the fixed prices, until after October, 1919. This proposition assumes, either that, during this period, there can be no alienation except by the executrix under the power given in the will, or that the persons in whom the estate vests at the death of the testator are deprived of such power during the said period. We think this proposition is not maintainable. The property of a decedent vests immediately upon his death, either in his heirs, or in the devisees and legatees. Civ. Code, §§ 1341, 1384; Estep v. Armstrong, supra; Estate of Delany, supra. When property is vested, without valid limitations to the contrary, the power of alienation goes with it as a concomitant of ownership. Chaplin on Suspension, § 61, note 2; Williams v. Williams, 73 Cal. 102, 14 Pac. 394; Toland v. Toland, 123 Cal. 143, 55 Pac. 681; In re Winter, 114 Cal. 188, 45 Pac. 1063. If the will vests in any person the present title to any interest or estate, other than in trust, a provision directly or indirectly restraining such person from alienating it, would be repugnant to the particular interest created, and, consequently, void. Civ. Code, § 711. Hence, since there is no trust created, if the legal effect of the will is to vest the present title to the entire fee in persons ascertained and in being, although different interests or rights therein are given to each of such persons, the interest of each person can be conveyed immediately and the collective transfers of all the interested persons will convey the absolute fee. The power of alienation is not suspended, when there are persons in being by whom an absolute interest in possession can be conveyed. Civ. Code, § 716. Such conveyance may be consummated either by the joint act of all, or by the separate and independent conveyances of the several persons seised of the interests. "Whenever there is in being a representative for each estate, interest, right and possibility, present and future, vested and contingent, each capable of alienating—if he wishes—the estate or interest represented by him, there can be no suspension. For the various estates and interests constitute amongst them the makings of an absolute fee; and if by releases or conveyances to a common grantee, these can be consolidated in one, the consolidated estate thus formed is, of necessity, an absolute fee in possession." Chaplin on Suspension, § 64; Gray on Perpetuities, § 274. The limitation upon the power of sale given to the executrix does not affect this rule in the least, for the executrix, as we have seen, has not, in her representative capacity, any interest in the property, but only a naked power. The fact that some of the interested persons are minors, incapable of executing a valid conveyance except by the intervention of the court, does not bring the case within the prohibition. The suspension of power as to the minors' interests, in such a case, would not be made by the will, but by the law. The prohibition is against those limitations upon the power of alienation which may be imposed by dispositions of property, and not against limitations made by the law upon the capacity to convey. "The suspension of the power of alienation which is prohibited by statute is such as arises from the terms of the instrument by which the estate is created, and not such as exists outside of that instrument, as a disability of a person in whom an interest is vested, or the delay incident to procuring an order of court for the sale or its confirmation." Estate of Pforr, 144 Cal. 121, 77 Pac. 825. "The suspension must be by virtue of some provision in the instrument by which the limitation, condition, or estate is created, and the power is not suspended by a mere direction in the instrument to make a sale or other alienation of the land after a designated period of time." Toland v. Toland, 123 Cal. 143, 55 Pac. 681.

It cannot be doubted that the interests created by the will in the property of the estate are all vested interests. No specific disposition is made of the rents, issues, proceeds, or profits of the mines mentioned in item 8, which may accrue during the time between the death of the testator, and the sale of the property. The funds arising from these, therefore, fall into the residue disposed of by items 4 and 14, and the right thereto is thereby vested in the wife as trustee for the designated children. The respective rights of the several legatees in the proceeds of the lands when sold, although such shares of the proceeds cannot be received, nor the actual sum payable to each ascertained, until the sales are made, are nevertheless interests which vested upon the death of the testator, the enjoyment, only, being postponed until the fund out of which payment was to be made should be realized. The fact that as to those entitled after the legacies to the children and the nephew were satisfied, it could not be ascertained whether or not they would receive anything until sufficient sales should be made to satisfy the prior charges, does not prevent the vesting of those interests in like manner. The right to the shares vested immediately, subject only to be defeated by the failure of the property to produce sufficient funds wherewith to pay them. "It may be laid down as a general rule that where, by a will, shares or interests in real or personal estate, to be ascertained by a division, are given, or where the real estate is directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee in the property to be divided or converted is a vested interest before the conversion or division, and that limitations over to take effect in case of the death of those first designated prior to the division or sale must be held to refer to the time appointed for the division or sale, and not to the period of their completion, unless the language of the will clearly and unequivocally expressed an intention that the vesting shall be postponed until such completion. * * *" "A similar rule is applied to gifts of shares or legacies to be paid out of a fund or surplus to be collected in or ascertained and divided; and in those cases the interests of the legatees are held to vest absolutely before the fund is collected, or the surplus ascertained, or division actually made. * * * The uncertainty as to the shares is no obstacle to such a vesting; a vested estate can exist in an undivided share, as well as in a specific piece of land; and it is not necessary that the share should be ascertained by separation, provided the rule for its ascertainment is established." Manice v. Manice, 43 N. Y. 303; Hone's Executrix v. Van Schaick, 20 Wend. (N. Y.) 564; Wetherhead v. Stoddard, 58 Vt. 632, 5 Atl. 517, 56 Am. Rep. 573; Robert v. Carning, 89 N. Y. 225; Henderson v. Henderson, 113 N. Y. 1, 20 N. E. 814; Millard's Appeal, 87 Pa. St. 457; In re Winter, 114 Cal. 188, 45 Pac. 1063.

The bequest of the six shares to the children and nephew is not made to them as a class, as was the case in Estate of Winter, 114 Cal. 186, 45 Pac. 1063, but to each severally. Nor is the right to share in the fund contingent, as in that case, upon survival until division take place. The language of the opinions in Estate of Walkerly, 108 Cal. 644, 41 Pac. 772, 49 Am. St. Rep. 97, and Estate of Caverly, 119 Cal. 409, 51 Pac. 629, was used with reference to the fact, apparent in those cases, that by the terms of the instruments there under consideration a trust was created in fee which was vested in trustees absolutely for that purpose, and such trustees were, by the terms of the trust, forbidden to convey within a certain prescribed period, and, consequently, during that time there were no persons who could convey the present estate. Those cases are distinguished from the present case by the fact that in this case no trust has been created, and the interests all vest in persons who can convey immediately. These respective interests in the proceeds of the contemplated sales, thus vested in the beneficiaries, coupled with the right vested in the wife as trustee to receive the intervening rents or mining proceeds, constitute the entire beneficial interest and estate in the lands. If there remains any other existing estate, right, title, or interest therein, legal or equitable, therein remaining, it is the barren, formal, legal title for so long a time as may elapse between the death of the testator and the sale. Bank v. Rice, 143 Cal. 271, 76 Pac. 1020. No disposition appears to have been made of this formal title, unless it is included in the residue given to the wife in trust. It is not necessary to determine what has become of it, for, in any case, it is vested, and the will does not directly or indirectly forbid or prevent a transfer of it by the persons in whom it is vested, whether it be in the wife as trustee, in the heirs at law, or in the beneficiaries. All the interests being vested, there being no valid attempt to forbid any persons seised of any particular interests or estates from conveying the same, and the persons in whom they are vested being ascertained, it follows, under the rules we have stated, that a present alienation of the absolute fee is at any time possible, and hence, that there is no invalidity in the portions of the will attacked.

We have, so far, treated the case upon the assumption that the disposition of the residue of the estate to the wife, in trust for the three designated children, is valid. It is contended that it is void because it leaves no power of disposition of the corpus of such residue in any person in being until the time when the child Caroline arrives at the age of 21 years. We do not wish to be understood as expressing any opinion upon the validity of this part of the will. The appellants herein are not interested in the residue, and the validity of the disposition made of it does not affect the validity of their specific legacies, and is not involved in the case as presented on this appeal. If it is invalid, the residue may go absolutely to the legal heirs, but whether so or not, the appellants will first be entitled to receive their respective special bequests or devises. What becomes of the residue after they are paid, is of no importance to them so far as the legacies are concerned.

In view of the necessity of reversing the judgment appealed from, and the possibility of another trial, we find it necessary to consider another point presented in the record. The testator was, at the time of his death, domiciled in Riverside county, in this state, and the will was there first probated. Subsequently, the will was admitted to probate in the state of Utah and ancillary administration was had there through an administrator with the will annexed, appointed by the courts of that state, in which a large part of the land involved in the controversy is situated. The administrator with the will annexed reported to the courts of that state a sale of some of the property there situated, made by him without any order of the court and at a price much less than that fixed by the will, and, of course, within the prohibited period. By regular proceedings for that purpose in the courts of that state, the sale was confirmed. Afterwards, under a decree of the Utah court, regularly made, a distribution was ordered to be made of the net proceeds of this sale to the three children, son and nephew, named in the first clause of item 12 of the will, and the sums distributed were paid to the several persons accordingly. It is now claimed by the appellants that this judgment of the Utah court is a conclusive adjudication of the validity of the provisions of the will here involved, binding not only upon the courts of Utah, but also upon the courts of this state and upon all the persons concerned in the estate anywhere, and that it determines, in effect, that the power of sale given to the executrix may be exercised by an administrator with the will annexed, and that it may be exercised by him without regard to the prices fixed in the will and at any time within the forbidden period. To this proposition we cannot agree. The judgment of the Utah court doubtless is conclusive as to the land sold, and as to the proceeds distributed under it. Possibly it may be binding as to future sales in that state, and as to the construction of the will with respect to property in that state, but upon this point we express no opinion. We are satisfied, however, that it is of no binding force as a general judicial construction of the will to be applied and enforced in this state in the administration of assets within the jurisdiction of the courts. It does not constitute an estoppel against the respondents in the case at bar.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

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149 Cal. 687

JONES et al. v. GUNN et al. (Sac. 1,261.)

(Supreme Court of California. Sept. 17, 1906.)

1. Homestead—Acquisition—Declaration—Description of Property—Sufficiency.

Under Civ. Code, § 1263, providing that the declaration of homestead must contain a description of the premises, a declaration of homestead which describes the land as "lying in B. county * * * being with other land * * * [describing land in a designated township] and all lands owned by" the husband of the declarant "in said township" is insufficient for failing to describe all the land claimed as a homestead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 61.]

2. Same—Allegation of Value.

Civ. Code, § 1263, provides that a declaration of homestead must contain an estimate of the actual cash value of the premises claimed. A declaration of homestead claimed as a homestead other lands than those definitely described. The declarant estimated the actual cash value of "said property" to be a specified sum. *Held* that, as the estimate of the value was, not of the premises described, but of the property claimed as a homestead, there was no estimate of value as required by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 61.]

3. Process—Proof of Service—Parol Evidence—Admissibility.

Where a judgment roll containing an unsigned return of service on defendant in the suit is offered in evidence, parol evidence of actual service of process on defendant therein is admissible, for the court acquired jurisdiction of defendant therein by the service of process and did not lose it by a neglect to make proof of the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 200.]

4. Judgment—Opening and Vacating—Irregularities.

Code Civ. Proc. § 581, subd. 7, requiring the dismissal of an action on failure of plaintiff to cause the summons to be returned with proof of service within three years after the commencement of the action, etc., applies to actions which are untried, and not to actions which have gone to judgment, and a judgment rendered against a defendant regularly served with process will not be set aside because there is on file no proof of service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 686, 697.]

Department 2. Appeal from Superior Court, Butte County; H. M. Albery, Judge.

Action by T. B. Jones and another against E. Gunn and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Maguire & Gallagher, for appellants. Warren Sexton and F. C. Lusk, for respondents.

HENSHAW, J. This action was brought by plaintiff T. B. Jones and his wife, Mary Jones, to quiet title to certain lands described in their complaint. Defendants joined issue upon the allegations of the complaint, asserting title in themselves under mortgage foreclosure proceedings and by adverse possession. Judgment passed for them, and plaintiffs appeal.

The undisputed facts are that Jones executed a mortgage upon the land to secure the repayment of $1,950. The mortgage was foreclosed, judgment was entered in favor of the mortgagee, an order of sale issued, the property sold, a certificate of sale given, and the sheriff's deed of the property executed and delivered in due course on February 12, 1891. On August 20, 1891, the defendants, claiming under this deed, entered into possession of the property, and the court found that they had remained in adverse possession of it ever since. While the sufficiency of their adverse possession is disputed, it is not questioned that, during all the time subsequent to the date of the deed, they have paid all taxes levied and assessed on the land. In 1899 the plaintiff Mary Jones forcibly entered upon the possession of a dwelling house upon the premises, and immediately thereafter brought this action to quiet title. Her contention has its foundation in the following facts: That, subsequent to the giving of the mortgage, she filed a good and sufficient claim of homestead upon the land in question; that in the foreclosure proceedings she was not made a party defendant; and that her homestead claim is still valid and subsisting. To foreclose the homestead right of the wife it was, of course, necessary that she should have been made a party, and it is unquestioned that this was not done. If, however, her claim of homestead was itself invalid, this omission was without significance. The homestead claim filed by the wife was admitted in evidence, subject to the determination by the trial court of its legal sufficiency and validity, and the court decided that it was invalid. It expressed its views in an opinion, the clearness and cogency of which leave nothing to be desired, for which reason that opinion is here set forth at length and adopted.

"I also incline to the opinion that no valid declaration of homestead was filed by the plaintiff Mary J. Jones. While it is true that homestead and exemption laws are remedial, and, generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction. Indeed, the Supreme Court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements as (formerly) to wife's acknowledgment (Beck v. Soward, 76 Cal. 530, 18 Pac. 650); as to head of family (Reid v. Englehart-Davidson Mercantile Co., 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206); as to residence on premises (Boreham v. Byrne, 83 Cal. 27, 23 Pac. 212); as to statement of husband's failure to make declaration (Cunha v. Hughes, 122 Cal. 113, 54 Pac. 535, 68 Am. St. Rep. 27) and as to estimate of the actual cash value of the premises, etc., Tappendorff v. Moranda, 134 Cal. 421, 66 Pac. 491. See, generally, cases cited in notes to sections 1237 and 1263, Civ. Code, Pomeroy's Edition. These requirements must all appear upon the face of the declaration, and the omission of any one of them from the declaration is fatal to the claim of homestead, and cannot be supplied by extraneous evidence. 126 Cal. 529. 58 Pac. 1063, 77 Am. St. Rep. 206.

"Section 1263, Civ. Code, by separate subdivision, provides that the declaration must contain a description of the premises, and this provision would seem to be as mandatory as any of the other provisions of said section. True, the declaration before us contains a description of premises, but does it contain a description of the premises claimed therein as a homestead? The declarant states that the land and premises on which she resided are described as follows: Lying in Butte county '* * * being with other land, * * * [describing land in sec. 30, tp. 22 N., R. 4 E.] and all lands owned by T. B. Jones in said township.' Is this not a statement that the declarent claims as homestead lands not specifically described? And is it a statement that she (declarant) claims the lands which are definitely described? The statement is, not that the described lands are claimed, but that they, with other lands, and all lands in said township owned by T. B. Jones, are claimed as a homestead. No authorities are cited by counsel on either side, and presumably none have been found on this question.

"It has been held that the description in a declaration of homestead need not be more particular than in a conveyance (Ornbaum v. Creditors, 61 Cal. 455); also that it may contain more than one lot (Id.). But will this meet the objection here made? The argument is made, and with a great deal of force, that the words in the attempted description above quoted are mere surplusage, and should be disregarded. But is the court at liberty to thus treat the matter? It would seem clear that the declarant claimed other lands than those specifically described, as the declaration claims as a homestead, 'with other lands,' the lands specifically described. This is emphasized by the concluding words, 'and all lands owned by T. B. Jones in said township.' These words cannot refer to the lands described as it is expressly stated that they are in said township, and it is also alleged in the complaint that they are owned by plaintiffs. This is not a case like In re Ogburn, 105 Cal. 97, 38 Pac. 498, in which the description clearly discloses the lands intended to be claimed, for, as stated, it is clear that the declarant intended to claim other lands, and it is alleged in the complaint that the plaintiffs in fact did own other lands in said township which are not specifically described in the declaration. The question is exasperating, for, if the claim of 'other lands' is void, and if the words 'with other lands, * * * and all lands in said township,' can be disregarded, and the declaration be read as if those words did not appear therein, then, as regards description, the declaration would seem to be sufficient to sustain the claim of homestead. But it does seem to me that the lands specifically described are not the lands claimed, but that they, with other lands, are claimed, and claimed in such a way that the court cannot say what lands are claimed in the declaration as a homestead. An examination of the homestead records would not disclose to a third party just what lands plaintiffs claim as a homestead.

"The question may also bear another aspect. Section 1263, Civ. Code, provides that the declaration must contain an estimate of the actual cash value of the premises claimed. As already shown other lands than those definitely described were claimed as a homestead. Now, if we omit the outside lands and disregard them under the objection to the descriptions, can we do so to the statutory requirement as to an estimate of the actual cash value of the premises? The declarant estimates the actual cash value of 'said property' to be $4,000. Can this be said to have reference exclusively to the land specifically described? Is this not an estimate of value upon all the property referred to in the declaration? T. B. Jones owned other lands in said township, and his wife claimed them, with the lands described, as a homestead. Can it be said, therefore, that the other lands did not enter into the estimate of value simply because they were not specifically described? It seems to me not. The estimate of value is not of said 'described premises,' but of 'said property.' It would seem that the words 'said property' have reference to all the property mentioned in the declaration, whether specifically described or not, and hence that there is no estimate of value of the lands definitely described. As the question involves statutory requirements, I do not believe that, in holding that the declaration of homestead is invalid, the court places too strict construction upon the provisions of our homestead laws."

Upon the trial the defendants offered the judgment roll in the foreclosure suit of Gunn et al. v. Jones et al., and, over the objection and exception of the plaintiffs, this judgment roll was admitted. The judgment roll contained an unsigned return of service upon the defendant T. B. Jones. Defendants, in offering the judgment roll, proposed to prove, and did prove, by the witness, who at the time was deputy sheriff of the county, that Jones actually had been served; that Jones had suffered default in the foreclosure action, and the judgment in foreclosure contained a recital that the default of the defendants was entered, it having been shown to the court that each of them had been regularly served by the process of the court. The date of service upon T. B. Jones was August 20, 1889. The summons, with the unsigned return indorsed thereon, was filed October 12, 1889. After proof of this actual service, which was not disputed, the court permitted the witness Patterson, who had been deputy sheriff at the time of the service, to complete the return of service by signing the name of his former principal as sheriff by himself as deputy, and, so corrected, admitted the judgment roll in evidence. As to this it is urged by appellants that such a correction was void; that the power of the deputy to bind his principal certainly ceased when that principal himself ceased to be sheriff; and that the signature of the deputy made some 12 years after was as meaningless as though the principal had been dead. Upon the part of respondent it is argued that the act was merely a correction of the judgment roll nunc pro tunc as of the time when the service was actually made, and of the time when the signature to the return should actually have been placed on the judgment roll, and that the proceeding was wholly in consonance with the powers of the court to correct its records nunc pro tunc at any time to make them speak the truth. We need not, however, pause to consider this proposition, for the reason that the court had the unquestioned right to take evidence upon the fact of the service, since upon this fact, and not upon the return, the jurisdiction of the court in foreclosure depended, and, if it found the fact of service to exist, as here it did, then to admit the judgment roll in evidence, regardless of the defective return of service. In Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145, this court said: "The question then arises, did the court err in allowing the proof of service to be amended and filed nunc pro tunc as of the date of the judgment? Upon this subject, Mr. Freeman, in his work on Judgments (4th Ed. § 89b) states the law as follows: 'If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correcion a judgment apparently void is made valid.'" And in Hibernia Sav. & L. Soc. v. Mathai, 116 Cal. 426, 48 Pac. 370, the same rule is announced in the following language: "The court acquired jurisdiction of the appellant by the service of its process, and did not lose it by neglecting to make the proof of such service a matter of record; Sichler v. Look, 93 Cal. 600, 29 Pac. 220, and a subsequent amendment of the record by supplying this proof of service is as effective to support the judgment as if it had been filed before its entry. Freeman on Judgments, 89b; Allison v. Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. The evidence was before the court indisputably showing the fact of service. None of appellants' rights was impaired by the mode adopted by the court to show that such service was actually made. Whether the better procedure would have been to have cast the evidence of the deputy sheriff into the form of an affidavit, and to have attached that affidavit to the judgment roll as proof of service, as was done in Woodward v. Brown, 119 Cal. 299, 51 Pac. 2, 542, 63 Am. St. Rep. 108, cannot matter to appellants, since, in the course pursued by the court, there was no invasion of any of their rights. And this is so because, when we come to consider the next proposition which they advance, namely, the applicability of section 581, Code of Civil Procedure, to the case before us, the judgment roll will be treated as though proof of service did not appear upon it.

Section 581, subdivision 7, of the Code of Civil Procedure requires a court to dismiss an action upon failure of the plantiff to cause the summons to be returned with proof of service within three years after the commencement of the action, and this, although the summons may have been actually served, and although the lapse of time until the return may be but a few days after the expiration of the three years. Herein appellants place reliance upon Modoc Land Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848; Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; White v. Superior Court, 126 Cal. 245, 58 Pac. 450. That such is the law as established by these cases there is no question. Previous to the enactment of subdivision 7 of section 581 an action could be dismissed if not prosecuted by the plaintiff with reasonable dispatch. It being thought that in its operation this law was unsatisfactory, as leaving too large a play for discretion in the minds of judges, the law as it now exists was enacted. Its very clear design, therefore, was to enable defendants to remove by dismissal, and to make it compulsory upon courts to dismiss, actions which, by the long delay in their prosecution, were thus to be conclusively presumed to have been brought and to have been left pending for purposes of vexation and harassment. Such was the condition presented in each of the above-enumerated cases. The motions were addressed to pending actions which had never been brought to trial. Entirely different is the case at bar, where, after commencement of the action, service of summons was made, the trial had, and a judgment, which has long since become final, was rendered within a year after the commencement of the action. That subdivision 7 of section 581, Code of Civil Procedure, must be construed to apply to pending actions which are untried, and not to actions which have gone to judgment, is a conclusion demanded, not only by the reasons which called the law into being, but by the extraordinary and absurd anomalies which would result from any other construction. Thus, A. commences his action against B., causes summons to be regularly served upon B., the summons is returned and filed, but without proof of service. B. makes default, proof of service and of the default is made before the court and A. obtains his judgment; all within 60 days after the commencement of his action. For 2 years and 10 months thereafter that judgment is perfectly valid and enforceable, but, at the expiration of 2 years and 10 months, under appellants' contention, it would become ipso facto void, and without the power of the court to do aught but dismiss the proceedings, notwithstanding the fact that there is no law which limits the time when a court may, by nunc pro tunc order, correct its judgment. Such a construction was as surely not within the contemplation of the lawmakers, as it is clearly not within the reason which called section 581 into being.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

(149 Cal. 732)

Ex parte CLARY. (Cr. 1,339.)

(Supreme Court of California. Sept. 25, 1906. Rehearing Denied Oct. 23, 1906.)

1. HABEAS CORPUS—GROUNDS—WANT OF JURISDICTION—EFFECT OF RECITALS IN COMMITMENT OF INSANE PERSON.

On habeas corpus to procure petitioner's discharge from custody in the state hospital for the insane, it appeared that the commitment under which he was detained stated that it concerned an application for the commitment of Dennis C., and that on the petition of Paul C. and a certificate of lunacy made by two duly qualified medical examiners in lunacy, and upon such other facts and information as were produced before the court, "at a hearing in open court in the presence of said C. duly had, and being satisfied that the alleged insane person is insane, and a proper subject for custody and treatment, within the meaning of the statute," his commitment was ordered. *Held*, that the commitment was sufficient to show jurisdiction as "said C." must be construed as referring to the alleged insane person, and a finding that he was insane and a proper subject for custody and treatment, within the meaning of the statute, was sufficient to include the findings required by Pol. Code, § 2217, as amended by St. 1881, p. 7, c. 9, that he was "so far disordered in his mind as to endanger health, person, or property," and the recital that the hearing was "duly had" implied that due and lawful notice was given to the alleged insane person and proved to the satisfaction of the court, and it was not necessary that the record should on its face expressly state the particular statute under which the tribunal assumed to act.

2. STATUTES — REPEAL — INVALIDITY OF REPEALING ACT—INSANE PERSONS.

Pol. Code, §§ 2210-2218, provide for the preferring of a charge of insanity against a person, and for the issuance and service of a warrant for his arrest for a trial of the charge, and an adjudication as to his sanity, and similar provisions are found in St. 1875-76, p. 137, c. 135. Act 1897, art. 3, § 8 (St. 1897, p. 329, c. 227), in relation to commitment of insane persons to a hospital, was void as authorizing a deprivation of liberty without due process of law, but contained no express repeal of the provisions of any other statute on the subject, merely repealing all acts or parts of acts in conflict with the same. *Held*, that the statute of 1897 did not operate to repeal any of the prior provisions relative to the commitment of insane persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 244.]

3. HABEAS CORPUS—HEARING—JURISDICTION.

Pen. Code, § 1475, as amended in 1905 (St. & Amend. to Code 1905, p. 706), gives the Supreme Court power to make a writ of habeas corpus returnable before any superior judge for determination by him, and Act 1897, art. 3, § 8 (St. 1897, p. 329, c. 227), and the act of 1903 (St. & Amend. to Code 1903, p. 485, c. 364), provide that any patient committed as an insane person who has become sane while confined in the hospital may be discharged from further custody after examination on habeas corpus proceedings. *Held*, that on application to the Supreme Court for a writ of habeas corpus to obtain the applicant's release from confinement in the state hospital for the insane, on the ground that the applicant was not insane, a writ would issue for the production of the applicant before the judge of a certain superior court for a hearing as to applicant's sanity on proper evidence.

In bank. Habeas corpus by Dennis G. Clary to obtain petitioner's discharge from custody in the Mendocino State Hospital for the Insane. Ordered that a writ issue for the production of petitioner before the judge of the superior court of Sonoma county for a hearing on the question of petitioner's sanity, and his discharge or remand, according to the determination of such question.

C. W. Eastin, for petitioner.

SHAW, J. The petitioner, a patient confined in the Mendocino State Hospital for the Insane, applies for his discharge by habeas corpus on two grounds: First, that the commitment under which he is confined is void; second, that he is not insane.

1. The petition avers that he has applied on the same grounds to the superior court of Mendocino county and to the District Court of Appeal for the Second District for discharge on habeas corpus; that the superior court, after a hearing, denied the same; and that the District Court of Appeal, after a hearing, was unable to agree as to whether or not the court which committed him had jurisdiction to commit him, and thereupon dismissed the proceedings. A copy of the commitment is made part of the petition, but no other part of the record is exhibited. The commitment is as follows: "In the Matter of the Application for the Commitment of Dennis G. Clary, an Alleged Insane Person. Upon the petition of Paul Clary, dated Oct. 31, 1902, and a certificate of lunacy made by two duly qualified medical examiners in lunacy, which certificate is dated on the 6th day of November, 1902, and which is annexed hereto, and upon such other facts and information as were produced before me at a hearing in open court in the presence of said Clary duly had, and being satisfied that the above alleged insane person is insane and a proper subject for custody and treatment in an institution for the insane within the meaning of the statute, it is therefore hereby ordered that the said Dennis G. Clary be and hereby is adjudged insane, and that he be committed to the Mendocino State Hospital." The recital that the hearing was "in the presence of said Clary" must be taken to mean that it was had in the presence of Dennis G. Clary, the alleged insane person, and not as referring to the Paul Clary, who happened to prefer the charge of lunacy. The contrary is not alleged or claimed. The language of judgments and orders is not chosen by the adverse party, but is official and presumably fair and impartial. It is not subject to the common-law rules of pleadings made to secure to the opposite party precise information of the facts alleged against him. Where it has been considered necessary or proper, in framing a judgment or order, to recite the facts conferring jurisdiction to make it, it has been the custom, from time immemorial, to do so by a very brief statement of the general facts which give jurisdiction to act in the particular matter, and over the particular person affected. These statements are mere general conclusions of fact. From the nature and purpose of such recitals it follows that they must be given the utmost force and effect which the language employed will warrant. This rule must be observed in considering the effect of the commitment in the present case; it being, in effect, also an adjudication that Dennis G. Clary was then insane. When its recitals are so construed, the objections of the present petitioner are all refuted. The recital that the hearing was duly had in open court, in the presence of the person alleged to be insane, implies that everything was done which the law requires as essential to give jurisdiction to hear and determine the matter. Otherwise it would not be "duly had," and the recital would be untrue.

Taking up the objections more in detail, they are each untenable. The record, by virtue of this recital, affirmatively shows jurisdiction. Upon a collateral attack, and in the absence of any specific averment that any other part of the record is inconsistent therewith, this is a sufficient showing of jurisdiction, even in the case of the judgment of an inferior tribunal, or a superior court or judge acting in a special statutory proceeding. The finding that Clary was "insane and a proper subject for custody and treatment in an institution for the insane within the meaning of the statute" is sufficient to include the findings required by section 2217 of the Political Code, as amended in 1881 (St. 1881, p. 7, c. 9), that he was "so far disordered in his mind as to endanger health, person, or property." We do not mean to intimate, however, that upon a collateral attack the absence of the statement of a proper finding in the record would be fatal to the validity of the judgment in an insanity proceeding, where the court had jurisdiction of the person adjudged insane. The recital that the hearing was "duly had" implies that due and lawful notice was given thereof to the alleged insane person, and that such giving of notice was proven to the satisfaction of the court, and is equivalent to a finding to that effect. It was not necessary that the record should, on its face, expressly state the particular statute under which the tribunal assumed to act. It is sufficient if there was legal authority under any statute in force at the time for the proceeding actually had, and no reference to the statute was necessary.

It is contended, under the authority of In re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296, that at the time this commitment was made there was no valid statute in force authorizing the commitment of insane persons to state hospitals for the insane, and hence that the proceedings are necessarily void. It is said that that decision held the act of 1897 wholly void in that respect, and that the act expressly repealed all prior statutes, thus leaving in force no law on the subject. If this is true, then all of the hundreds of inmates of the state insane hospitals, committed thereto during the six years from 1897 until the passage of the act of 1903 (St. & Amend. to Code 1903, p. 485, c. 364), are held without authority. A result so grave demands close scrutiny of the propositions on which it depends. The act of 1897 provided, or attempted to provide, that any judge of the superior court of a county could adjudge any person insane and commit him to a state hospital for the insane, without any process of law upon, or notice to, such person, without trial or hearing, and even without his presence or knowledge, upon the mere certificate of two physicians who had been authorized under the statute to act as "medical examiners in lunacy," to the effect that they had made inquiry into the facts and had sufficiently examined such person, and that in their opinion, after such inquiry and examination, such person was insane. It was an arbitrary proceeding under this provision which was considered and held void in the Lambert Case above cited. No just criticism can be made of the decision upon that point. Such a procedure would clearly allow a person to be deprived of his liberty without notice or trial; that is, without due process of law. It does not follow, however, that there was no other method authorized by the act of 1897 by which an insane person could legally be committed to a hospital, nor, if the act provided no other legal mode, does it follow that previous laws were thereby repealed so that no statute on the subject remained in force. The decision intimates that in special cases, as under section 8 of article 3 (St. 1897, p. 329, c. 227), in which notice is provided by means of an arrest, the act may authorize commitments which would be lawful and valid. On that subject, the opinion in the Lambert Case contains the following expression: "The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon." If the act does authorize a valid commitment under any proceeding, we should have to presume, under the case as presented to us, that the authorized proceeding was duly followed.

But we need not inquire whether or not it does so provide. It may be conceded that no valid commitment can be made under the act of 1897, and that the reason is that the procedure therein prescribed does not provide for any notice to the person charged, nor for any trial upon which he would have a right to be heard, and that all the provisions of that act relating to the arrest and commitment of insane persons are unconstitutional and void. In that case the former law on the subject is not repealed by the act, and is still in force. There is no express repeal of the provisions of the Political Code on the subject. The act merely repeals "all acts or parts of acts in conflict with this act." Such a repealing clause has no greater force than a repeal by implication. Every valid statute repeals by implication all prior statutes in conflict with it. "No repeal by implication can result from a provision in a subsequent statute, when that provision is itself devoid of constitutional force." Endlich on Statutes, § 192; McAllister v. Hamlin, 83 Cal. 365, 23 Pac. 357; Ex parte Sohncke (Cal. Sup.) 82 Pac. 957, 2 L. R. A. (N. S.) 813. And the rule is the same where the subsequent unconstitutional act declares the repeal of all acts or parts of acts inconsistent therewith. County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594; Santa Cruz R. P. Co. v. Lyons, 133 Cal. 116, 65 Pac. 329. Sections 2210 to 2218, inclusive, of the Political Code, contain provisions for the preferring of a charge of insanity against a person, for the issuance and service of a warrant for his arrest, for the regular trial of the charge in the usual manner, and for the adjudication as to his sanity, and his commitment, if found insane. Similar provisions are found in section 17 of the act of March 6, 1876, relating to the Napa Asylum. St. 1875–76, p. 137, c. 135. If the provisions of these statutes are not in conflict with those of the act of 1897, then they were not repealed and the proceeding here attacked was in full compliance with the two statutes mentioned and is valid. The same result follows if they do conflict with the invalid parts of the act of 1897; for, in that case also, the prior statutes are not repealed. In any possible alternative shown by the petition for the writ, the commitment is valid. So far, therefore, as the petition is based on the ground that the commitment is void, it is insufficient and must be denied.

2. The commitment of a person to a state hospital for the insane does not authorize his confinement after he is permanently restored to sanity. The act of 1897 and the act of 1903 both recognize this, and provide that any patient who has become sane may be discharged from further custody after examination on habeas corpus proceedings. The petition alleges that the petitioner is not insane. Upon that allegation he is entitled to a preliminary writ, in order to inquire into its truth and discharge him if he is found to be sane. This court does not usually issue writs to try and determine such questions of fact. Under the present law (Pen. Code, § 1475, as amended in 1905; St. & Amend. to Code 1905, p. 706, c. 544) the Supreme Court has power to make the writ returnable before any superior judge for determination by him, and we think this is the proper disposition of the present case.

It is ordered that a writ of habeas corpus issue herein for the production of the petitioner before Hon. Emmett Seawell, judge of the superior court of Sonoma county, that he may receive the return thereto, and thereupon hear such proper evidence as may be offered upon the question of the sanity of petitioner, and discharge or remand the petitioner as he may determine such question.

We concur: BEATTY, C. J.; SLOSS, J.; LORIGAN, J.

150 Cal. 1

DOLLENMAYER et al. v. PRYOR (CÆSAR, Intervener.) (Sac. 1,460.)

(Supreme Court of California. Oct. 2, 1906.)

1. Appeal—Decision Reviewable—Form of Judgment—Order Denying Intervention.

An order clearly showing a denial of a right of intervention, and forbidding the filing of a complaint, is sufficient to form the basis of an appeal without any more formal verbose judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 876.]

2. Same—Final Judgment.

An order, denying a right of intervention, is final as to the right of intervener, and justifies an appeal without waiting for judgment between the other parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 368.]

3. Public Lands—Disposal of State Lands—Grant to Individual—Right to Protest.

One not claiming any right, title, or interest, in land filed on for purchase from the state as not suitable for cultivation, and who does not himself propose to purchase such land, cannot initiate a contest before the surveyor general against the proposed sale on the ground that the land is suitable for cultivation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 394.]

4. Same—Jurisdiction of Court.

Pol. Code, § 3414, authorizing the surveyor general on demand, or when he believes a question of law is involved, to submit to the district court contests arising before him, as to locations on public lands, does not give the court jurisdiction of a purported contest so referred, in which the one, objecting to the proposed sale of the land, claims no right, title, or interest therein, and does not himself propose to purchase the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 394.]

5. Appeal — Review — Intervention—Lack of Jurisdiction.

Where the court has no jurisdiction of a proceeding as to the purchase of public land referred to it by the surveyor general, under Pol. Code, § 3414, its order, denying a right of intervention, must be sustained on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3406.]

In Bank. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Mattie Y. Dollenmayer and another against John S. Pryor, James Cæsar praying to be allowed to intervene. From an order, denying such right of intervention, Cæsar appeals. Affirmed.

Robt. W. Miller, for appellant. Chas. G. Lamberson and H. P. Brown, for respondents. John S. Pryor, in pro. per.

SHAW, J. This is an appeal by James Cæsar from an order of the superior court denying his application to be allowed to intervene in an action between Dollenmayer and Mellen as plaintiffs, and Pryor as defendant.

The action was a land contest begun in pursuance of an order of reference from the surveyor general, under section 3414 of the Political Code. Dollenmayer filed his application, on November 28, 1903, to purchase an entire section as land not suitable for cultivation. His application was approved May 18, 1904, and a certificate of purchase was issued to him on June 18, 1904, and was thereafter assigned to plaintiff Mellen. Afterward on July 26, 1905, Pryor filed a verified protest against the issuance of any further evidence of title under the Dollenmayer certificate, on the ground that the land was suitable for cultivation, that Dollenmayer was not a settler thereon, and that he did not make the application in good faith. Pryor demanded a trial in the courts. The order of reference was thereupon made on the day the protest was filed, and the action was begun September 24, 1905.

On August 10, 1905, after the order was made, but before suit was begun, Cæsar settled on the north half of the section, which was then unoccupied, and on August 14, 1905, offered to the surveyor general for filing, his application to purchase the same, including therein a protest against the Dollenmayer purchase on the ground that the land was suitable for cultivation and that Dollenmayer was not an actual settler, and demanded a trial in the courts. The surveyor general refused to receive or file the application on the ground that he had previously made an order of reference of the contest arising upon Pryor's protest. The complaint in intervention was presented, and leave asked to intervene, a few days after the action was begun. It alleged, in addition to a statement of Cæsar's rights, that Dollenmayer did not apply to purchase in good faith, but for the benefit of Mellen, to whom he had previously agreed to sell the land, that Pryor's protest was filed in collusion with Dollenmayer and Mellen, in pursuance of an agreement that Pryor should not appear in the action, and for the purpose of forestalling other applicants who might apply to purchase after the order of reference was made on the protest. The court refused to allow the complaint to be filed.

The respondent objects to the consideration of the appeal, contending that it is premature, and that the party asking to appeal from such an order must await final judgment between the original parties, and appeal from that judgment, or, at all events, must procure the entry of a more formal judgment denying his motion, and appeal after such entry. We can perceive no merit in this objection. The record shows that the order, or judgment, denying the application to intervene was entered before the appeal was taken. It clearly shows that the court had determined the right of the intervener and declared that Cæsar should not intervene in the action, and that his proposed complaint should not be filed therein. The most verbose statement could not state the determination more accurately or effectually. So far as the intervener and his rights in that action were concerned, it was final. We see no good end to be secured by requiring him to await judgment between the other parties, after a trial in which he could not participate. It ended the litigation as to him, and he should be allowed an immediate appeal. Stich v. Goldner, 38 Cal. 610; People v. Pfeiffer, 59 Cal. 90; Donner v. Palmer, 45 Cal. 180. Anything in Wenborn v. Boston, 23 Cal. 321, contrary to this rule, must be considered as overruled by these later decisions. Upon the merits of the appeal we are of the opinion that the action of the court below must be sustained, but for reasons different from those presented by respondent. It appears from the record that Pryor, upon whose protest the order of reference was made, did not therein claim to be a settler upon or occupant of the land, or any part thereof, that he made no application to purchase the same and did not claim any right, title, or interest therein. In the absence of statutory authority, one who does not himself claim a paramount title or right of possession to the land, or apply to purchase the same from the state, but merely protests against a proposed purchase by another, cannot, by such protest, initiate a contest before the surveyor general against the right of the other person to purchase. Such a person has no interest to protect and no right to interfere between the proposed purchaser and the state. A mere sentimental interest, or a general interest as a citizen in the protection of state property, or in the enforcement of the state policy of selling its arable land only to actual settlers and in limited quantities, or even the particular interest which a qualified person, privileged to purchase state lands and expecting at some future time to apply for the particular tract in question, but who is not a settler thereon, might have in preventing or delaying a prior applicant, would not be a sufficient interest to authorize such a contest. Such interests as these are not property rights. The party who raises such a contest must be one who has some proprietary interest or right of possession, an interest which he would be entitled to protect in some action or proceeding. There are some expressions in the opinion in Tyler v. Houghton, 25 Cal. 26; Higgins v. Houghton, 25 Cal. 259; Thompson v. True, 48 Cal. 606; Cadierque v. Duran, 49 Cal. 357, and Cunningham v. Crowley, 51 Cal. 131, which might seem to announce a rule contrary to this conclusion. But when considered in connection with the context and the facts of the respective cases, it will be seen that they simply lay down the rule that where one claims an interest or right of possession under the United States, or some right under the state law superior to that of the prior applicant, he may contest such proposed sale for the purpose of protecting his superior or paramount right, and that in such a case he may do so by filing a mere protest without himself applying to purchase the land from the state. The only case in which a different proposition from this could be claimed to have been asserted is the Higgins Case above cited. In that case, however, the protesting persons were said to be "dwellers" upon a mining claim upon which active mining operations were going on, and upon which a large amount of money had been expended, and although it did not appear that these parties themselves were personally asserting a claim to the mine, it was said that they had a sufficient interest to entitle them to raise the contest. This, however, was done upon the authority of Tyler v. Houghton, which decides nothing more than that one having a paramount title under the United States, may contest a purchase, proposed to be made from the state, without himself applying to purchase. The cases cannot be taken as a precedent for the right of Pryor, who had neither possession, interest, or claim, to inaugurate a contest before the surveyor general.

The result is that the surveyor general had no authority to entertain the protest of Pryor. There was, in fact, no contest in his office arising upon that protest and, hence, the order of reference was null and gave the superior court no jurisdiction of the action. Jurisdiction in such cases exists only by virtue of a lawful order of reference, issued upon a real contest, by a party whose protest shows himself entitled to oppose the purchase. Parties cannot give jurisdiction by filing a complaint in a case where there has been no valid order of reference, nor where a reference, has been made without there having been any contest to refer. The court below, therefore, had no jurisdiction of the action, no authority to render judgment of any force for or against either party, and its order denying the right to intervene must be sustained on the ground that it had no jurisdiction either of the action or the intervention. The intervener's attention is called to the amendment of 1899 (St. 1899, p. 182, c. 149) by which lands of this class, suitable for cultivation without reclamation, can be sold only to actual settlers in tracts of 160 acres.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.; SLOSS, J.; BEATTY, C. J.

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149 Cal. 795

WATERS v. POOL et al. (Sac. 1,324.)

(Supreme Court of California. Oct. 2, 1906.)

1. Public Lands—Swamp Lands—Sale by State—Affidavit of Purchase.

One seeking to purchase state swamp lands must aver in his affidavit that he does not know of any legal or equitable claim to the lands other than his own, as required by Act March 28. 1868 (St. 1867–68, p. 507, c. 415).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 199, 392.]

2. SAME.

Evidence in a suit to determine the rights to swamp lands examined, and *held* to warrant a finding that one who sought to purchase the lands truthfully averred in his affidavit, as required by Act March 28, 1868 (St. 1867–68, p. 507, c. 415), that he did not know of any claim to the lands other than his own, so that he and his successors in title acquired title thereto.

3. SAME—WAIVER OF PREFERENCE RIGHT OF PURCHASE.

In an action to determine rights to swamp lands, it appeared that the lands were segregated December, 1870, and that plaintiff had been in possession since 1863. In 1871 a survey was made at the instance of defendants' grantor, who made application to purchase the lands. *Held*, that plaintiff as actual settler had under the express provision of the act of 1870 (St. 1869–70, p. 878, c. 575), the preference right to purchase, which he lost by failing to make application therefor within 90 days after the filing of affidavits showing that the lands had been segregated, so that the lands could be sold to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 200, 394.]

4. SAME—AFFIDAVIT OF PURCHASE.

A survey of swamp lands was made in 1871 at the instance of one who applied for the purchase thereof. The affidavit of purchase was in its essence true, but, after the survey was made, it was found that it conflicted with another survey previously made, and approval thereof was refused. Two years thereafter a new survey was made, removing the conflict, to which the original affidavit was attached. Payment was made and a certificate was issued. *Held*, that the affidavit must be treated as a new application made subsequent to the time of the rejection of the first survey, and must be tested as if made subsequent to that time.

In Bank. Appeal from Superior Court, Yolo County; Eugene P. McDaniel, Judge.

Action by James Waters against D. C. Pool and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hudson Grant, for appellants. R. Clark, L. Schillig, and G. Clark, for respondent.

PER CURIAM. This is an action to determine the respective rights of plaintiff and defendants to certain swamp and overflowed land on reference by the surveyor general to the superior court of Sutter county. Plaintiff had judgment for the entire tract in controversy from which defendants appeal on bill of exceptions.

It appears that one Lars Johnson, on October 10, 1870, made affidavit before the county surveyor of Sutter county and filed the same with said surveyor, declaring his desire "to purchase, under the provisions of an act to provide for the sale of certain lands belonging to the state, approved March 28, 1868 (St. 1867–68, p. 507, c. 415), and the several acts mandatory thereof, and supplemental thereto a certain tract of swamp and overflowed land, lying and situate on the left bank of the Sacramento river, it being the fractional N. W. ¼ of section 19, township 11 N., range 3 E. * * * and that he does not know of any legal or equitable claim, other than his own to the said lands." The court found on sufficient evidence that on July 18, 1871, at the request of said Johnson, said county surveyor surveyed said land, platted the same and recorded said plat and filed notes of said survey in the records of swamp land surveys in his office and numbered said survey No. 609 of Sutter county; on July 21, 1871, a copy of Johnson's application of said survey was filed in the office of the surveyor general of the state, attached to a copy of Johnson's said affidavit; said plat, survey and field notes conflicted with the plat, survey and field notes of swamp land survey No. 548 of Sutter county, namely, the N. W. ¼ of the N. W. ¼ of said section applied for by one McGriff, and Johnson's survey was not then approved, but was subsequently by the surveyor general, returned to the county surveyor of Sutter county, who by his then deputy (formerly the county surveyor) altered and changed said plat and field notes so that the same were made a plat and field notes for a survey of the E. ½ and fractional S. W. ¼ of the fractional N. W. ¼ of said section 19, omitting the McGriff 40-acre tract, and thereafter the said plat and field notes so altered and attached to a copy of said affidavit of Johnson, were received by the surveyor general, who, on September 9, 1873, indorsed the same: "Approved Sept. 9th, 1873. Robert Gardner, Surveyor General;" that on October 20, 1873, said Johnson paid to the then county treasurer of said county, $24.56, being 20 per cent. of the price of the land embraced in said survey No. 609, and also paid interest on the unpaid balance for one year (it appears by the evidence, however, that interest was paid to September 9, 1876); on November 13, 1873, the register of the state land office issued and delivered to Johnson Certificate of Purchase No. 3,924 for the lands contained in said survey No. 609, as altered and changed, and no patent has ever been issued to Johnson or any other person for the lands in controversy.

It appears that plaintiff made application to purchase the land described in the Johnson certificate of purchase, on June 7, 1901, in which he made oath, among other things, that he "is and has been an actual settler and is now such actual settler on said lands, for upwards of 35 years; that during all said time he has actually resided on said lands with his wife and family or children; that he has improved the same by clearing about 25 acres and has at all times maintained his home on said lands since 1863; that there are adverse occupants of said land adverse to affiant (naming some of defendants), but they have been occupants of a portion of the land for more than 60 days since the plat of said lands was filed in the United States Land Office; that he knows the land applied for and its exterior boundaries and knows that there are settlers thereon other than himself, but the whole of said lands have been segregated for more than six months prior to making this application and filing this affidavit;" that said lands are suitable for cultivation and that affiant is an actual settler thereon. The court found the substantial averments of the affidavit to be true. The reference to the court was made July 11, 1901, and the complaint was filed September 7, 1901. The court found that the land was, on December 1, 1870, segregated by the United States, and that the plats showing the line of segregation were filed in the Marysville land office on that day and the land was listed to the state as swamp and overflowed land on April 11, 1871, and on August 30, 1871, was patented to the state and that said land was sectionized and the plats filed in the said land office prior to October 10, 1870. It was alleged in the complaint and found by the court that the Johnson affidavit was defective and void, in this, that the statement therein as follows: "He does not know of 'any legal or equitable claim other than his own to the said land' was, is and at all times has been wholly false"; that plaintiff was at the filing of said affidavit in possession and occupancy as his home of a certain portion of the land known as "The Island," situated in the southwesterly portion of the N. W. ¼ of said section and that plaintiff occupied and had cultivated about seven acres and had his dwelling on the southerly portion of "The Island" and had an equitable claim to said island under the act of April 4, 1870, supplemental to the act of March 28, 1868 (St. 1869–70, pp. 878–879, c. 575); and that said Johnson knew at the time he filed his said affidavits, of plaintiff's said possession and claim and knew that plaintiff had a preferred right to purchase said tract known as "The Island", on which plaintiff now resides and ever since 1856 has resided, using the same for farming purposes. It appeared that the island was at that date formed by the river surrounding it. Johnson died in 1880, after having conveyed his claim to an interest in said land and his certificate of purchase, and one Griggs and one Hawk as tenants in common succeeded to Johnson's rights through whom defendants claim by mesne conveyances. The evidence was that Johnson lived on the portion across the river east of the island and was farming the land, as did his successors also, and the relations of plaintiff to these people and the situation of the land leaves no doubt that plaintiff knew of the occupancy by Johnson, and defendants after him, of the lands not in his own possession. The court found that plaintiff was not a trespasser upon any part of the lands and that, at the time of his application in 1901, he "was an actual settler upon and claimed the whole of the land applied for and since said application has resided upon and claimed the whole of said lands applied for, and that plaintiff in good faith sought to purchase the lands described in his said affidavit, that he had substantial improvements upon said lands * * * and made said application to said lands in good faith." The court did not find directly on the issues as to the alleged knowledge of plaintiff, when he filed his application, that he, plaintiff, knew of Johnson's prior application and knew that defendants were in good faith claiming the lands as successors of Johnson. The evidence showed that plaintiff must have known that defendants as successors of Johnson were claiming the lands now occupied by the plaintiff, namely, the lands not embraced in the island tract and plaintiff's application states that there were other occupants of the land beside himself.

The court found that the land had been segregated at the time alleged in the answer, to wit, December 1, 1870, and that the approval of Johnson's said application by the surveyor general and the issuance of said certificate of purchase to Johnson were in fact not done, given or made within six months after the lands were so segregated. But the court found "that it is not true that plaintiff has lost his right to purchase said lands by any laches or by reason of not having made application to purchase the same from the state within 90 days of the filing of the said plats in the Marysville land office, showing the said line of segregation." As conclusions of law the court found that the Johnson application and the approval thereof were void, and that the certificate issued to Johnson be annulled, and that plaintiff's application be approved and he be permitted to purchase the lands described therein, and judgment passed for plaintiff in accordance therewith.

The statutes in force when Johnson made his application were the act of March 28, 1868 (St. 1867–68, p. 507, c. 415, pt. 2, §§ 28, 29, p. 514) and the act of April 4, 1870, supplementary thereto (St. 1869–70, p. 878, c. 575). The act of 1868 required the person making application to purchase swamp and overflowed land to state in an affidavit among other things, "that he does not know of any legal or equitable claim to said lands other than his own; * * * which application and affdavit shall be filed in the office of the surveyor of the country in which said lands * * * are situate, who shall make survey of the land as required by section 18 of the act." The act of 1870 provides that "all settlers upon swamp and overflowed lands belonging to the state, whose settlement is evidenced by actual inclosure, or by ditches, plow furrows, or monuments, showing clearly the metes and bounds of their possessory claim, and the same are occupied for purposes of tillage or grazing, are hereby recognized as possessing an equitable claim to the land so inclosed or occupied by them, within the true intent and meaning of the act to which this is supplementary; and are declared preferred purchasers for such lands to the extent of such inclosure or occupancy." It is made the duty of the county surveyor to return surveys of such settlers to connect with the United States surveys. The act also provides that "the Surveyor General of the state shall not approve, nor the register of the state land office issue, title for any swamp and overflowed land, until six months after the same shall have been segregated by authority of the United States or of the state by legislative enactment; and for ninety days after the filing of plats showing said line of segregation in the United States Land Office for the district in which the land is situate, the settlers possessing equitable claims under section one of this act shall be deemed preferred purchasers and shall file their applications for surveys of their possessory claim with the county surveyor * * * within ninety days."

It is well settled that in the purchase of state lands the requisites of the statute must be stated in the affidavit and must be true, and that the hearing of a contest as to such lands must be shown to be true, or no right to the land can be awarded by the court. McKenzie v. Brandon, 71 Cal. 209, 12 Pac. 428; Harbin v. Burghart, 76 Cal. 119, 18 Pac. 127; Davidson v. Cucamonga Fruit Co., 78 Cal. 4, 20 Pac. 152, and many other cases. At no time have defendants been entitled to patent, not having paid the purchase money and interest. The legal title to the land has at all times been and now is in the state. If Johnson acquired no right to any part of the land under his certificate of purchase the land was open to location in 1901, when plaintiff made application to purchase. Johnson's successors in interest stood in his shoes and occupied no better or different relation to the land or to the state than did Johnson. When this cause was submitted for decision to the appellate court of the third appellate district Justice McLaughlin delivered the following opinion: "On October 10, 1870, nearly two months prior to the segregation of the land in controversy by the United States government, the predecessor in interest of the defendants made an affidavit stating his desire to purchase lands lying on the left bank of the Sacramento river, and being the fractional N. W. ¼ of section 19. This affidavit also contained the statement that he did not know of any legal or equitable claim to the land other than his own. The land was segregated from the public domain of the United States on December 1, 1870, and at that time the plaintiff was occupying an island which was entirely surrounded by the waters of the Sacramento river. The island was originally a peninsula connected with the main land by a narrow strip or neck of land, but the river cut through this neck a few years prior to plaintiff's entry upon the land. The exact date of this severance does not definitely appear, but I regard this as unimportant, in view of the uncontradicted testimony of the plaintiff to the effect that 'The old river channel is deep and has always run all the way around the island.' Transcript, fol. 167. This testimony was designed to show that the land was so surrounded that an actual inclosure was unnecessary, but to my mind it convincingly demonstrates that Johnson, the mesne grantor of defendants not only intended to but that he did actually state the truth when he expressed his desire to purchase land on the left bank of the river, and stated that he knew of no legal or equitable claim thereto other than his own. The main, central, controlling description of the land affiant had in mind when making his application and oath, and which he expressed a desire to purchase, was 'a certain tract of swamp and overflowed land on the left bank of the Sacramento river.' The subsidiary description 'it being the fractional N. W. ¼ of section 19' should not be given undue weight. Testing the truth of the statements made by the affiant 36 years ago, by the then existing conditions, it may reasonably be assumed that he knew little, if anything about government subdivisions or the line of public surveys, but he did know of that island in the river which could not be said to be on either bank thereof. In order to convict this affiant —long since dead—of an untruth, we must not only disregard the general description in the affidavit, but must also place a technical meaning on the word 'fractional' as used in the subsidiary description. Thirty-six years have elapsed since the affidavit was made; the affiant's lips cannot speak his defense or explanation of the statements made; the land has passed through mesne conveyances to others; the plaintiff has slept for many years on rights he now asserts, and if there ever could be a case where rules of construction should be invoked in favor of innocence of untruth or crime, or wrong, it is this. And it seems to me that the affidavit is reasonably susceptible of an interpretation which would acquit the affiant of perjury and relieve his successors from the results flowing from a contrary construction.

"But conceding that the statements in the affidavit were false, when it was made, there are cogent reasons for measuring their truth or falsity by conditions existing when it was used as the basis for the claim of title upon which appellants rely. Admitting that the plaintiff had a legal or equitable claim as a preferred purchaser to the land occupied by him, when the affidavit was made and the land was segregated, such claim was forfeited before any action was had upon the false affidavit. The land was segregated on December 1, 1870, and the plaintiff was by law given 90 days from that date to make his application. After March 1, 1871, he could assert no lawful or superior right to this land as against any applicant having the necessary qualifications. On June 1st, 1871, the Surveyor General could approve any survey and issue evidence of title thereto to any person applying to purchase the same. It results, that when the survey was made at Johnson's instance, on July 18, 1871, the plaintiff had, by lack of diligence in the assertion of rights reserved to him for a limited period, lost his claim or right to preference, and any person could then assert that he had no preferred legal or equitable claim to the land he occupied. On that date it might be said that he had no legal or equitable claim to such land. On July 21, 1871, when the survey made at Johnson's request was received at the state land office, the affidavit to which such survey was attached was in its essence true. But at that time, the survey was found to conflict with another survey made by the same official, and approval was refused and the papers were returned. This was, to all intents and purposes, the end of the matter, and the finale of all proceedings initiated by the affidavit. Strictly speaking, and the plaintiff invokes and relies upon strict construction of rules and papers, Johnson's application had failed, and proven abortive, and he, too, had lost his preferential rights. In strictness, a new application and survey were necessary. Matters were allowed to rest as they were when the papers were returned, for more than two years. The approval of a new survey on September 9, 1873, shows that during this time no application for purchase or survey of this land was made by any person. On that date a new survey attached to the old affidavit was filed by Johnson, and approved. Payment was made and a certificate was issued. Had Johnson made another affidavit as of any date subsequent to July 21, 1871, and attached it to the new survey, there could hardly be a question touching the validity of the title evidenced by the certificate of purchase. But, unfortunately, the old affidavit was used in making the second application, and the question arises whether the mere use of the old instead of a new certificate, will destroy the effect of the certificate. In my opinion, the truth of the statements in the affidavit accompanying the record survey, upon which the certificate rests, must be tested by the conditions existing after the rejection of the first application and survey. In other words, the affidavit which was used on both applications, must be treated as a new application made subsequent to the time of such rejection. It should be measured by the same standard, and tested in the same crucible as if it was an entirely new affidavit bearing date subsequent to July 21, 1871. In fact it must be viewed as having been made on September 9, 1873, when the Surveyor General sealed it with his approval, notwithstanding his knowledge of the original conflict with the McGriff survey and application. It was so treated and tested by the Surveyor General, and I cannot see why this or any court should adopt another rule of interpretation, harsh in its rigidity, and unjust and inequitable in its effect on the rights of persons who were lulled into fancied security by the muniment of title granted by an agent of the state. I am aware that equitable considerations cannot be invoked to avoid the consequences of willful perjury committed by an applicant to purchase state lands. I am fully cognizant of rules which place subsequent purchasers in the shoes of the applicant with no greater modicum of equitable or legal rights than he possessed. But the law 'respects form less than substance,' and, in my opinion, it is only by a rigid adherence to form, and by making all subsequent proceedings relate back to the time the affidavit was made, that the plaintiff, who slept the sleep of indifference, carelessness, and negligence for 30 years, can now be permitted to take not only what he then claimed, but also that which Johnson admittedly possessed and which others have innocently acquired. The conduct of Johnson in failing to make any claim to the island or any effort to oust Waters from his island home may have induced the latter's slumbers, but such conduct most eloquently attests that Johnson meant to tell the truth in 1870 and in 1873 and his constant belief that he had done so. The penalties of perjury are entailed only by those who intentionally swear to an untruth, and the circumstances of this case would certainly acquit Johnson of intentional wrong. The earmarks of fraud are evidenced by acts indicating a willful intent to profit by its perpetration. Looking at the substance of things, and brushing aside all films and cobwebs of technical construction, the conduct of the affiant clearly demonstrates that he neither intended to defraud the state or deprive the plaintiff of his land. If he ever entertained such intention his conduct was incomprehensible, for, during the subsequent years of his life he made no attempt to profit by his fraud or reap the reward of his perjury. Under these conditions it is indeed a harsh construction which results in reproach to his memory and spoliation to his successors. In my opinion such construction is unnecessary, and the more charitable and equitable interpretation is most reasonable, and hence I am firmly convinced that rules of law as well as considerations of justice demand the reversal of the judgment."

We are of opinion that the construction which is thus placed upon the Johnson certificate is as reasonable as it certainly is equitable. It leaves to plaintiffs and defendants their possessory rights to the lands which they were actually occupying. For which reason the foregoing opinion is adopted and approved as the opinion of this court, and the judgment appealed from is reversed.

149 Cal. 772

BUNDY v. SIERRA LUMBER CO.

(Sac. 1,274.)

(Supreme Court of California. Oct. 1, 1906.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

2. SAME — ADMISSION OF EVIDENCE — OBJECTIONS—CHANGING GROUND.

A party objecting to the testimony of a witness on the ground that it was immaterial, incompetent, and irrelevant, cannot on appeal urge that the subject to which the testimony related was not a subject for expert testimony, and that the witness had not qualified as an expert.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1430.]

3. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

An employé suing for injuries received, while operating a train over a trestle, in consequence of the fall of the trestle, who alleges as a ground of recovery that the employer negligently permitted the trestle to become defective, must show that the employer had knowledge of the defective condition, or could, by reasonable inspection, have discovered it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 243–251.]

4. EVIDENCE — DECLARATIONS OF EMPLOYÉ—ADMISSIBILITY.

Where, in an action for injuries received by an employé in consequence of the fall of a trestle while running a train over it, a right of recovery was based on the employer's negligence in permitting the trestle to become defective, it was shown that it was the duty of the section foreman to look after the trestle and require a trestleman to repair it, evidence that the foreman, a short time before the accident, requested a third person to tell the trestleman to go to work on the trestle and repair it, that the trestle was going down and that it was in bad shape, was admissible as showing knowledge on the part of the employer that the trestle was defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 887, 898.]

5. SAME—RES GESTÆ—DECLARATIONS OF EMPLOYÉ.

The declaration of the foreman, being illustrative of his act in sending notice to the trestleman to repair the trestle, was admissible as a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 297, 308, 331.]

6. MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE — EVIDENCE — ADMISSIBILITY.

In an action for injuries to an employé in consequence of the fall of a trestle while running a train over it, evidence that an expert trestle builder had, prior to the accident, called the attention of the manager of the road to defects in the trestles on the road, and to the trestle that fell, was admissible as bearing on the question of the negligence of the employer in failing to obviate the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 923.]

7. EVIDENCE — SUBJECTS OF EXPERT TESTIMONY—CONSTRUCTION OF RAILROAD TRESTLES.

An expert trestle and bridge builder is competent to testify as to how a trestle in a logging railroad should be constructed, considering the purposes for which it was intended to be used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2349–2352.]

8. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

That an employé, injured by the fall of a trestle while operating a train over it, sought to recover on the theory, either that the trestle was not properly constructed originally, or that it had been suffered to go to decay, did not preclude proof as to how the trestle in its entirety, including guard rails, should have been properly constructed, it appearing that the guard rails, though primarily intended to prevent derailment, strengthened the trestle.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 920, 921.]

9. EVIDENCE—EXPERT TESTIMONY.

An expert railroad trestle and bridge builder may testify that trains running over a trestle have a tendency, in consequence of the vibration caused thereby, to loosen spikes driven in the bracing, and thus shake loose the bracing itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2356.]

10. SAME.

An expert railroad trestle and bridge builder may testify that a trestle is more securely constructed by the use of bolts through the bracing rather than by the use of spikes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20. Evidence, §§ 2349–2352.]

11. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

In an action for injuries to an employé while running a logging train over a trestle in a logging road in consequence of the fall of the trestle, the court properly sustained objections to questions on cross-examination asked an expert trestle builder as to whether the trestle, as he had testified it should have been constructed, would bring absolute safety to the employés of the road, and whether it would be sufficiently safe for a passenger train to run over, the question being simply whether the trestle as constructed or maintained by the employer was a reasonably safe one for the uses to which it was subjected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 865, 872.]

12. APPEAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The error, if any, in sustaining objections to questions asked a witness is harmless where the witness has fully testified on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194–4199.]

13. MASTER AND SERVANT—INJURY TO SERVANT — CARE REQUIRED OF EMPLOYER — INSTRUCTIONS.

Where, in an action for injuries to an employé while operating a logging train over a logging road in consequence of the fall of the trestle therein, the court gave as requested a part of an instruction correctly stating the rule as to the degree of care necessary to be exercised by the employer in constructing and maintaining the trestle, it was not error to refuse the other part of the instruction asserting that the employer was not required to use the degree of care in the construction of a trestle that would be required of a railroad company in the performance of its duty toward passengers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1148–1161.]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by George Bundy against the Sierra Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Morrison & Cope, C. H. Wilson, and A. M. McCoy, for appellant. J. T. Matlock and W. P. Johnson, for respondent.

LORIGAN, J. This action is brought by plaintiff to recover damages for personal injuries sustained in the discharge of his duty while in the employment of defendant. Plaintiff on September 23, 1901, was an engineer engaged in operating a "logging train" over the railroad of defendant in hauling logs from Beale Camp to its mill at Lyonsville, a distance of about 15 miles. The railroad of defendant between these points crossed a high trestle known as the "Big Wible Trestle," which, while the plaintiff was passing over it, on the date mentioned, with a logging train, went down with the engine and cars, and plaintiff was severely injured. The complaint alleged that the fall of the trestle was occasioned through defects in the construction, care, and preservation of said trestle, and through the negligence of defendant in allowing the timbers of which said trestle was constructed to become worn, rotten, and decayed, and, without any fault of plaintiff, the said trestle gave way and the said track, locomotive, and train were precipitated to the ground below and demolished. The case was tried by a jury, which returned a verdict in favor of plaintiff for $2,500. Defendant moved for a new trial, which was denied, and this appeal is taken from such order of denial.

As grounds for a reversal, it is urged that the evidence is insufficient to justify the verdict, and that certain errors were committed by the court during the trial.

The claim that the evidence was insufficient is untenable. The evidence in the case was mainly directed on both sides to showing the character of the trestle as originally constructed, and the condition it was in at the time it fell. The evidence upon the subject, it may be said, was conflicting, but in this conflict there certainly was sufficient evidence produced by plaintiff to warrant the jury in finding, not only that the trestle was defectively constructed originally, but also to warrant a finding that at the time it fell—some 12 years after its construction—its timbers had become rotten, loose, and insecure to such an extent as to render the trestle unfited for the purpose for which it was constructed and was being used. And, the evidence being so conflicting, the finding of the jury under the conflict is conclusive, and not subject to review here.

Now, as to the errors of law complained of which we deem merit consideration.

Richard Gernon, a surveyor and civil engineer, skilled in bridge and trestle building, was called as a witness for plaintiff, and testified, both from observation and as an expert, to the manner in which the trestle in question was originally constructed, the defects in such construction, and how it should have been reconstructed to have been reasonably safe for the purposes for which it was designed. During his direct examination he testified as to the kind of stringers used, the manner in which they were placed on the trestle, and their effect, and was then asked: "Q. And you knew the manner that the stringers were placed upon the trestle? A. I did. Q. Now I ask you whether that was the safe way for the construction of a trestle or bridge of that kind, considering the purpose for which it was used?" to which the witness responded in the negative. To the latter inquiry defendant interposed an objection on the ground that it was "immaterial, incompetent, and irrelevant," which being overruled he excepted, and now claims that the court erred in its ruling.

In this court he insists that the objection should have been sustained for two reasons: First, because the matter was not a subject for expert testimony; and secondly, because, if it was, the witness had not qualified as an expert. There is no merit whatever in the second ground of objection. The evidence shows beyond question that the witness qualified as an expert. But, even if it did not, we think, under the general objection made by appellant, it cannot now, for the first time in this court, on account of both or either of the specific reasons, or particular ground of objection that it urges here, but which it did not directly present to the lower court, be heard to question the accuracy of the ruling. Without passing on the point whether or not the matter involved in the question was the subject of expert testimony, we do not think that, under the general objection presented, the appellant can now specifically raise it on this appeal. If the objection was intended to raise that question, it should have been directly made. Certainly it was proper for the plaintiff to prove that the stringers, as placed upon the trestle, and their number, were insufficient to render it a safe structure. If the method adopted to do so was not proper it should have been directly pointed out in the objection. To require this is simply a matter of fairness and justice in order that cases may be tried on their merits. Had attention been called directly in the court below to the particular objection which it is now claimed the general objection of appellant presented, that court would have had a concrete legal proposition to pass on, and counsel for plaintiff would have been advised directly what the particular complaint against the question was, and, if he deemed it tenable, could have withdrawn the inquiry, or reframed his question to obviate the particular objection. Trial judges are not supposed to have the numerous, varied, and complex rules governing the admissibility of evidence so completely in mind and of such ready application, that, under an omnivagant objection to a question, they can apply with legal accuracy some particular principle of law, which the objection does not specifically present. Counsel for appellant could just as readily have directly presented to the lower court the particular objections which he urges now, instead of objecting generally, and we think that, in order to support any complaint on this appeal relative to the ruling, he should have done so. As was said by the Supreme Court of Arizona in Rush v. French, 1 Ariz. 124, 25 Pac. 816. and quoted approvingly by this court in Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271: "The object of requiring the grounds of objection to be stated, which may seem to be a technical rule, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits."

It is further insisted that the court erred in admitting in evidence, over defendant's objection, the testimony of the witness Homer Harvey, as to a conversation had with him by James Lucas relative to the condition of the Big Wible trestle. Harvey was a brakeman in the employ of defendant, assisting in operating its logging trains over this trestle. James Lucas was one of the section foremen in the service of defendant. The evidence shows that it was the duty of Lucas to look in general after that part of defendant's road embracing the Big Wible trestle. He was to look after the groundwork entirely and report anything that was necessary in the way of repairs, or to see that the matter was repaired, and as to trestles, if there was one that needed fixing or repairing, it was his duty to tell the trestleman to repair it. Now, as to the conversation in question. Harvey testified that he had seen Mr. Lucas a short time before the accident, and then proceeded: "Well, I was sitting in front of my house one evening, and Mr. Lucas had been out to feed his horse, I think, and he stopped there and said: 'I wish you would tell Paul to go over and get to work on Big Wible trestle.' He says, 'That trestle is going down and will kill the whole outfit of you.' He says, 'It is in bad shape.' This was some time before the accident. I don't remember just how long. Three weeks or a month. No repairs were made to my knowledge on that trestle after that time before the accident. * * * He [Lucas] didn't speak any more as to that one trestle. I saw Mr. Paul and gave him the message. I don't remember whether it was the next day; it was in a day or two." This conversation was admitted over a general objection of appellant, and the particular objection that the defendant could not be bound by any statements which Mr. Lucas might have made. The Mr. Paul referred to in the conversation was in the employment of defendant as foreman, having in charge a crew of men engaged in the work of repairing the trestles on defendant's road.

We perceive no error in the admission of this testimony. As one of the grounds upon which plaintiff based his right of recovery was that the defendant had negligently permitted the trestle to become defective, it was incumbent on him to show that the defendant had knowledge of such defective condition, or that, by a reasonable inspection, it could have been discovered. Brymer v. Southern Pacific Co., 90 Cal. 496, 27 Pac. 371; Sappenfield v. Main St., etc., Co., 91 Cal. 48, 27 Pac. 590. It was the duty of Lucas to examine that portion of the groundwork and the general condition of the Big Wible trestle. He was the agent of the company for that purpose. It was his duty to ascertain whether repairs were necessary, and to inform the other agent of the company—the foreman of the trestle-repairing crew—of their existence so that the repairs might be made. His conversation with Harvey was in the line of a proper performance of his duty. He sent him to inform Paul, the trestle repairer, that the trestle was in bad condition and to make the necessary repairs. As tending itself to show that the defendant had knowledge through its agents of the defects in the trestle, this evidence was relative. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290. As to the language used by Lucas, it was illustrative of his act in sending notice to the trestle repairer; it was used in the discharge of his duty to the company and was part of the res gestæ—a declaration made dum fervet opus. It was certainly admissible to prove generally that Lucas notified Paul, the trestle foreman, that the trestle was in a defective condition, and when what he did in that regard is admissible, it is equally competent to prove what was said by him about these defects while he was doing so. It was a declaration made during the continuance of the agency in regard to a matter concerning which it was the duty of the agent to act, and as part of the res gestæ was admissible. Beasley v. San José Fruit Packing Co., 92 Cal. 392, 28 Pac. 485; Birch v. Hale, 99 Cal. 301, 33 Pac. 1088; Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687; Krogg v. Atlanta, etc., Co., 77 Ga. 202, 4 Am. St. Rep. 79. The cases cited by appellant against the admission of the declarations of Lucas are not in point. They apply to declarations of an agent made after the accident—declarations which are not part of the res gestæ, and which are universally held to be inadmissible. The distinction between these cases and the case at bar is that in this case the declarations were not made subsequent to the accident, but prior to and relative to a matter concerning which the agent was acting within the scope of his employment; a matter depending at the very time and arising from his duty under the agency, to examine the trestle for the purpose of discovering the defects, and to notify the trestle foreman of them and of the immediate necessity for repair.

In connection with the alleged inadmissibility of the conversation between Harvey and Lucas may be considered the further claim made by defendant that it was improper for the court to permit the witness Richard Gernon, heretofore referred to, to testify that he had, prior to the accident, called the attention of J. C. Turner, manager of defendant's road, to certain defects in the trestles and bridges on that road. This defect was with reference to the system of stringers used. This evidence was, we think, admissible as showing that the attention of the defendant, prior to the accident, had been called to what was claimed to be a defect in the original construction, as bearing on the question of negligence in failing to obviate the defect. It is true that the inquiry, in as far as it applied generally to the trestles and bridges on the defendant's road, was too broad. Defendant, however, did not object on that account. If, in fact, the particular defect as to these stringers was common to all the trestles on the road, no harm resulted to the defendant from the admission of the evidence as to them in the aggregate, because it is quite apparent from the testimony of Gernon, given prior and subsequent to the evidence objected to, that he had in mind, and was applying his testimony particularly to, the defects existing in his judgment in the Big Wible trestle. This same witness Gernon, as an expert trestle and bridge builder, testified for plaintiff as to how the Big Wible trestle should have been constructed, considering the purposes for which it was intended to be used. He went into details as to these matters, and testified, among other things, that there should have been additional and perpendicular posts inside the bents of the trestle as originally constructed, and also that the caps should have been longer, and should have had pieces of timber firmly bolted on them so as to hold the cars or train from going over the trestle in case of derailment. Defendant objected to this evidence, but we think it was admissible. In fact we can see no pertinent objection to it. This witness was testifying as to how the trestle should have been properly constructed, and if, in a proper construction, for the purpose intended, it should have had these bents, caps, and bolted timbers, it was proper to show it. It is claimed that the question of guard rails and derailment of the logging train was not involved in the case; that the plaintiff's right of recovery proceeded upon the theory, either that the trestle was not properly constructed originally, or that it had been suffered to go to decay, and that the plaintiff's injury occurred through the fault of the trestle for either or both of those reasons. This is true, but did not preclude proof as to how the trestle in its entirety should have been properly constructed, and it is further apparent from the testimony that, while these guard rails were primarily to prevent derailment, they tended also to strengthen the trestle.

This witness also testified, over defendant's objection, as to the effect that running trains over the trestle would have upon the diagonal timbers used in its construction; that the jar of the train in running over them—the vibration—would have a tendency to loosen the nails or spikes driven in the bracing, and thus shake loose the bracing itself; that, instead of nailing these timbers, they and all parts of the trestle should have been fastened with bolts. There was nothing improper in admitting this testimony. It is not such a matter of common knowledge whether vibration occasioned by the passing of a logging train over a trestle will or will not loosen spikes in its timbers that the testimony of one conversant with such matters from experience is inadmissible. Neither is it a matter of such common knowledge that a trestle is more securely constructed, for the purpose the one in question here was built, by the use of bolts rather than of nails or spikes. Hence it was entirely proper to admit the evidence of the witness on both matters, as a proper subject for expert testimony.

The appellant further complains because the court sustained objections of the plaintiff to interrogatories made by defendant's counsel of the witness Gernon on cross-examintain as to whether the trestle, as he testified it should have been constructed, would "bring absolute safety to the employés of the road," and whether it would "be sufficiently safe for a passenger train to run over." The objection was properly sustained. It was not a question in the case whether "absolute safety" would be secured, or whether a passenger train could safely be operated on the trestle in question, but simply whether the trestle as constructed or maintained by defendant was a reasonably safe trestle for the uses to which is was subjected. Aside from this, it is apparent, from the narrative of the testimony of this witness in the record, that, prior to the particular inquiries complained of here, appellant had endeavored to show by the witness that, in describing how the Big Wible trestle should have been built, he had in contemplation a stronger one than the logging purposes of defendant required, because, in response to an inquiry on cross-examination in that direction, the witness had answered: "I mean to say that it is necessary to have a trestle constructed in the way I have described in order with reasonable safety to carry such loads as they were accustomed to carry over those trestles." Hence, assuming that the questions objected to were permissible, the witness having already been examined by appellant, and having testified on the subject, no harm was committed in precluding further inquiry.

Complaint is made because the court modified one of the instructions asked on behalf of the defendant. The modification consisted in striking out the first sentence thereof, as follows: "The defendant was not required to use the degree of care in the construction of this trestle in satisfying the demands of the law as to its duty towards its employé, as would be required of a railroad company in the performance of its duty towards passengers upon its trains." The court gave the rest of the instruction which correctly stated the rule of law as to the degree of care necessary to be exercised by the defendant in constructing and maintaining the trestle in question for the purpose for which it was actually intended and used. We perceive no error committed by the court in modifying the instruction. Counsel for appellant insists that the instruction as tendered was in the language of this court as expressed in Dolan v. Sierra Ry. Co., 135 Cal. 436, 67 Pac. 686. This is true, but for that reason it was not error to refuse it. It does not follow, because a trial court does not give an instruction in the language employed by an appellate court in reasoning out a proposition of law or elaborating upon it, that error is thus committed. The most that the trial court is required to do is to give instructions which will embody clearly the principles of law under which the jury is to apply the evidence in the case before them. There was nothing in the case at bar involving any question of the degree of care due from a railroad company in relation to its passengers. The question actually before the jury was whether the defendant performed its duty by the exercise of ordinary care in the construction and maintenance of this trestle for the purpose for which its servant (the plaintiff) was required to use it. The trial court in several instructions clearly instructed the jury on that point, which was all it was required to do, or to which either of the parties was entitled. Some other points are presented on this appeal, but we do not think they merit particular discussion.

The order appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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149 Cal. 752

SCHINDLER v. GREEN et al. (Sac. 1,260.)

(Supreme Court of California. Oct. 1, 1906.)

MECHANICS' LIENS—RIGHT TO LIEN—PERFORMANCE OF CONTRACT—SUBSTANTIAL PERFORMANCE.

Code Civ. Proc. § 1187, in relation to mechanics' liens, provides that any trivial imperfection in the work shall not prevent a lien. The contract for the making of an addition to a house contained no plans or specifications where windows were to be placed, and the contractor placed two windows in the basement, so that they were not directly under windows in the first story of the house, and the contractor testified in an action to enforce a mechanic's lien that he placed the windows in such a manner in order to give the largest amount of furniture room in the basement, and that no request was made to him to have the windows changed until after the plastering had been put on around them, when he refused unless he should be paid additional for it, whereupon defendant made the change. The cost of placing the windows in alignment was $7.50. *Held*, that the facts warranted a finding that the contractor acted in good faith, and that the failure to place the windows in alignment was a trivial imperfection.

Department 2. Appeal from Superior Court, Sacramento County; Peter F. Shields, Judge.

Action by C. Schindler against Thomas Green and others. From a judgment in favor of plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

John D. Moynahan and Hinkson & Elliott (C. A. Elliott, of counsel), for appellants. R. Platnauer, for respondent.

LORIGAN, J. This action is brought by an original contractor against defendants as owners of a lot in the city of Sacramento, to foreclose a mechanic's lien: A written contract was made by plaintiff with Annie and Maggie Green, daughters of defendants in the action, who lived on the premises with their parents, said defendants, to do the carpenter work in making alterations and adding two rooms to the house in which defendants lived. The plastering of the rooms was to be done by another person under a separate contract, with which plaintiff had nothing to do. There were no regular plans or specifications as to where the doors or windows in the rooms should be placed, the contract providing generally that there should be not to exceed six doors and not to exceed ten windows, and that the new addition should be built uniformly. The contract price was $403.50 for all materials and carpenter work, of which plaintiff was paid $100 during the progress of the work. Defendants refusing payment after the plaintiff claimed his contract was completed, the latter filed a lien on the premises and in due time brought this action to foreclose it in the amount of $326.50; the $23.00, over the unpaid contract price of $303.50, being claimed for extra work and material furnished beyond that provided for in the written contract. At the trial plaintiff had judgment as prayed for and this appeal is taken by defendants from the judgment and from an order denying their motion for a new trial.

There are many specifications of error in the transcript relative to the admission of evidence. We have given all of them careful consideration, and do not think any of them are well taken, or that particular reference to them is required. Aside from such alleged errors, the main point made by appellants for a reversal is as to the sufficiency of the evidence to sustain a finding of the lower court relative to two windows placed in the basement story of the house as built by plaintiff and the effect of such finding. The court found as to the windows: "That the two windows placed by plaintiff in the front portion of the basement story of said house were not directly beneath the two front windows of the upper portion of said house, which upper portion consisted of the old house after the same had been raised, and that the placing of such windows in this manner was not workmanlike; and the court finds that the failure of plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection." The only complaint made relative to the two windows so referred to was that they were not in alignment with the two front windows in the upper story. No other defect relative to them was complained of. This was what the lower court found to be a trivial imperfection, and relative to it further found that after the work had been completed by plaintiff defendants caused the position of said two front windows to be changed, and had said windows placed directly underneath the two windows in the upper portion of said house for which they paid the sum of $7.50, which the court finds was a reasonable amount to allow the defendants for making such change and which it deducted from the amount for which the plaintiff sued. It is insisted by appellants that the evidence does not support that portion of the finding that the failure of plaintiff to place said windows in a direct line with the windows in the upper portion of the house was a trivial imperfection. We do not think this point is well taken. In the last clause of section 1187 of the Code of Civil Procedure, it is provided that any trivial imperfection in the work shall not prevent a lien. Whether an imperfection in the work for which a lien is sought is a trivial one or not is to be determined from the facts and circumstances of each particular case. No fixed or inflexible rule upon the point can be laid down. Upon this subject it is said in Bianchi v. Hughes, 124 Cal. 27, 56 Pac. 610: "'Trivial imperfection,' as used in the Code, relates to the question whether or not there has been an actual completion of the building. Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164. 'What constitutes a "trivial imperfection" is a question of fact in each instance' (Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629); and the decision of the trial court thereon cannot be disregarded, unless the party complaining makes it clearly appear to be without any evidence in its support. Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686. The 'trivial imperfections' mentioned in the above section (section 1187, Code Civ. Proc.) refer to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly uncompleted, and workmen are still engaged in constructing substantial portions thereof." See Santa Monica, etc., Co. v. Hege, 119 Cal. 376, 51 Pac. 555. And in Harlan v. Stufflebeem, 87 Cal. 511, 25 Pac. 687: "The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no willful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. * * * Whether the contract has been substantially performed is a question of fact, which must be determined by the trial court in each instance from the facts and circumstances in that case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact."

Now applying these rules to the matter under review: It is not contended that the plaintiff omitted to put in any windows, which he agreed to place in the basement story, but only that they were placed some inches out of alignment with the windows in the upper story. The court found that this was unworkmanlike. This, however, was not a finding that the plaintiff had failed to substantially perform his contract, but only that the manner of its performance was not workmanlike, with the additional finding, bearing upon such defective alignment of the windows, that it constituted but a trivial imperfection. And the facts and circumstances in the case warranted the court in so finding, as was the court also warranted in finding (as is implied in the finding that the imperfection was trivial) that in placing the windows where he did plaintiff acted in good faith with the intention of complying fully with his contract. As we have said, there were no plans or specifications showing where the windows were to be placed, and as testified to by Devine (who drew the contract and was acting as agent for the Green sisters in supervising the building) the plaintiff had to use his best judgment in the construction of the house, and plaintiff testified that in his opinion the placing of the windows was workmanlike, and that he placed them, though not in alignment, so as to give the most furniture space in the room; that he understood when placing them there that he was following directions given him by Devine and Maggie Green; that during the progress of the work on the house Devine and Maggie Green, who lived in the house with her parents, were about the premises frequently giving orders how the addition thereto should be constructed and directing changes to be made; that at their direction plaintiff changed the windows on the west side of the building, one of them three times; that no request was made to change the windows in dispute until after they had been put in and the plastering done around them, and only then when the plaintiff demanded payment of what he claimed was due him; that the evidence in the case was in fact conflicting as to whether it was or was not good workmanship to place the windows as plaintiff had placed them. The evidence further shows, as found by the court, that the cost of placing the windows in alignment was $7.50, and there is no pretense that in remedying this deviation by resetting the windows in proper alignment any damage or disfigurement to the building, either from a material or æsthetical point of view, was occasioned. We think these facts warranted the court in finding that the defect complained of was but a trivial imperfection, readily remedied and compensated for out of the contract price, and that such imperfection in the work arose in an attempt in good faith by plaintiff to substantially perform his contract. As against the good faith of the plaintiff relative to the placing of these windows it is claimed the evidence shows that he refused to change them when demand was made on him to do so, and that he stated, upon refusal of Devine, as agent of the Greens, to pay him until he did, that he could do better in a law suit. It is true the plaintiff refused to change the windows after he had, as he claimed, finished the work according to his contract, and the plastering had been put on around them, unless paid additional for it, but this fact would not affect the implied finding of the court that the plaintiff was acting in good faith in claiming that he finished the work as agreed to. This was his claim all along, and if he was mistaken in it, as the imperfection was trivial, his right to a lien was not forfeited thereby. Upon his refusal the defendants had a month before the lien was filed within which they could have had the change in the windows made by another carpenter, or have ascertained what it would cost to do so, and could have tendered the plaintiff what was due him less such expense. As to the statement that plaintiff said he could do better in a law suit: This was testified to by Devine, but it is quite evident from all his testimony that this statement was made by plaintiff while he and Devine were disputing over the claim of plaintiff for extra labor. Devine and the Greens claimed that plaintiff had performed no extra labor and refused to pay him anything on that account. Devine offered to pay him the balance of the contract price, $303.50, only, and charged him with trying to get by his claim for extra work more than belonged to him. Plaintiff refused to forego his claim for the extra labor, and it was in this connection that the remark about doing better in court was made. The defendants in their answer in this case denied any liability to the plaintiff for such extra work, but the lower court found that his claim for it was just and allowed it to him, which makes further comment upon his remark about doing better by litigation unnecessary.

We have discussed what we deem the principal point upon this appeal. Other claims are made for a reversal, but we do not think any of them tenable.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(149 Cal. 738)

PLACER COUNTY v. FREEMAN.

(Sac. 1,352.)

(Supreme Court of California. Sept. 25, 1906.)

1. APPEAL — JUDGMENTS APPEALABLE — CONSENT JUDGMENT.

After the lower court on defendant's motion, struck out several items sued on, to which plaintiff excepted, and the amount remaining being less than $300, plaintiff and defendant both entertained a view that the court had no jurisdiction of the action. A judgment of dismissal followed in the following language: "Both plaintiff and defendant having admitted in open court that the court has no jurisdiction in this action, it is therefore ordered * * * that the same be and is hereby dismissed." *Held*, that plantiff did not consent to the judgment in such sense that it was deprived of the right to appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 717-719.]

2. COUNTIES—ROAD COMMISSIONER—COMPENSATION—EXPENSES.

County Government Act, § 228, subd. 8, St. 1897, p. 576, c. 277, declaring that county charges shall include "the contingent expenses necessarily incurred for the use and benefit of the county" does not entitle the supervisors as ex officio road commissioners to repayment of their traveling and personal expenses incurred as road commissioners in view of section 215 (page 572) which provides that the salaries and fees provided for shall be in full compensation for all services rendered the county as officer or ex officio officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 54.]

3. HIGHWAYS — ROAD OVERSEERS' COMPENSATION—STATUTES—CHANGE DURING TERM.

Act March 23, 1901 (St. 1901, p. 752, c. 234, § 185, subd. 15), providing for the repayment to road commissioners of such expenses as they actually incur cannot be construed to apply to officers who went into office before and retained office after the enactment of the law.

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the county of Placer against W. A. Freeman. From a judgment for defendant, plaintiff appeals. Reversed.

A. K. Robinson, Dist. Atty., and F. P. Tuttle, for appellant. L. L. Chamberlain and J. E. Marks, for respondent.

HENSHAW, J. This action was brought by the district attorney of the county of Placer in the name of the county, against the defendant, who was a member of the board of supervisors of the county. As such supervisor he was ex officio a road commissioner of the county. Pol. Code, § 2641. As road commissioner he presented for payment claims against the county aggregating the sum of $458.10. These claims were for traveling and personal expenses incurred as road commissioner. The action by the county was to recover back these moneys, and was prosecuted under the provisions of the county government act of 1897. St. 1897, p. 452, c. 277, § 8. The constitutionality of this section has been upheld in Burr v. Board of Supervisors, 138 Cal. 57. By the provisions of the county government act, each member of the board of supervisors of Placer county became ex officio a road commissioner of the county. At the time when the defendant, as road commissioner, paid out the several sums of money for traveling and personal expenses and these claims were ordered paid by the board of supervisors, the warrant drawn by the auditor and paid by the treasurer, there was nothing in the law making special provision for the repayment of the money so expended. To the contrary, section 215 (page 572) of the county government act provided that the salaries and fees provided for should be in full compensation for all services rendered the county as such officer or ex officio officer. To this complaint was interposed a demurrer and a motion to dismiss. The motion was overruled. The court, in an opinion overruling the demurrer suggested to the attorney for the respondent that it would entertain a motion to strike out from the complaint many of the items charged upon, as having been illegally collected, and the defendant, following this suggestion with a motion to strike out, the motion was granted under opposition and objection by the plaintiff. To the granting of the motion plaintiff reserved its exception. The granting of this motion left the complaint as charging upon a few items, trifling in amount, not exceeding in the aggregate $20. The complaint thus charging for the recovery of a sum less than $300, plaintiff and defendant both appear to have entertained the view that the court had no jurisdiction of such an action. A judgment of dismissal followed, which judgment is in the following language: "Both plaintiff and defendant having admitted in open court that the court has no jurisdiction of this action, it is therefore ordered, adjudged and decreed that the same be and is hereby dismissed."

From this judgment of dismissal plaintiff promptly appealed, causing a bill of exceptions to be settled, upon which it sought to review the soundness of the order of the trial court striking out portions of the complaint. Upon this appeal respondent urges a preliminary objection that the judgment of dismissal was a "consent judgment"; that being such a judgment, plaintiff is bound by its terms, and no appeal from it will, therefore, be considered. Much authority is cited as to the meaning, force, effect, and finality of a consent judgment. These authorities are unimpeachable in point of law, but do not call for consideration, because the judgment here appealed from is in no legal sense a judgment by consent. If plaintiff had assented to the order of court striking out the items and allegations of the complaint, some force might attach to the argument that plaintiff's concurrence in the judgment which it was believed necessarily followed, was a consent judgment. But the facts are that plaintiff was strenuously opposing the motion to strike out, and reserved its exception to the order which was given. The order having been made against its objection and exception, it was the conviction of plaintiff that, by the order striking out, the court had stripped itself of jurisdiction to proceed further with the action. Whether plaintiff was correct in this view of the law or not is quite immaterial. It assented to the judgment only in the sense that one assents who, protesting against a given course of conduct or procedure, agrees with his adversary that but one consequence can follow the adoption of that course of procedure or conduct. Thus a man who is told that he is going to be executed, but may have his choice of modes of execution between shooting and hanging, can scarcely be said to have consented to his execution if he express a preference for being shot. An attorney, against whose complaint a general demurrer has been sustained without leave to amend, and who thereupon states to the court that, under his view of the law, nothing remains but to give judgment for the defendant, would hardly be said to have assented to the order sustaining the demurrer and to have bound himself through his declaration to a consent judgment. An attorney who objects to a question propounded of a witness, and who reserves his exception to the order of the court overruling his objection, can scarcely be said to have waived his objection and exception if thereupon he should turn to the witness and say "proceed with your answer." This proposition seems so plain as not to require the citation of authority, but reference may be made to Mecham v. McKay, 37 Cal. 154; Harvey v. Bunker Hill Co., 2 Idaho, 765, 24 Pac. 30; Smith v. Dittman, 16 Daly (N. Y.) 427.

Coming thus to consider the ruling of the court in striking out the allegations in the complaint as to the claims, it appears, as has been said, that there is no warrant in the law for their collection by the road commissioner, unless it is found in subdivision 8 of section 228 (page 576) of the county government act, which declares the following to be county charges: "Section 228, subd. 8. The contingent expenses necessarily incurred for the use and benefit of the county." It is a forced construction to hold that this provision contemplated the repayment of the personal expenses of the road commissioners, particularly in view of the fact that it makes no reference to these expenses, whereas, subdivision 2 of the same section expressly makes a county charge of "the traveling and other personal expenses of the district attorney," etc. The county government act, as to many officers, makes express provision as to repayment of their personal and traveling expenses, and in the case of Placer county it is provided that (besides the clause touching the district attorney) the superintendent of schools shall be allowed his actual traveling expenses, not to exceed $500 per annum. County Gov. Act, St. 1897, p. 539, c. 277, § 185, subd. 11. If the law, therefore, contemplated that the supervisors should receive repayment of such traveling expenses it would have said so. Whereas, in fact, what it does say in section 215 is that the salaries and fees provided for shall be in full compensation for all services rendered the county as such officer or ex officio officer. That this language is in absolute repugnancy and hostility to the idea that where compensation for all services is fixed by statute, personal and traveling expenses may still be allowed, is well expounded in the case of Albright v. County of Bedford, 106 Pa. 582, and State v. Trousdale, 16 Nev. 357, where it is held, as indeed it must be, that a statute providing in terms or in effect that the compensation fixed "shall be in full for all services" excludes the idea that the Legislature intended to allow extra compensation for traveling and like expenses. In the case at bar, if subdivision 8 of section 228, in providing that contingent expenses necessarily incurred for the use and benefit of the county are county charges, contemplated such expenses as are here in suit, it must necessarily include the traveling and personal expenses of every county officer, so that judges, sheriffs, county clerks, one and all, without any express provision of the law to that effect, would be entitled to recover their traveling expenses incurred in the performance of their duties. This certainly is not the construction of the section.

At a later session, in 1901, the Legislature seems to have considered it a hardship that road commissioners should be compelled to bear the cost of their traveling expenses, and made provision by act adopted March 23, 1901 (St. 1901, p. 752, c. 234, § 185, subd. 15) for the repayment to them of such itemized expenses as they had actually incurred, the result being that supervisors elected after the law of 1901 went into effect became clearly entitled to such reimbursement, while the supervisors who went into office before and retained office after the enactment of that law did not come within the scope of its liberality. But notwithstanding the fact that the result is as in this case, that certain members of the board of supervisors are entitled to reimbursement for their expenses as road commissioners, while other members of the board are not, the inequality and individual hardship which thus results cannot be permitted to overthrow, or even modify, the rule that the compensation of a public officer may not be increased during the term for which he is elected. This complaint, as has been said, was framed under the provisions of section 8 of the county government act (St. 1897, p. 452, c. 277) and under section 53 (page 473) of the same statute. The complaint was certainly sufficient in form. Solano County v. McCudden, 120 Cal. 648, 53 Pac. 213. It was, therefore, error for the court to strike out the allegations of the complaint.

The judgment is reversed, with directions to the trial court to deny the motion to strike out, and to allow defendant a reasonable time in which to answer to the merits of the complaint.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J

4 Cal. App. 291

SAN FRANCISCO COMMERCIAL AGENCY v. MILLER et al. (Civ. 267.)

(Court of Appeal, Third District, California. Sept. 18, 1906. Rehearing Denied Oct. 16, 1906; Denied by Supreme Court Nov. 15, 1906.)

CORPORATIONS — STOCKHOLDERS—LIABILITIES FOR DEBTS—ACTION—PLEADING.

Const. art. 12, § 3, provides that each stockholder of a corporation shall be individually liable for such portion of the debts incurred while he was a stockholder as the amount of stock owned by him bears to the whole of the subscribed capital stock. *Held*, that a complaint to enforce stockholders' liability under such section, alleging that the whole capital of the corporation was divided into 60,000 shares, of which about 37,735 shares were "issued" was not equivalent to an allegation that only that number of shares were "subscribed," and that the complaint was, therefore, fatally defective for failure to allege the whole number of shares subscribed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1129.]

Appeal from Superior Court, City and County of San Francisco; J. M. Troutt, Judge.

Action by San Francisco Commercial Agency against M. K. Miller and others. From a judgment for plaintiff, defendants William H. and Charles Dunphy appeal. Reversed.

W. J. Bartnett, for appellants. P. A. Bergerot and G. H. Perry, for respondent.

McLAUGHLIN, J. This is an action against certain stockholders of the Eureka Consolidated Oil Company to recover their proportionate share of the indebtedness of said corporation.

The only question presented for decision involves the sufficiency of an allegation in the complaint, which reads as follows: "That the capital stock of said Eureka Consolidated Oil Company now is, and at all the times hereinafter mentioned was, the sum of $60,000, divided into 60,000 shares of the par value of $1 each; that at all said times there had been issued by said company 37,735 shares of its capital stock, and no more, which shares were duly subscribed for, owned, and held by the shareholders of said company; and that there are now owned and held, and at all the times hereinafter mentioned there were owned and held, by the defendants above named the number of shares set after their respective names," etc. The appellants demurred to the complaint on the ground that no cause of action was stated. The demurrer was overruled, and the appeal is taken from the judgment thereupon entered in favor of plaintiff.

Section 3 of article 12 of the Constitution provides that "each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all of its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." In the complaint before us the number of shares issued and the number of shares subscribed for and owned by the defendants is stated, but we are left groping as to the number of shares constituting the whole of the "subscribed capital stock." It is contended that the averment that but 37,735 shares were issued is equivalent to a statement that only that number of shares were subscribed. With this contention we cannot agree. In the case at bar the averment in question might be absolutely true, and yet the remaining number of shares might have been subscribed by one or more persons not made defendants in this action. "To constitute the subscribers stockholders, it was not necessary that the certificates of stock should have issued to them." S. J. L. & W. Co. v. Beecher, 101 Cal. 79, 35 Pac. 349; Cal. S. H. Co. v. Callender, 94 Cal. 127, 29 Pac. 859, 28 Am. St. Rep. 99; Mitchell v. Beckman, 64 Cal. 121, 28 Pac. 110. The averment that stock has been issued amounts to no more than a statement that the stock certificates have issued. Tulare Sav. Bank v. Talbot, 131 Cal. 49, 63 Pac. 172. And it is a matter of common knowledge that stock is invariably subscribed for before it is issued. From this it follows that one element necessary to fix the proportion of the indebtedness for which appellants were liable is entirely wanting. We know the amount of stock issued and the number of shares owned by appellants, but we are not informed as to the total number of shares subscribed.

It has been held repeatedly that a complaint failing to state the whole number of shares subscribed is fatally defective, and we have neither the inclination nor the right to depart from a rule so well settled and sound. John A. Roebling's Sons Co. v. Butler, 112 Cal. 678, 45 Pac. 6; Bidwell v. Babcock, 87 Cal. 32, 25 Pac. 752; Const. art. 12, § 3; Civ. Code, § 322.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

149 Cal. 770

SIERRA COUNTY v. FLANIGAN. (Sac. 1,219.)

(Supreme Court of California. Oct. 1, 1906. Rehearing Denied Oct. 31, 1906.)

LICENSE—ORDINANCE—REPEAL—EFFECT.

Where a license tax accrued after the passage of Pol. Code, § 3366 (St. 1901, p. 635, c. 209) authorizing the imposition of a business license, which operated to repeal the ordinance under which the license was levied, the county had no right to recover the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 16.]

In Bank. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by Sierra county against P. L. Flanigan. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., W. I. Redding, Dist. Atty., and Frank R. Wehe, for appellant. A. E. Cheney and Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

SHAW, J. This is an action to recover of the defendant certain license taxes alleged to have accrued and to be due and owing from him to the county of Sierra, under an ordinance adopted by the board of supervisors of the county on May 31, 1900.

Precisely the same ordinance was under consideration by the Supreme Court of the United States in Flanigan v. County of Sierra, 196 U. S. 557, 25 Sup. Ct. 314, 49 L. Ed. 597. It was held by the Supreme Court of the United States in that case that the ordinance in question was repealed by the act of the Legislature of California of March 23, 1901, adding section 3366 to the Political Code (St. 1901, p. 635, c. 209), and that the repeal operated to prevent further collection of taxes previously accrued under the ordinance. The taxes for which this suit was begun accrued after the passage of the act of 1901, and there can be no doubt but that, under the decision, the right of action for the tax was terminated by the passage of the statute. The Supreme Court of the United States, upon this point, followed the decisions of this court in Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674, and Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732.

Following the decisions in these cases, we hold that the plaintiff had no right of action to collect the tax sued for. The court below took the same view, sustained a demurrer to the complaint without leave to amend, and rendered judgment for the defendant thereon, and this action was correct.

The judgment is affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

149 Cal. 782

WHEELER et al. v. PLUMAS COUNTY.

(Sac. 1,341.)

(Supreme Court of California. Oct. 2, 1906.)

1. LICENSES—REVENUE—STATUTES—REPEAL.

County Government Act 1897, p. 465, c. 277, § 25, subd. 25, conferred on boards of supervisors power to license, for the purpose of regulation and revenue, every kind of business not prohibited by law, transacted and carried on within the county. Under such authority the supervisors of P. county passed an ordinance entitled "An ordinance levying a license tax on persons, firms, copartnerships and corporations, carrying on the business of grazing, herding or pasturing sheep or lambs within the county," which provided that all persons so engaged in such business should pay an annual license equal to $10 for every 100 sheep and lambs owned and controlled by them, etc. *Held*, that such ordinance was a measure passed for the purpose of revenue, and not for the regulation of sheep raising, and was, therefore, repealed by Pol. Code, § 3366, amending the county government act and restricting the power of counties to license to matters of regulation only.

2. SAME—EFFECT OF REPEAL—PRIOR TAXES.

The repeal of a county's power to levy a license tax for revenue by Pol. Code, § 3366, was to destroy all the county's right to collect a license tax under an existing revenue ordinance, though the tax was due before the repeal took effect.

3. SAME—RECOVERY OF PAYMENT—DURESS—PROTEST.

After a statute granting counties the right to levy license taxes for revenue purposes had been repealed, the county claimed the right to collect a license tax from plaintiffs under an ordinance taxing sheep raisers, and procured the arrest of R., one of the plaintiffs, for engaging in such business without procuring a license. While R. was in the custody of the sheriff, and in order to procure his release from custody, he was required to, and did, deposit the alleged amount of the license tax with C., who thereafter paid over the money to the county under protest in order to prevent R.'s rearrest. *Held*, that neither the payment made to C. nor to the county were voluntary, but under duress, and, the county not being entitled to collect such tax, plaintiffs were entitled to recover the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 68.]

Department 2. Appeal from Superior Court, Plumas County; C. E. McLaughlin, Judge.

Action by D. C. Wheeler and another against Plumas county. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Campbell, Metson & Campbell and Cheney, Massay & Smith, for appellants. U. S. Webb, Atty. Gen., and L. N. Peter, Dist. Atty., for respondent.

LORIGAN, J. This is an appeal from a judgment in favor of defendant entered against plaintiffs after they had declined to amend upon demurrer sustained to their first amended complaint, and the only question presented is as to the validity of the order sustaining such demurrer.

The facts as gathered from the amended complaint are as follows: The board of supervisors of Plumas county on the 9th of January, 1900, enacted an ordinance entitled "An ordinance levying a license tax on persons, firms, copartnerships and corporations carrying on the business of raising, grazing, herding or pasturing sheep or lambs within the county of Plumas, * * *" wherein it was provided that all persons engaged in such business within the county of Plumas must annually procure a license therefor from the license collector of the county, and pay therefor $10 for each 100 sheep and lambs owned by and under the control of such persons. It further provided that the license collector should have the collection of the license tax provided for by the ordinance, and should direct the district attorney to bring suit in the name of the county to recover such license where any person required by the ordinance to take out a license failed to do so. The ordinance made the license a debt due the county, and provided that the money collected for the license should be paid over to the county treasurer and placed to the credit of the general fund of the county. In August, 1901, plaintiffs, as copartners, were engaged in the business of raising and grazing sheep, and had in their possession and were grazing within the county of Plumas 13,000 sheep and lambs, and had failed to take out a license for such business. During that month the plaintiff D. W. Ridenour was arrested, taken many miles to Quincy, the county seat of Plumas county, and was there held in the custody of the sheriff under a warrant of arrest issued by the justice of the peace of Plumas township in Plumas county, based upon a complaint of the license collector, which charged said Ridenour with the commission of a misdemeanor in the carrying on of a business for which a license was required without first procuring a license. While said Ridenour was in the custody of said sheriff, in order to procure, and as a condition for, his release from custody, he was required to, and did, deposit with one C. C. Clough $1,301, which was the amount claimed by the license collector as the amount of the license under the ordinance. The money so deposited was the money of the plaintiffs, and, as alleged in the complaint, it was agreed between the plaintiffs and defendant that the money was deposited and paid under protest, and that it should be held by the said Clough until the protest was prepared. Upon deposit of this money, the said Ridenour was released from custody, and the case against him in the justice court continued. On April 3, 1902, while the criminal case against said Ridenour was still pending, the plaintiffs prepared and served on the license collector of the county their protest in writing against the payment of the license tax. Thereafter, upon the demand of the defendant, in order to prevent said Ridenour from being again taken into custody under said warrant of arrest and prosecuted for carrying on said business without a license, said $1,301 was paid and delivered to said defendant under protest by said C. C. Clough. The plaintiffs then presented their claim in writing to the board of supervisors of the county, praying for the repayment of the said money, which claim was rejected. Upon the rejection of said claim, the plaintiffs commenced this action, resulting in the judgment appealed from. Upon this appeal, the argument in the briefs upon both sides is devoted principally to questions as to the validity of such ordinance, and whether, at the time of the arrest of Ridenour, and the payment under protest of the license demanded of him, said ordinance and license tax imposed thereby had not been repealed, and the right of the county to collect any tax under the ordinance extinguished and gone.

It will be unnecessary to consider the constitutional objections urged by appellant against the validity of the ordinance, because it is settled by the authorities, not only that, by legislation of the state subsequent to the enactment of the ordinance, it was repealed, but also that the effect of such repeal was to extinguish any right to collect a license tax previous to such appeal. It will be observed that the ordinance in question was passed by the board of supervisors of Plumas county in 1900, at a time when, by subdivision 25 of section 25 of the county government act (St. 1897, p. 465, c. 277) power was conferred upon boards of supervisors of the several counties "to license for purposes of regulation and revenue of every kind of business not prohibited by law and transacted and carried on in such county." When the ordinance in question was passed this law was in force, but before the arrest of the appellant Ridenour or any proceedings taken to enforce the collection of the license tax imposed by defendant, the Legislature, by the act of March 23, 1901 (St. 1901, p. 635, c. 209; section 3366, Pol. Code), repealed by implication said subdivision 25 of section 25 of the county government act, as far as it conferred power to license for purposes of revenue, and restricted the power to matters of regulation alone. Ex parte Pfirmann, 134 Cal. 148, 66 Pac. 205; City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Town of Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732; Ex parte Braun, 141 Cal. 204, 74 Pac. 780. The effect of the act of March 23, 1901, was to repeal the ordinance of 1900 if the ordinance was a measure passed for the purpose of revenue and not for regulation, and that it is of the former character alone is not, we think, open to question. It is apparent from the title of the act itself, and the entire absence of any regulatory provisions, that it was intended as a revenue measure, and comes within the scope of the rulings in City of Sonora v. Curtin and Town of Santa Monica v. Guidinger, supra, and the cases of Flanigan v. County of Sierra, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597; Wheeler & Ridenour v. County of Plumas, 196 U. S. 562, 25 Sup. Ct. 316, 49 L. Ed. 599. See, also, County of Sierra v. Flanigan (Sac. No. 1,219) 87 Pac. 801, written and decided by this court since this portion of this opinion was prepared.

The cases in the Supreme Court of the United States were decided since the appeal in this case was taken, and involved the construction of ordinances practically identical with the one here in question, one of which was a controversy between these same parties. It was there held, following the California cases immediately above cited, that the ordinances there in question were enacted for the purpose of revenue and not for regulation. Equally so is the one under consideration here a revenue measure only, and, under the act of March 23, 1901, adopted after its passage was repealed, and the effect of the repeal of the power to levy the license tax for revenue was to destroy all right to collect a license tax under the ordinance, even though due before the repeal took effect. The repeal of the power repealed the ordinance, and destroyed, also, all right to collect any tax thereunder. Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322; City of Sonora v. Curtin, supra; Town of Santa Monica v. Guidinger, supra. And that this was the effect of such repeal of the power upon the right to collect was also declared in the Flanigan and the Wheeler & Ridenour Cases in the United States Supreme Court, above referred to. See, also, on both the above points, the case of Sierra Co. v. Flanigan (Sac. No. 1,219, decided by this court and above referred to) 87 Pac. 801.

In passing from this branch of the case it is well to say that the ordinances embraced in the above cases, passed upon by the Supreme Court of the United States, are entirely different in their terms from the ordinance under consideration in the case of County of Plumas v. Wheeler et al. (No. 1,361) 87 Pac. 909, and County of Sierra v. Flanigan (No. 1,305) 87 Pac. 913, pending in this court, and the decisions in which cases were filed yesterday—October 1, 1906. These latter ordinances were passed subsequent to March 23, 1901, and purported, by their title, and from their provisions, to be for the purpose solely of regulating the business of raising, grazing, herding, and pasturing sheep or lambs in the respective counties where they were enacted. We have, however, nothing to do with those cases in the consideration of this appeal, and simply refer to them as involving ordinances passed at a different time and containing different provisions.

Recurring now to the matter under consideration: As the ordinance here in question was a revenue measure, and it, together with any right to collect a license under it, became inoperative upon the passage of the act of March 23, 1901, it necessarily follows that the claim made by the respondent, and sought to be enforced by the criminal prosecution taken against said Ridenour, was unauthorized and invalid, and, if payment of such illegal demand was compelled by duress, and paid under protest, the plaintiffs have a right to recover it back.

This brings us to the last point made on the appeal—an inquiry as to whether the payment made was a payment under duress, or, as contended by respondent, a voluntary payment. Under the facts alleged in the complaint, the payment was unquestionably compulsory and involuntary, and we cannot perceive the slightest basis for the contention that it was otherwise. Laying down the general rule as to what constitutes an involuntary payment, it is said: "The authorities are unanimous to the effect that where one is compelled by duress of his person to pay an unjust or illegal demand, and he makes the payment under protest, such payment is compulsory and can be recovered back." 22 Am. & Eng. Enc. of Law, 613. "In the absence of specific statutory provision the general doctrines as to the recovery of payments apply to the payment of taxes. Hence, taxes voluntarily paid, without legal duress or coercion, cannot be recovered back, but, when a person is called upon peremptorily to pay a tax to which he is not liable, and he can save himself or his property in no other way than by paying the illegal demand, he may recover the money so paid as money had and received." 27 Am. & Eng. Ency. of Law, 757, 758. In Osborn v. Robbins, 36 N. Y. 371, the Court of Appeals says: "When a party is arrested without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin, and the wrongdoer can take no benefit from its execution. In such a case, the element of voluntary assent is wanting. The parties do not meet on equal terms. The authority of the courts is perverted to unworthy uses. The instrumentalities employed to produce a consenting will are force and fraud, agencies which the law abhors. The prisoner is at the mercy of the accuser, and he submits to extortion, as the means of deliverance from oppression under the forms of law." And in this state in Brumagin v. Tillinghast, 18 Cal. 272, 79 Am. Dec. 176, involuntary payment is thus defined: "It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money."

Now, from the facts alleged in the complaint, it appears that the respondent, the county of Plumas, was asserting against these plaintiffs an illegal and unjust claim for conducting a lawful business. In the enforcement of that claim the agents of the county caused the arrest of one of these plaintiffs, against whom this claim was made, charged him with a criminal offense with a view of enforcing its demand, took him into actual custody, and, as a condition precedent to his obtaining release from the custody of the sheriff under such criminal proceedings, and to avoid imprisonment, compelled him to pay the amount of the license tax which it unjustly asserted was due. The obvious purpose of the criminal prosecution was to attain this end. The process of the criminal court of the county was invoked to accomplish it; the plaintiff Ridenour was, under its process, in duress of imprisonment, and, to procure his liberation from such imprisonment—from a danger urgent and immediate—paid under protest the license tax illegally demanded of him. That the payment by the appellant Ridenour of the amount demanded by respondent under this ordinance was unlawfully exacted has been heretofore determined, and that the payment itself was compulsory and involuntary, the recital of the above facts from the complaint, and the application to them of the rules of law above cited, makes it so apparent that further discussion of the proposition would be useless.

It is insisted, however, that, if Ridenour was arrested and charged with a misdemeanor in conducting a business for which he had not paid a license, he would have been entitled to acquittal on a trial, upon the ground that the ordinance involved in the criminal prosecution was void, and that the proper place to have made that defense was in the criminal case; that, if the ordinance was invalid, that finding would have been sufficient to secure his release, and, if he saw fit to pay the license, rather than make a defense against the criminal charge, his act was the result of a choice between a trial of the criminal case and the payment of the money to avoid it, and hence, was voluntary. We are not able to grasp the force of this reasoning as applied to the case at bar. It might have more merit if there was not present here the fact that Ridenour was in duress, and could only obtain his release upon payment of the illegal charge. He was not required to pay a fine under the criminal accusation, but, as a condition precedent to his release, required to pay the illegally exacted amount of the license tax, and could not procure his release from custody otherwise. To this contention of respondent may be aptly applied the language of the Supreme Court of Illinois, used in Harvey v. Olney, 42 Ill. 336: "It would be a reproach to our law if these municipal corporations should be permitted to assume the right to pass ordinances threatening people with heavy fines and a long imprisonment for carrying on a lawful business, and, after extorting a large sum of money for a pretended license by threats of a prosecution, be allowed to come into court and resist repayment by saying, 'Although we did this thing, we had no right to do it, and the ordinance that we pretended was a law was really no law, and these persons should have known better than to have paid us the money.' It is only necessary to say that the town cannot be permitted to defend its wrong by this species of self-stultification. A person to whom a town offers the alternative of paying for a license or undergoing a prosecution before the police magistrate, which would result in fine and imprisonment if the ordinance should be held valid, may certainly pay his money under protest, without losing his rights, and cannot be required to incur the hazard of the magistrate's decision upon the validity of the ordinance, and possibly be driven to a writ of habeas corpus, to relieve himself from imprisonment. Such payment would not be voluntary."

It is further claimed that, whatever the effect of the original payment to Clough was, the final payment to the county was different. We think not. The payment to Clough was, as we have seen, made under duress and to effect Ridenour's release from custody, and was made under protest. The final payment to the county was made on demand of the respondent doubtless so as to have the money claimed to be due for the license actually paid into the county treasury. It was paid by Clough upon its demand and under protest, and so paid for the purpose of preventing Ridenour from being again taken into custody under the warrant of arrest issued in the criminal proceeding, and to be relieved from which the original payment had been made. The same compulsion which had required the original payment to Clough operated as a continuous compulsion on the part of respondent, and eventuated in the payment of the money into the county treasury, and worked no change in the conditions under which Ridenour paid it, and did not render it the less involuntary or compulsory.

There are no further points made in the appeal which we think merit attention.

The judgment of the lower court is reversed, with directions to set aside the judgment entered, overrule the demurrer, and grant leave to the defendant to answer.

We concur: McFARLAND, J.; HENSHAW, J.

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4 Cal. App. 306

BANCROFT v. RANDALL et al. (Civ. 268.)

(Court of Appeal, Third District. California. Sept. 26, 1906. Rehearing Denied Nov. 22, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS — HIGH SCHOOLS—STATUTES—CONSTRUCTION.
Pol. Code, §§ 1669–1674, regulating the government of high schools are not to be controlled by the provisions of the Code applicable to common schools.

2. SAME—SCHOOLS—ESTIMATE—VOTE.
Pol. Code, § 1670, subd. 4, requires high school boards to furnish to the authorities, whose duties it is to levy taxes, estimates of the cost of a suitable building, and that, when such estimate shall have been submitted, it shall be the duty of the authorities authorized to levy taxes in the high school district to levy a special tax sufficient in amount to erect a high school building, and subdivision 15 declares that the tax shall be computed and entered on the tax roll and collected in the same manner as other taxes. *Held*, that no vote of the people of a high school district was necessary to authorize a board of supervisors to levy a tax on a proper estimate being made and presented as provided by such section.

3. SAME—ESTIMATE—PRESENTATION—TIME.
Pol. Code, § 1670, subd. 14, makes it the duty of a high school board on or before the 1st day of September in each year to send to the proper authorities an estimate of the amount of money required for conducting the school, for the school year, etc. *Held* that, where an estimate was presented and filed in August and a levy based thereon was made September 21st, there was a sufficient compliance with the statute as to time.

4. SAME—FORM OF ESTIMATE.
An estimate in the form of a letter signed by the secretary of the board of trustees of a high school district reciting that, at a meeting of the trustees, etc., the board estimated that

$4,100 additional to the amount on hand would be necessary to the maintenance of the high school for the succeeding year, and that the sum of $10,000 additional to the building fund was necessary to the erection of the proposed high school, wherefore the board requested the board of supervisors of the county to levy a tax for such amounts, was sufficiently formal to warrant the exercise of jurisdiction by the board of supervisors though it was without seal or authenticated otherwise than by the secretary's signature.

5. SAME—STATUTES—CONSTRUCTION.

Pol. Code, § 1670, subd. 6, provides for an election of representatives for the establishment of a high school, which representatives are required to meet to determine the location of the school, and, in case they fail to unanimously agree, provides for an election to determine the site, at which only such sites as have been named by the representatives and certified to the superintendent shall be voted on; that the location receiving the largest number of votes shall be chosen as the location of the high school; and that the representatives may arrange for temporary quarters in some suitable location. *Held*, that such section referred to the general location of the school as distinguished from the particular lot at the place where the school was located, and therefore did not preclude the levy of a tax for the construction and maintenance of a high school until a suitable lot had been acquired.

6. SAME—VOTE OF DISTRICT.

Pol. Code, § 1670, subd. 14, requires high school district trustees to furnish the board of supervisors with an estimate of the cost of purchasing a suitable lot as a location for such school, and subdivision 15, gives the supervisors authority to levy the necessary tax to purchase the site. *Held*, that no vote of the district was necessary to authorize the levy of a tax for the purchase of a high school site.

7. SAME — SECURING SITE — INJUNCTION — PLEADING—PRESUMPTIONS.

In a suit to restrain county supervisors from levying a tax for the construction of a high school building, an allegation that the trustees of the high school district did not, and never had, owned any lot on which to erect a building, was not equivalent to an allegation that no provision had been made for the acquisition of a lot, or that such provision would not be made before the erection of a building.

8. SAME—SEPARATE ESTIMATES—TAX LEVY.

Where a tax levy made by a board of supervisors on an estimate submitted by a board of high school trustees for the construction of a school building was found to be inadequate, the supervisors were not precluded by such levy from making a further levy on a new additional estimate submitted by the school board.

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Suit by Fannie W. Bancroft against E. J. Randall and others, as members of the board of supervisors of Contra Costa county. From a judgment in favor of defendants, and from an order denying an injunction, plaintiff appeals. Affirmed.

J. S. Reid and Curtis Hillyer, for appellant. W. S. Tinning and A. B. McKenzie, for respondent.

CHIPMAN, P. J. The action is to enjoin defendants from levying any special tax upon the taxable property within the Mt. Diablo union high school district, Contra Costa county, "for erecting any building for said district or for any purpose or purposes kindred thereto." A general demurrer to the complaint was sustained without leave to amend and judgment passed for defendants. The appeal is from the judgment and from the order denying an injunction.

It is alleged in the complaint: That plaintiff is the owner of real estate, as her separate property, situated in said union high school district. That the board of trustees of said district have made what purports to be an estimate of the cost of constructing a building for the use of said district, estimated to cost $10,000, which estimate has been presented to defendants with request that they levy a special tax upon the taxable property of said district sufficient in amount to erect said building. That the estimate so furnished was as follows: "At a meeting of the trustees of the Mt. Diablo union high school held August 20, 1904, the board estimated that the sum of four thousand one hundred dollars ($4,100.00), additional to the amount on hand, would be necessary to the maintenance of the Mt. Diablo union high school for the school year 1904–1905; and also, that the sum of ten thousand dollars ($10,000.00), additional to the building fund already on hand, will be necessary to erect the proposed high school in said district. Therefore, we, the board of trustees of Mt. Diablo union high school ask the Hon. board of supervisors of Contra Costa county to levy such a tax as will raise the aforesaid amounts. Annie Loucks, Sec. Board of Trustees." Indorsed: "Filed Aug. 24, 1904. J. E. Rodgers, Clerk. By J. H. Wells, Deputy Clerk." That said district "does not now, never did, own any lot upon which the, or any, proposed building might be erected." That the said trustees have never been directed by any vote of said district "to purchase, or receive, or select or accept or otherwise acquire, any school lot, or to build any schoolhouse, and no such vote for any purpose has ever been had at all." That about September 1, 1903, said trustees furnished to said board of supervisors what said trustees pretended and what purported "to be an estimate of the construction of a building for the use of said" district, as follows: "The sum of four thousand dollars being necessary to maintain Mt. Diablo union high school for the present school year 1903–1904, the board of trustees of said school ask that your Hon. board levy such a tax as will produce the said sum of four thousand dollars ($4,000.00). They also find that, it being necessary to erect a high school building and improving grounds, erecting windmill, tank, etc., the sum of twenty thousand dollars ($20,000.00) will be necessary to complete the above work, and therefore ask your honorable board to levy such a tax as will produce the said sum of twenty thousand dollars ($20,000.00). Annie Loucks, Secretary Board of Trustees of Mount Diablo Union High School. Indorsed: "In the matter of Mt. Diablo union high school. Estimate of amount of money required to maintain Mt. Diablo union high school for fiscal year 1903–4 and to erect building. J. E. Rodgers, Clerk, by J. H. Wells, Deputy Clerk." That, pursuant to said estimate, said trustees procured defendants, on or about September 21, 1903, to levy a special tax upon all the property in said district. That the tax so levied, "in the judgment of the said board of supervisors, was for an amount sufficient to build the said proposed new high school building, aggregating the sum of $5,016.53, according to the report of the county auditor of said Contra Costa county, filed on the 21st day of September, 1903." That "almost all of the aforesaid special tax levied in the year 1903 has been paid to the tax collector of said Contra Costa county * * * and is now in the custody of the county treasurer to the credit of said * * * district.' That plaintiff has protested to the defendants against the levy of any special tax for the erection of any building for said district, on the ground, among others, that said defendants have "no jurisdiction to entertain any such application, * * * but said board of supervisors, acting by the defendants herein, threaten to, and unless restrained * * * by this honorable court, will levy another special tax upon all the taxable property of said * * * district for such amount as in the judgment of the said board of supervisors will be sufficient to erect the said proposed school building," to the injury of plaintiff and other taxpayers of said district: Wherefore, etc. Plaintiff urges want of jurisdiction in defendants to act in the premises, on the grounds, to wit: (1) That the trustees of the high school had never been directed by any vote of the district to purchase, receive, select, accept, or otherwise acquire any school lot or to build any schoolhouse. (2) That no estimate was ever presented for such purposes. (3) That no school site had been selected. (4) That the district owned no lot on which to erect a building. (5) That the first levy was void, and the moneys thus collected cannot be used for the purposes named. (6) That, if the defendants ever had jurisdiction to levy any tax, it was exhausted by the making of the first levy.

It is urged that the board of supervisors have no power to levy special taxes for school purposes except such as are conferred by statute; that it can levy such taxes for a union high school only upon an estimate made by the school trustees. Pol. Code, § 1670, subd. 14. It is next contended that these trustees have only such powers as are conferred by the same Code, section 1670, subdivision 11, which, it is claimed, are the same as those of boards of common school trustees; that such latter school trustees can build school houses or purchase or sell school lots only "when directed by a vote of their district." Pol. Code, § 1617, subd. 5. It is hence argued that, as by no vote were the trustees ever directed to build a schoolhouse, no authority rests in the board of supervisors to levy the tax. Many of the provisions of the high school acts, as set forth in sections 1669 to 1674 inclusive of the Political Code were given careful and somewhat extended examination and construction in People v. Lodi High School District, 124 Cal. 694, 57 Pac. 660. It would be useless repetition to again explain the scope and meaning of the provisions which established our high school system of education. The authority there given to levy taxes for the maintenance of these schools flows from the same source as the authority to levy taxes for constructing buildings in which the schools are to be held, and the latter power is co-extensive with the former. Subdivision 14 of section 1670 makes it the duty of the high school board "to furnish to the authorities whose duty it is to levy taxes * * * an estimate of the cost of * * * erecting a suitable building, * * *" and to furnish such estimate to such authorities (the board of supervisors here). "When such estimate shall have been made and submitted it shall be the duty of the authorities whose duty it is to levy taxes in said * * * high school district to levy a special tax upon all the taxable property of said * * * high school district, sufficient in amount to * * * erect the building. * * * Said tax shall be computed, entered upon the tax roll, and collected, in the same manner as other taxes are computed, entered and collected." Subd. 15, § 1670, Pol. Code. In speaking of the scheme of taxation provided by these sections to maintain high schools, the court said in the Lodi High School District Case, supra: "It is within the power of the Legislature to constitute these schools and to provide for their support by methods different from those adopted for like purposes as to other schools." It is true the point under discussion was whether the law is obnoxious to constitutional objection as being special legislation. But the reasoning leads also to the conclusion that the provisions of the high school acts are not to be controlled by the provisions relating to the common schools. See, also, Brown v. City of Visalia, 141 Cal. at p. 382, 74 Pac. 1042. In our opinion no vote of the people of the district was necessary to authorize the defendants to act, upon a proper estimate being made and presented as provided in the act.

Objection is raised to the sufficiency of the estimate in matter of form and substance. It is claimed that subdivision 14, § 1670 requires the estimate to be presented on September 1st. It was filed in August and the defendants made the levy, as alleged in the complaint, on September 21st. This was a sufficient compliance with the law as to time.

The objection that the document is not an estimate but a mere letter, without seal or other authentication, and is but "the conclusions of the so-called secretary" is without merit. The section prescribes no particular form for the estimate, nor does it call for details. If the supervisors should deem it insufficient they could call for specifications or refuse to act upon it. The estimate was sufficient as a basis for the exercise of jurisdiction by the board of supervisors who act in a quasi judicial capacity in the matter; (Lodi High School Case, supra). We think the estimate sufficiently shows the source whence it emanated and is sufficiently authenticated. It was not necessary that all the trustees should attach their names to it.

It is alleged in the complaint "that the said trustees have never been directed by any vote of the said * * * district to purchase, or receive, or select or accept or otherwise acquire, any school lot, or to build any schoolhouse." It is argued first, that subdivision 6 of section 1670 refers to the lot on which the building is to be erected; and, second, that the district must own the lot before the supervisors can make the levy for the schoolhouse and that the lot must be selected by vote of the district. The meaning of subdivision 6 is not entirely clear, but we think it refers to the general location of the school and not to the particular lot at the place where the school is to be located. The union high school district is made up of several common school districts, and, before it can be known upon what particular lot of ground the schoolhouse is to be erected, the general locality or town within some one of the common school districts must be determined. The act provides that the district may maintain the school without owning any building by leasing suitable premises (subd. 6, § 1670). No lot could have been purchased until the general location of the school had been decided upon. The clause of the complaint above quoted is not inconsistent with the existence of the fact that the district either owns a lot by gift or has made provision for so or otherwise acquiring one. The averment is that the trustees have never been "directed by any vote to purchase a lot." The statute points out the method of purchasing or acquiring the lot. Subdivision 14 requires the trustees to furnish the board of supervisors "an estimate of the cost of purchasing a suitable lot," and subdivision 15 gives the supervisors authority to levy the necessary tax "to purchase the site," when such estimate is made. It is not necessary that there should be a vote of the district as in the case of purchasing a lot for a common schoolhouse. The authority to purchase the lot is the same as the authority to provide for the maintenance of the school or the erection of a suitable building or the leasing of a suitable building. These are to be accomplished by an estimate of the cost, presented by the trustees to the supervisors to be followed by the necessary tax levy. It might be more satisfactory to the supervisors to know, when the estimate for a building is presented, that the lot has been provided for, or that, if not, the estimate included the cost of the lot also. But it must be presumed that both the trustees and the supervisors will discharge their duties in accordance with law and it cannot be assumed in this action that the supervisors will act improvidently or in violation of law. Besides, we do not think that there is anything in the statute to prevent the trustees and the supervisors from making provision for the building before a lot is provided for.

It appears from the complaint that the estimate made in 1903 for a building, improvements, etc., was $20,000 and that the levy made realized only something over $5,000, most of which is now in the treasury to the credit of the building fund; that the estimate of 1904 calls for $10,000 "additional to the building fund now on hand." It is not alleged that the amount raised by the first levy was sufficient to build the schoolhouse, nor does it appear that that amount was the amount which the supervisors intended to raise by the levy. The averment is that the supervisors will, unless restrained, "levy another special tax * * * for such an amount as * * * will be sufficient to erect the said proposed building." It is claimed, under Martin v. Board of Supervisors, 103 Cal. 668, 37 Pac. 758, that there is no power given to levy the tax for a building unless the district has a lot; that estimates cannot be made separately, for the site only or the building only. In the Martin Case cited, the action was mandamus to compel the supervisors to estimate the cost of a county high school building. No legal provision had been made for the purchase of a lot and presumably the supervisors were unwilling to proceed until this was done. All that the court was called upon to decide was whether their judgment could be controlled to provide for a building when the statute gave them the power to provide for acquiring a lot and erecting a building by the same estimate. It was not necessary to the decision that before they could estimate for a building they must have first become the owner of a lot. However this may be, the complaint here avers only that the trustees do not now, and never did, own any lot. But they may have made provision for a lot, and we must assume if they have not that they will do so before erecting any building.

There seems to be no special provision for estimating the cost of the building and making levies of taxes by installments or for making additional levies of taxes to complete unfinished work. A reasonable construction should be put upon the statute such as would effectuate its main object if it can be done without violating settled principles of construction. Here the first estimate was for $20,000, of which only $5,000 was raised by the levy. The second estimate is for $10,000 additional to the fund on hand, alleged to be $5,000, or about that sum. We are not told why the first money raised was not expended, or why an additional amount became necessary, or why the supervisors failed to make the levy large enough to raise the requisite amount estimated by the trustees. All we know is that the first estimate was for $20,000, and only $5,000 was raised, and that an amount of $10,000 additional to the $5,000 was estimated as necessary to erect the proposed building. If it be true, as claimed by appellant, that the supervisors exhausted their power to make a levy under the first estimate (which we do not decide), we see no reason why, when it was found that the building fund was inadequate, the trustees might not make a further estimate or that the supervisors might not on such estimate make a further levy.

We can discover no infirmity in the first levy. The money raised by it belongs now to the building fund and in making the second estimate the end is reached by estimating the requisite additional amount quite as definitely as by making the estimate $15,000, as is claimed it should have been. The suggestion that this view leaves the supervisors with unrestricted powers to keep on from year to year adding to the cost of the building, presupposes that both the trustees and the supervisors will proceed recklessly and without regard to the welfare of the property holders. On the other hand we must presume official duty regularly performed, and, if the power here sought to be restrained is denied, the district might find itself seriously embarrassed.

It seems to us that the statute is sufficiently broad to justify the course being taken to secure a building for the school. Respondents make the point, not raised in the lower court, that injunction will not lie in anticipation of the action of a judicial body; citing Barto v. Board of Supervisors, 135 Cal. 494, 67 Pac. 758. We have thought it more satisfactory to dispose of the questions raised by appellant without considering the point suggested by respondents.

The judgment and order appealed from are affirmed.

I concur in the judgment. BUCKLES, J.

I concur: McLAUGHLIN, J.

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4 Cal. App. 343

WRIGHT v. COULES et al. (Civ. 257.)

(Court of Appeal, Second District, California. Oct. 16, 1906. Rehearing Denied by Supreme Court Dec. 13, 1906.)

1. LIBEL—SLANDER OF PROPERTY—PUBLICATION RELATING TO CHANGE IN HOTEL BUILDING—LIABILITY.

A complaint, which alleges that plaintiff was engaged in the hotel business; that at the date of the publication complained of designated persons had notified him that they were about to come to the hotel; that defendants maliciously and falsely published in a newspaper an article averring that the hotel had been purchased by a club and would be remodeled into a clubhouse, and that the specified persons read the article, and, by reason thereof, they were dissuaded from going to the hotel; and that such persons would have paid plaintiff a large sum of money from which he would have derived a specified profit—sufficiently states a cause of action for injury to plaintiff's business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 386-390.]

2. SAME — ALLEGATION OF DAMAGES — SUFFICIENCY.

A complaint in an action by the proprietor of a hotel for injury to his business caused by a newspaper publication, which alleges that, by reason of the publication, a large number of persons who were negotiating for board at the hotel were dissuaded from making any contract in relation thereto, and were dissuaded from going to the hotel, and from paying to the proprietor for board at least a designated sum, is demurrable, because of the uncertainty of the allegation with reference to the damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 389.]

3. SAME—PROOF OF DAMAGES.

The damages to a hotel business resulting from a false newspaper publication may be proved by showing the existence of facts which would naturally tend to diminish the business, followed by evidence that it was actually diminished thereby, which may be shown without showing the specific name or giving the personal description of each guest driven away from the hotel by reason of the publication.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by A. D. Wright against J. C. Coules and others. From a judgment of dismissal on sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Tanner, Taft & Odell, for appellant. James P. Clark, M. M. Meyers, and M. J. McGarry, for respondents.

GRAY, P. J. This is an action for injury to the plaintiff's hotel business alleged to have been caused by publications made by defendants in several newspapers. A demurrer to the amended complaint as amended was sustained and the appeal from the judgment is by plaintiff.

The questions presented relate to the sufficiency of the complaint. The amended complaint as amended purports to set out three several and distinct causes of action. In the first cause of action it is alleged in substance that plaintiff was engaged in the business of an innkeeper at the Hotel Arcadia in Santa Monica, in the county of Los Angeles, on the 27th day of August, 1904, and for that purpose had a lease of the premises extending from a date at least two years prior to said date and up to and including the date of the filing of this suit, and that such business was popular and the income therefrom was about the sum of $2,000; that at the date of the publication complained of several persons, Young, Paine, Mrs. Paine, Wilsely, and Lawrence had notified the plaintiff that they were about to come to the said Hotel Arcadia and lodge or room in the said inn. It is further alleged that on said 27th day of August, 1904, the defendants maliciously and without reason caused to be published in the Los Angeles Examiner, a public newspaper printed in the city of Los Angeles and state of California, and widely distributed, etc., among the numerous customers, boarders, lodgers and transients of said hotel, a false and injurious article. We quote from said article, as set out in the complaint, as follows: "The famous Hotel Arcadia at Santa Monica has been purchased by the Occidental Club, and will be remodeled into a colossal country clubhouse, the largest in the world, for the use of the members and their families. The deal was accomplished by a double sale, O. B. Steen, an Arizona mining man, purchasing from the Pacific Improvement and transferring the property to the Angeles Investment Company, the parent corporation of the Occidental Club. The price was well into six figures. The new owners will proceed at once to enter upon the privileges of the spacious quarters they have acquired by the sea. They do not take possession until the close of the present season, but a series of balls, planned to occur twice a week, will soon commence. In the meantime, extensive alterations and repairs will go on without interruption. * * * As to the new seaside home which has formerly been the aristocratic Hotel Arcadia, it is already in high favor with the members of the organization. A big bathing party which will wind up with a dinner and dance is planned to take place in about two weeks." The complaint then alleges that the said article was false in this, that the said Hotel Arcadia had not been purchased by the said Occidental Club, was not to be remodeled, and there had been no double sale by O. B. Steen, an Arizona mining man, nor had the property been purchased from the Pacific Improvement Company, nor had it been transferred to the Angeles Investment Company, nor had there been any new owners thereby placed in possession of the title, nor did they make or begin to make any extensive improvements or alterations therein. It is further alleged that the parties above specifically named read this article, and that by reason thereof were dissuaded from coming to the hotel and did not come at all, and that these persons would have paid the plaintiff as proprietor of said Hotel Arcadia, as roomers, lodgers, boarders, or transients, a large sum of money had they so come, from which the plaintiff would have derived a profit of $1,000, and that by reason whereof plaintiff has been damaged in the sum of $1,000.

We are clearly of the opinion that the first count of the complaint, the substance of which only is stated above, states a cause of action; that it is so free from uncertainty and ambiguity that the defendants will not be misled to their prejudice for want of any necessary allegation. If the facts as alleged are proved on the trial, we think there can be no question as to the plaintiff's right to recover the damages proven. The second cause of action alleged is the same as the first, except that it is based upon a different publication, claimed to have been made September 15, 1904, in the Daily Outlook, a public newspaper printed at Santa Monica, Cal. The same persons as stated in the first cause of action are alleged in the second cause of action to have been kept away from the hotel by the latter publication and the same damages are alleged to have accrued. We think, also, the allegations of this cause of action are sufficient as against both the general and the numerous special demurrers. The third cause of action is based upon the said publication in the Los Angeles Examiner on the 27th day of August, 1904. It also contains allegations similar to the first count of the complaint touching the ownership and conduct of the Hotel Arcadia and as to the printing and distribution of the paper containing the article; but the allegation of damage differs from that of the other two counts of the complaint. It reads as follows: "That by reason of the said publication, a large number of persons who were then and there negotiating for rooms in said Hotel Arcadia and for board and lodging, were dissuaded from making any contract in relation thereto and were dissuaded from coming to said Hotel Arcadia and from paying to plaintiff for board and lodging at least the sum of $3,000. Wherefore, plaintiff prays judgment against the defendants for the sum of $4,000 damages, and for costs of suit."

It appears from the order sustaining the demurrer and judgment of dismissal of the action that the several demurrers to the third cause of action were sustained without leave to amend. We think that for the uncertainty of the allegation with reference to the damage, quoted above from the third cause of action, the demurrer was perhaps properly sustained, but are of opinion that it should not have been sustained without leave to amend. To be sure, we find no record of any request in the transcript to amend this complaint further, and ordinarily this would be a sufficient answer to the plaintiff's appeal from the judgment following the order sustaining the demurrer. But as this case must go back to the trial court for further proceedings, we deem it fair and just that the plaintiff should be permitted by the court below, on the return of the case, to amend this allegation as to his damage so as to include a specific allegation that he was damaged by the facts alleged in that count of his complaint in a specific sum, whatever that sum may be. We are of opinion that damages to a hotel business may be proven by showing the existence of facts which would naturally tend to diminish and tear down that business followed by evidence showing that it was actually diminished and impaired thereby, and that this may be shown without showing the specific name or giving the personal description of each guest who was driven away from the place or prevented from coming there by reason of the acts complained of. A general allegation such as indicated above of people being dissuaded by reason of a publication from making any contract with or coming to the hotel or giving it their patronage, is sufficient.

The judgment is reversed, with directions to the lower court to permit plaintiff to amend his third cause of action, as herein indicated.

I concur: ALLEN, J.

SMITH, J. (concurring). I concur in the judgment and in what is said in the opinion as to the first and second causes of action set out in the complaint. I am also of the opinion that the demurrer to the third cause of action was rightly sustained, for the reasons stated in the opinion.

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4 Cal. App. 326

OSTROM et al. v. DE YOE et al. (Civ. 208.)

(Court of Appeal, Third District, California. Sept. 26, 1906. Rehearing Denied by Supreme Court Nov. 22, 1906.)

1. TRIAL—SUBMISSION OF ISSUES TO JURY—SPECIAL VERDICT—CONCLUSIVENESS.

An action for specific performance of an alleged oral contract of a decedent to make a will, and to set aside certain deeds, being an equity action, the court may disregard a special verdict of the jury and make its own findings of fact and conclusions of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 884; vol. 19, Equity, §§ 815, 816.]

2. DEEDS — DELIVERY — EVIDENCE — SUFFICIENCY.

Certain deeds to a wife were found in a bank among the grantor's papers after his death. There was testimony that the grantee during her life stated that she never saw the deeds until they were found after his death. The scrivener delivered the deeds to the grantor, and the banker could not remember the circumstances of their deposit. *Held* insufficient to show a delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 625–634.]

3. WILLS — CONSTRUCTION — RESIDUARY DEVISE — LANDS SUPPOSED TO HAVE BEEN DEEDED.

Certain deeds to a wife, signed by a decedent but never delivered, were found among his papers after his death, and the property covered thereby was not specifically mentioned in his will. *Held* to pass to the grantee under a devise to her of the "residue of my estate both real and personal of whatever kind, whether * * * chattels, lands," etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1279–1291.]

4. SAME—RESIDUARY CLAUSE.

Certain deeds, executed by a testator but undelivered during his life, having been discovered after his death, the lands covered thereby were not returned in the inventory. The decree of distribution under the will, which did not mention the lands, but contained a sweeping residuary clause, gave the residue of the estate in the hands of the executrix "and any other property" belonging to the estate, "not now known or discovered," to the residuary devisee who was also grantee in the deed. *Held*, that such lands passed under the residuary decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1279–1291.]

5. SPECIFIC PERFORMANCE — CONTRACT TO MAKE WILL.

In an action for specific performance of an alleged oral contract of a decedent to make a will, the only evidence as to such contract was evidence of decedent's statements that she was not to make a will, that there was no agreement to that effect, and that decedent never told the witness that there was any agreement as to her disposition of the property before or upon her death. *Held* sufficient to support a finding of no contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 387–395.]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Vincent R. Ostrom and others against N. E. De Yoe and others. From a judgment in favor of defendants and an order denying a new trial, plaintiffs appeal. Affirmed.

L. J. Maddux, for appellants. P. J. Hazen and Wm. O. Minor, for respondents.

BUCKLES, J. This is an action to enforce a trust in certain real and personal property, based on a supposed verbal contract, made by Caroline De Yoe, under whom defendants claim, with Stephen Rogers, her then husband, under whom plaintiffs claim—by which contract appellants claim said Caroline obligated herself to make a will, which is admitted she never made. The action was tried by the court; certain special issues were submitted to a jury which answered the same adversely to the defendants; the court reserved the action for further consideration, heard further testimony, and, when the case was argued and submitted, made and filed its findings and decision, rendering judgment thereon in favor of defendants. The plaintiffs appeal from the judgment and from the order denying a new trial. Stephen Rogers and Caroline Rogers were husband and wife, and, during their married life, had accumulated a large amount of property. In January, 1885, Stephen Rogers made several deeds of gift to his said wife of 1,524.06 acres of his land and numerous town lots, and on December 18, 1886, he made another deed of gift to the said wife of 3,967.34 acres, generally known as the "Oak Flat." These deeds were found after Stephen Rogers' death in a tin box in which he kept his papers, deposited in the First National Bank of Modesto, and were recorded March 26, 1888, at the request of Ora McHenry. Stephen Rogers died testate March 21, 1888. On December 31, 1886, he made his will. The property described in the said deeds was not described in the will nor returned in the inventory in the probating of said will and settlement of his estate. The will was admitted to probate April 21, 1888, and the said Caroline Rogers appointed executrix. The devises in said will over which this controversy arises are as follows:

"Third. I give and bequeath to my grandson, Stephen Roy Rogers, son of Stimpson P. Rogers and Ella Rogers, the sum of ten thousand ($10,000) dollars, to be paid to him as hereinafter directed, and only after the death of my said wife Caroline if she survive me; the income from the said ten thousand dollars to be paid to said Stephen Roy Rogers personally for his own private use from the time he be fifteen years old till he be twenty-one years old; and then when he be twenty-one years old, I direct that he be paid five thousand dollars, being half of the above-named bequest, and that from the time he is twenty-one till he be twenty-five (25) years old, I direct that the income from the remaining five thousand dollars be paid him annually for his private use. And then, when he the said Stephen Roy Rogers be twenty-five years old, I direct the remaining five thousand dollars paid to him personally, for his own exclusive and private use. If my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequest, together with the income thereon, I direct shall be distributed as the other portion of my estate shall be or shall have been distributed, namely, to the brothers and sisters of myself and wife Caroline, share and share alike.

"Fourth. The residue of my estate, both real and personal, of whatever kind, whether money, credits, chattels, lands, houses or shares in corporations, and wheresoever situated, I give, bequeath, and devise to my beloved wife, Caroline Rogers, if she survive me. And it is my will and I so direct, that my said wife also have the exclusive and absolute control, during her life, of that part of my estate hereinbefore devised to Lizzie Kay and Stephen Roy Rogers.

"Fifth. If I survive my said wife Caroline, then I give, bequeath, and devise all the residue of my estate, both real and personal, and wheresoever situated, share and share alike, to my grandson, the said Stephen Roy Rogers, if he be then living, and to my brothers and sisters, and to the brothers and sisters of my said wife Caroline; or if any of the said brothers and sisters be dead, and their children shall take the share of their parent, respectively, save and except only Gilbert P. Ostrom, son of Jemima Ostrom, and also Clarence Cotton, son of Jacob Cotton, to whom I bequeath nothing; and I will and bequeath, in case I survive their parents, or either of them, the share of my estate hereinbefore given to said Jemima Ostrom and Jacob Cotton, to the remaining brother and sister of said G. P. Ostrom and Clarence Cotton, respectively."

Stephen R. Rogers died May 15, 1899. The court made and entered its decree of distribution of said estate, and was in accordance with said will. The decree contained the following clause: "And the residue of said estate of Stephen Rogers, deceased, hereinafter particularly described and now remaining in the hands of said executrix, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to wit:" To Lizzie Kay, $1,000 if she survive Caroline Rogers. The remainder to Caroline Rogers. No objection is made to the decree. On April 25, 1894, Caroline Rogers married N. E. De Yoe, who is a defendant in this action. She died February 29, 1904. The plaintiffs in their complaint allege as follows: "That prior to, and at the time of, the making and execution of the said will hereinbefore set forth by the said Stephen Rogers, it was mutually understood and agreed by and between the said Stephen Rogers and the said Caroline De Yoe, then Caroline Rogers, and the said Caroline Rogers promised and agreed to and with the said Stephen Rogers that, if the said Stephen Rogers would make and execute the will hereinbefore set forth, the said Caroline Rogers would make and execute her will, and upon her death give and bequeath all of the property owned and possessed by the said Caroline Rogers and Stephen Rogers at the time of his death, and all the property possessed by her at her death, and all the proceeds of such property, in equal shares to Stephen Roy Rogers, if he then be living, and to the brothers and sisters of the said Stephen Rogers and brothers and sisters of said Caroline Rogers, or, if any of the said brothers and sisters be dead, then to their children, said children to take the share of the parent, respectively, save and except Gilbert P. Ostrom and Clarence Cotton, and, in case of the death of Stephen Roy Rogers, then to be willed to the brothers and sisters of Steven Rogers and Caroline Rogers, and their children, as aforesaid. That, pursuant to said agreement, and being induced by said agreement and promise of said Caroline Rogers and relying thereon, said Stephen Rogers made and executed the will and testament hereinbefore fully set forth."

The complaint prays for a specific performance of the alleged agreement and that the said deeds of Stephen Rogers to Caroline Rogers be set aside. The answer denies that there ever was such a contract, admits the making and execution of said deeds, and alleges that such deeds were delivered to Caroline Rogers and were for good and valid considerations and conveyed all the interest of Stephen Rogers in said land to Caroline Rogers. After denying fully the allegations of the complaint the defendants for a separate defense plead laches on the part of plaintiffs, and that they should be estopped from asserting and claiming any right to the lands by reason of allowing the rights of defendants to accrue without any knowledge of plaintiffs' claim; pleads the statute of limitations; also that plaintiffs' alleged claim is based upon an alleged agreement which is void and cannot be enforced because not in writing; also that said claim cannot be enforced because an attempt is made to create a trust to hold real estate and suspend the power of alienation; also that, if said agreement was made, it is void because made by Caroline Rogers, a married woman. This being an equity case, the special verdict of the jury was but advisory, and the court had a right to disregard it, which the court did by saying: "And the court, being fully advised in the premises, does not approve of said verdict, but now makes and files its findings of fact and conclusions of law." Galvin v. Palmer, 113 Cal. 50, 45 Pac. 172.

The testimony in the case as to the deeds was as follows: O. McHenry testified that he had seen the said deeds (Stephen Rogers to Caroline Rogers) in the First National Bank of Modesto; that they were recorded by him at his father's request and that his father was the custodian thereof; and that they were recorded on the dates shown on the deeds, to wit, March 26, 1888. The deeds were introduced in evidence and the witness Miss Jennie Broughton said that Mrs. Caroline Rogers had "discovered some deeds made by Stephen Rogers with me. She said she found them in a little brown box—tin box, I think it was—that she said to me, she says, 'you know that Stephen always kept his business papers in.' He had that little box on the ranch, and after he died she found the deed, she said, when she opened that box. If I remember right, she said, 'The box was in the First National Bank,' and said, 'The first time she saw the deeds was after he died, and she went and opened his box.'" L. B. Walthal testified that he drew the deeds at the request of Stephen Rogers and delivered them to him. He also drew the will. J. E. Ward, cashier of the First National Bank of Modesto, testified: "I remember the deeds introduced in evidence being left in the bank, but do not remember the circumstances." This is all the evidence in relation to the deeds.

The court found as follows: "Each and all of the deeds referred to in said complaint were made, executed, and delivered, at the times of their respective dates, for good and sufficient considerations, and were valid conveyances of the property therein described, and conveyed title thereto to said Caroline Rogers as of the dates of said deeds, and she and her successors have been, since the death of Stephen Rogers, the owners in fee simple thereof, claiming title and asserting such ownership against all the world." The delivery of the deeds before the death of Stephen Rogers is not shown to have taken place. But the finding is immaterial. The deeds not having been delivered, no title to the lands mentioned therein passed under said deeds to Caroline Rogers, and said lands remained a part of said estate and would be and were included in the residue of the estate devised to Caroline Rogers. The making of the deeds furnished sufficient reason for omitting any mention in the will of the lands attempted to be conveyed by said deeds, for the deeds had been drawn and executed prior to making the will. Evidently the testator did not realize, when he made his will, that these lands were still a part of his estate. However, the decree of distribution herein referred to distributed these lands to Caroline Rogers under that clause "and any other property not now known or discovered which may belong to the said estate or in which the said estate may have any interest."

Irrespective of the will, one-half of these lands belonged to the widow at the death of Stephen Rogers, because they were community property. The widow went into possession of all the property devised to her including these lands, under the decree of distribution in the Stephen Rogers estate, made October 9, 1890, and held the same as her own, farmed and controlled the lands and managed the same, and her holding was open and notorious to all the world from that date until her death in 1904. The court found there was no contract or agreement between Stephen Rogers and Caroline Rogers; that she did not promise or agree with Stephen Rogers, if he would make and execute his said will as he did or for any other consideration, that she would make her will, or upon her death give or bequeath the property, or any part thereof, as alleged in said complaint, nor did said Caroline Rogers at any time make any such contract or agreement; that the will of Stephen Rogers was not made pursuant to any agreement such as is alleged in the complaint, and he did not rely upon any such agreement or promise when he made his will. The only witness who gives any testimony at all concerning the contract or agreement between Stephen Rogers and his wife was that of Miss Broughton, who said Mrs. Rogers would tell her that she was not to make a will, that there was no agreement that she was to make a will, and, when finally the court asked this witness, "Did she ever tell you at any time she had agreed, or made a contract, with Stephen Rogers that she was to do anything with the property upon her death or prior to her death?" She answered, "I don't think so."

There is testimony supporting every material finding the trial court made, and these findings warrant the judgment "that plaintiffs have no right, title, interest, or claim in or to any of the property described in the complaint, and that defendants are the owners of, and entitled to, the whole thereof, freed of any claim of plaintiffs thereto, etc."

Judgment and order affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

(150 Cal. 28)

FLEMING v. HOWARD et al. (Sac. 1,358.)

(Supreme Court of California. Oct. 11, 1906.)

1. APPEAL—CONFLICTING EVIDENCE—FINDINGS—REVIEW.

A finding of the trial court based on conflicting evidence will not be reversed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3983.]

2. EASEMENTS—ADVERSE USE—PRESUMPTIONS—BURDEN OF PROOF.

Open, visible, continuous, and unmolested use of a way for more than 30 years prior to the commencement of an action with reference thereto is sufficient to raise a presumption that the use was under an adverse claim of right sufficient to establish a prima facie title by prescription, and the burden of proof is on the party alleging that the use was permissive to prove such fact by affirmative evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

3. EVIDENCE—WEIGHT.

Where a hostile witness uses expressions favorable to the side he opposes, the court may properly attach more importance thereto than to the main purport of his narrative.

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by David M. Fleming against Annie Howard and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Sullivan & Sullivan, Theo. J. Roche, and H. D. Gill, for appellants. Frank R. Devlin, for respondent.

SHAW, J. The sole question presented in this case is the sufficiency of the evidence to sustain the finding that the plaintiff's predecessors in interest acquired by prescription the private right of way involved.

The case comes within the well-known rule that this court is bound by a decision of the lower court upon conflicting evidence. There was evidence to the effect that the road, or way, across the defendants' land, had been used in connection with, and for the benefit of, plaintiff's land, continuously and without interruption, from the year 1871 down to 1902, immediately before the action was begun. There was no dispute over the fact that the use was continuous during this period. It was also shown that during at least the last 27 years of the time gates were maintained and kept in repair by the owners of plaintiff's land at each end of the way; one of them being placed in the fence belonging to the defendants. The testimony on behalf of the plaintiff was to the effect that the use, during the entire period, was undisturbed. That it was adverse in its inception is not denied. Casey, who was the owner of the plaintiff's land from 1875 until June, 1902, testifying for the defendants, said, in substance, that during the first three years of his ownership he used the way under a claim of right. If the testimony on behalf of the defendants is disregarded, or only those parts are accepted which tend to confirm the plaintiff's case, as some parts of it do, the fact is clearly established that there was an open, visible, continuous, and unmolested use of the way for more than 30 years prior to the beginning of the action. Under these circumstances it will be presumed that the use was under a claim of right, and adverse and a prima facie title by prescription is thereby established. Washburn on Easements (4th Ed.) 156; 14 Cyc. 1147; Kripp v. Curtis, 71 Cal. 66, 11 Pac. 879; Franz v. Mendonca, 131 Cal. 209, 63 Pac. 361. "A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission to prove that fact by affirmative evidence. * * * Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption on a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right." Jones on Easements, § 186.

It is claimed that the testimony of the defendants, and of Casey in their behalf, satisfactorily explains this use, and conclusively shows that it was by permission, and therefore not adverse; but this testimony as to permission, though not directly contradicted, was, in its most important part, inherently improbable, or at least it might reasonably have been so considered by the court below. It was, to some extent, equivocal in the use of terms. The defendants themselves were interested witnesses, and their testimony was contradictory to each other and of that of Casey in important details. Casey's testimony was, to some extent, impeached by proof of inconsistent statements and conduct, and he appears to have been somewhat interested in favor of the defendants. Some parts of his testimony slightly corroborated the plaintiff's case, as also do parts of the testimony of the defendants. Where a hostile witness uses expressions favorable to the side he opposes, a court may properly attach more importancce thereto than to the main purport of his narrative. The combined effect of all these circumstances may have so impaired the credit of these witnesses in the mind of the court below that it may have disbelieved them entirely, or regarded only those parts of their testimony which were favorable to the plaintiff. Upon this ground it may have considered their attempted explanation of the character of the use of the way as unreliable, unsatisfactory, and insufficient to prove permissive use. In view of the findings, we are bound to presume that it did so consider it. Its conclusions as to the credibility of the testimony in this respect cannot, under the circumstances stated, be overturned or changed by the Supreme Court. Anglo-California Bank v. Cerf, 147 Cal. 396, 81 Pac. 1081.

The order denying the defendants' motion for a new trial is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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149 Cal. 758

PLUMAS COUNTY v. WHEELER et al.

(Sac. 1,361.)

(Supreme Court of California. Oct. 1, 1906. Rehearing Denied Oct. 31, 1906.)

1. LICENSES—TAXATION FOR REVENUE—POWER OF COUNTY—STATUTES.

Under Const, art. 11, § 11, providing that any county may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with General Laws, and Pol. Code, § 3366, declaring that boards of supervisors shall, in the exercise of their police powers, and for the purpose of regulation, and not otherwise, have power to license all and every kind of business not prohibited by law, etc., boards of supervisors are precluded from issuing business licenses for revenue, as previously authorized by county government act (St. 1897, p. 465, c. 277, § 25, subd. 25).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 6.]

2. CONSTITUTIONAL LAW — POLICE POWER — SCOPE.

It is within the legislative discretion to place such restrictions on the use of any property or the conduct of any business as may be reasonably necessary for the protection of the public safety, comfort, or health.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 148.]

3. LICENSES — REGULATION OF BUSINESS — FEES.

The power to regulate a business may be exercised by means of a license fee or charge, the amount of which is not greater than is reasonably necessary to pay for such regulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 15.]

4. SAME—SHEEP RAISING.

A county authorized to regulate every kind of business passed an ordinance for the regulation of sheep raising within the county, prohibiting the bringing of sheep or lambs within the county infected with certain diseases, and the grazing of sheep or lambs on public roads or trails, the dipping thereof near public highways or buildings, and requiring that every sheep herder should procure a license and pay a license fee of 10 cents for each sheep or lamb owned by or under his control. *Held*, that the license fee was not so excessive that it could be said, as a matter of law, that the ordinance was a revenue measure, but that whether it was so or not, should be determined from the conditions existing in the particular county when the ordinance was passed.

5. SAME.

Under Pol. Code, § 3366, restricting the licensing power of county supervisors to licensing for regulation, in the exercise of their police powers, and authorizing them to fix rates of license tax, and providing for the collection thereof by suit or otherwise, the fact that an ordinance imposing a license tax on sheep grazing authorized a suit by the county to recover the license fee did not indicate that the tax was exacted for revenue.

6. SAME—STATUTES.

A county ordinance regulating sheep grazing, and imposing a license tax thereon "is a law of this state" within Pen. Code, § 435, providing that every person commencing or carrying on any business for which a license is required by any "law of this state," without taking out or procuring the license prescribed, is guilty of a misdemeanor.

7. SAME—PENALTIES—COUNTY ORDINANCES—GENERAL LAW.

Under Pen. Code, § 435, providing that every person who commences or carries on any business for which a license is required by any law of the state, without procuring such license, shall be guilty of a misdemeanor, a county ordinance regulating sheep raising, and imposing a license on such business, was sufficient to prohibit the doing of such business without a license and to attach a penalty thereto, though the ordinance in itself provided no punishment therefor.

In Bank. Appeal from Superior Court, Plumas County; J. E. Prewett, Judge.

Action by Plumas county against D. C. Wheeler and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., and L. N. Peter, Dist. Atty., for appellant. Cheney & Massey (Campbell, Metson & Campbell, of counsel), for respondents.

SLOSS, J. This is an appeal from a judgment in favor of the defendants, entered upon the plaintiff's failure to amend its complaint after a general demurrer thereto had been sustained. The action was brought by the county of Plumas to recover the sum of $1,300, alleged to be due it from defendants as a license fee for conducting the business of raising, grazing, herding and pasturing sheep and lambs within the county. The plaintiff's claim is based upon an ordinance adopted by the county supervisors, in January, 1902, and set forth in full in the complaint. The enactment is entitled "An ordinance regulating the business of raising, grazing, herding, and pasturing sheep and lambs in the county of Plumas, state of California." Section 1 requires persons engaging in the described business in the county to present annually to the license collector an affidavit showing the number of sheep or lambs owned or controlled by them in the county, and whether such sheep or lambs are infected with contagious disease. Section 2 prohibits the bringing into the county of sheep or lambs infected with certain diseases. Sections 3, 4, 5. 6, and 7 make certain provisions regulating the conduct of said business. In a general way, it is sufficient to say that provision is made against the camping or grazing of sheep or lambs on public roads or trails, against dipping near public highways or buildings, and against such acts as would cause injury to the roads or trails of the county or delay and inconvenience to travelers. Section 8 makes a violation of any of the preceding sections a misdemeanor. Section 9, which provides for the license here sought to be collected, reads as follows: "Section 9. Every person, firm or corporation engaging in said Plumas county in the business of raising, grazing, herding, or pasturing sheep or lambs must annually, at the time of the commencement of said business, procure a license therefor from the license collector of said county, and must pay for said license, the license fee or charge of ten cents for each sheep or lamb owned by, in the possession of, or under the control of such person, firm or corporation." The remaining sections of the ordinance (except section 13, which will be referred to hereafter) provide for the collection of the license fee, section 16 declaring that the license fee or charge is a debt owing to the county, and shall become due and payable to the county in advance. Section 11 authorizes the district attorney to bring suit, in the name of the county, to recover license fees due.

The complaint alleges that the defendants, between May 1, 1902, and June 19, 1902, were engaged in the business of raising, grazing, herding and pasturing sheep and lambs in the county of Plumas, that during that time they owned and possessed in said county 13,000 sheep and lambs, and that they have failed and refused to take out a license or to pay any license fee. If the ordinance in question is a valid exercise of the legislative power of the county, the complaint states a cause of action. And, on the record before us, consisting simply of the complaint and the demurrer, the validity of the ordinance must be determined from an inspection of its provisions alone, read in the light of facts within the judicial knowledge of the court. Unless, so read, it appears that the ordinance is invalid on its face, the order sustaining the demurrer cannot be upheld. Under the state Constitution (article 11, § 11) "any county * * * may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Section 3366 of the Political Code, enacted in 1901, provides that "boards of supervisors of the counties of the state * * * shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions * * * to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise." The effect of this statutory provision was to cut off the power, theretofore residing in boards of supervisors under the county government act (section 25, subd. 25, St. 1897, p. 465, c. 277) to collect a license tax for revenue. "The words 'not otherwise' curtail and cut off all power boards of supervisors theretofore had to issue licenses and charge therefor as a revenue measure. * * * Indeed, it may be said that every feature of this act of 1901 indicates a plain purpose upon the part of the Legislature to restrict the licensing power of boards of supervisors and city councils to matters of regulation alone." Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205.

Can the ordinance now before us be sustained as a valid exercise of the power of the county to regulate the business of raising, herding, grazing and pasturing sheep? The principles affecting the right of legislative bodies in the exercise of what is known as the "police power," to place restrictions upon the conduct of lawful pursuits and occupations, are well settled, although there is often great difficulty in applying these principles to a given state of facts. It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort or health. "The police power, the power to make laws to secure the comfort, convenience, peace, and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested." Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." Commonwealth v. Alger, 7 Cush. 53. "The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous." Cooley, Const. Lim. (6th Ed.) 753. The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the Legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. But the legislative determination is not conclusive. As this court said, in Re Smith, 143 Cal. 368, 77 Pac. 180: "The law will not allow the rights of property or business to be invaded under the guise of police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment or by-law." "The question in each case," says the Supreme Court of the United States, "is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class." Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. It is also well settled that the power to regulate a business may be exercised by means of a license fee or charge. The amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, i. e., the regulation of the business. If it is so great that the court can plainly see that the purpose of its imposition was to realize a revenue under the guise of regulating the business, the provision for the fee cannot stand as an exercise of the police power. The elements that may properly be taken into consideration by the legislative body in determining the amount of license fee that may, for purposes of regulation, be imposed upon any business, are stated in two recent decisions of the United States Supreme Court. Both were cases involving the validity of ordinances imposing license charges upon telegraph poles and wires. Western Union Telegraph Co. v. New Hope, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240, was an action by the borough of New Hope to recover from the telegraph company a license fee of $1 per pole and $2.50 per mile of wire on the poles and wires maintained by the defendant within its limits. The defendant contended that the requirement of the fee amounted to a regulation of interstate commerce. Judgment for the plaintiff upon the verdict of a jury was affirmed, the court quoting with approval the following language of the Supreme Court of Pennsylvania in Taylor v. Postal Tel. Cable Co., 202 Pa. 583, 52 Atl. 128: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuance of the license and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. * * * Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts and is to be determined upon a view of the facts." In Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, action had been brought on a similar ordinance. In holding that the reasonableness of the charge was a question of fact upon which the parties were entitled to the finding of a jury, the court states the rule in the language of Mr. Justice Shiras in a similar case in the Circuit Court of Appeals (Philadelphia v. Western U. Tel. Co., 89 Fed. 454, 32 C. C. A. 246), i. e. "When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. * * * Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulation and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in Cooley, Const. Lim. (Ed. 1886) p. 242, may be safely adopted: 'A municipal corporation may impose, under the police power, such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses, thereby incurred.'" It is not to be understood from these citations that the costs to the municipality which may be considered are simply those which arise directly in the enforcement of the regulatory provisions themselves. The license fee may properly be fixed with a view to reimbursing the city, town or county for all expense imposed upon it by the business sought to be regulated. "In fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed." Cooley on Taxation, p. 599. Thus, in Philadelphia v. W. U. Tel. Co., 89 Fed. 460, 32 C. C. A. 246 in which the rule was stated in language which has had the approval of the United States Supreme Court, it was held to be error, in a case involving the reasonableness of a charge for maintaining telegraph poles and wires, to exclude evidence tending to show that the city was, by reason of the wires, put to additional expense in providing a greater number of fire companies and apparatus.

Applying these rules to the ordinance before us, can it be said that the charge of 10 cents per head of sheep and lambs is so clearly excessive, so grossly disproportionate to the expense incurred by the county by reason of this business, that the enactment is void upon its face? It is to be remembered that the presumption is in favor of the reasonableness of the charge, and that the county is not limited to the exact amount of the expense, as it may subsequently develop. "The municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses." A. & P. Tel. Co. v. Philadelphia, supra. The herding, pasturing, and raising of sheep is undoubtedly a lawful, indeed a necessary, vocation. But there can be no question that it, in common with the keeping of other kinds of livestock, is an occupation which may properly be subjected to reasonable restrictions for the purpose of preventing or lessening the annoyance or discomfort which, if unrestrained, it would be likely to cause. Tiedeman, State & Federal Control, p. 838; Sifers v. Johnson (Idaho) 65 Pac. 709, 54 L. R. A. 785. The first eight sections of the ordinance under examination indicate the nature of some of the objectionable features of this business. Certain acts are prohibited, and the violation of these acts is made a misdemeanor. As bearing upon the expense to which the county may be subjected, we note that it is made the duty of the peace officers in the various townships to cause the ordinance to be enforced and to report all violations thereof, and claims for services rendered or expenses incurred in performing these duties are claims against the county. Section 13. What expense the county will be put to in the enforcement of the ordinance cannot be determined from an inspection of the ordinance itself. It is a question of fact, the decision of which will depend upon the evidence to be introduced at a trial. If it should appear that all the items of expense which could reasonably be anticipated—including not only the cost of issuing the license but every other expense arising from the proper supervision or control of the business—would amount to less than ten cents per sheep (or lamb) the ordinance could not be sustained as a regulatory measure. If, on the other hand, it should appear from the facts shown that the reasonably anticipated expenses would equal or exceed the fee exacted, the ordinance must be held valid. Which of these two states of facts existed in Plumas county at the time of the adoption of the ordinance, this court cannot say. The expense to which the county would be put, or could reasonably expect to be put, by the herding, grazing, raising, and pasturing of sheep within its borders depends upon a variety of circumstances of which we do not have judicial knowledge. To arrive at the amount of such expense it would be necessary to consider the topographical conditions of the county, the extent of the industry as practised there, the effect of the industry on the roads, trails and other public property of the county, the probable cost of prosecutions for violations of the ordinance, and any other matters having a reasonable tendency to indicate the cost to which the county would be subjected by the business sought to be regulated. From these elements there could be a determination of the ultimate question of the reasonableness of the charge. And this ultimate question must be determined by a jury (or by the court, if a jury be waived) which has before it the facts from which a conclusion can be drawn. In the absence of any such facts, we cannot say that the charge here imposed is unreasonable. We do not intend to hold that there may not be ordinances imposing license fees so large that they appear, upon a mere reading, to go beyond any reasonable limits allowed under the rules of law which have been discussed. But we think a fee of 10 cents per head on sheep and lambs does not come within this category.

Much stress is laid upon the fact, which appears from decisions of this court in earlier cases (Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716; Inyo County v. Erro, 119 Cal. 119, 51 Pac. 32; Mono County v. Flanigan, 130 Cal. 105, 62 Pac. 293) that, even when counties had the power to license for revenue, a tax of only five cents per head was imposed by various counties. But this is not conclusive. The conditions in the counties which fixed those taxes may have been entirely different from the conditions existing in Plumas county. "What is reasonable in one municipality may be oppressive and unreasonable in another." Atlantic & Pacific Telegraph Co. v. Philadelphia, supra. And that the reasonableness of such a license fee is peculiarly a question of fact to be determined upon the conditions that may be shown to exist in the particular governmental subdivision imposing the fee is well illustrated by the two cases of Western Union Tel. Co. v. New Hope and Atlantic & Pacific Tel Co. v. Philadelphia, supra, both decided by the Supreme Court of the United States during the same year. Each case involved the validity (as a measure of regulation) of an ordinance imposing a license fee on the maintenance of telegraph poles and wires. The amount of the charge was the same in both cases. In the New Hope Case the question of reasonableness was submitted to a jury, which found in favor of the tax. The judgment was affirmed. In the Philadelphia Case the court took the question from the jury, and directed a verdict upholding the tax. The judgment was reversed, the court holding that the question was one of fact which should have gone to the jury.

In the case at bar we are not aware of any facts from which we can say, as matter of law, that the license fee imposed is necessarily, under all circumstances and in every locality, unreasonable or excessive. It may be unreasonable and excessive, in view of the conditions existing in Plumas county. If it is, the defendants may so allege, and if they prove their allegations they will be under no liability. But, in view of the purpose of the ordinance, as declared in its title, and the presumption of validity attending such enactments, it should not be held that the ordinance is, on its face, a revenue measure disguised as a provision for regulation. We see no force in the contention that the provision in the ordinance authorizing a suit by the county to recover the amount of the license fee indicates that the tax is exacted for revenue, rather than as an exercise of the police power. Pol. Code, § 3366, which restricts the licensing power of the county supervisors to licensing for regulation, in the exercise of their police powers, expressly authorizes them to fix the rates of license tax, and "to provide for the collection of the same by suit or otherwise." Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674, and Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732, decide nothing inconsistent with this view. Those were cases of ordinances imposing license fees for revenue and providing for the collection of the fees by suit. The ordinances were passed prior to the enactment of section 3366. It was held that the adoption of that section repealed the tax in each case, and that the right of action to recover the tax fell with the tax. But it was not held that a charge which a county or city is authorized to impose under Pol. Code, § 3366, cannot be collected by civil suit.

The point is made that the provision requiring the payment of a license fee cannot be regarded as a regulation, inasmuch as the ordinance does not "forbid the carrying on of the business mentioned unless a license be procured." If such prohibition be an essential element of a regulatory license fee, it is supplied by the provisions of Penal Code, § 435, to wit, "Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." A county ordinance is a "law of this state" within the meaning of this section. In re Lawrence, 69 Cal. 608, 11 Pac. 217. An ordinance providing no punishment for doing business without a license, but merely providing what the license should be, is therefore, when read in connection with the Penal Code, sufficient to prohibit the doing of such business, and to attach a penalty to the commission of the prohibited act. Ex parte Christensen, 85 Cal. 210, 24 Pac. 747. See, also, In re Sic, 73 Cal. 148, 14 Pac. 405; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Stephen, 114 Cal. 282, 46 Pac. 86. Various other points are made by the respondents, but, in our judgment, they are all reducible to, or are based upon, the proposition that the ordinance in question is necessarily to be regarded as a revenue measure. These points are therefore sufficiently answered by what has already been said in this opinion regarding the character of the enactment.

The judgment is reversed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.

We dissent: HENSHAW, J.; McFARLAND, J.

(149 Cal. 769)

SIERRA COUNTY v. FLANIGAN. (Sac. 1,305.)

(Supreme Court of California. Oct. 1, 1906. Rehearing Denied Oct. 31, 1906.)

In Bank. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by Sierra county against P. L. Flanigan. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell, Metson & Campbell, A. E. Cheney and Thomas H. Breeze, for appellant. Frank R. Wehe, W. I. Redding, and Solinsky & Wehe, for respondent.

SLOSS, J. This case was argued and submitted with Plumas County v. Wheeler et al. (just decided) 87 Pac. 909, and involves the validity of an ordinance of Sierra county, substantially similar to the ordinance of Plumas county, considered in the Wheeler Case. Here a general demurrer to the county's complaint setting forth the ordinance and seeking to recover license fees due under it, was overruled, with leave to the defendant to answer. Upon his default for failure to answer within the time allowed, plaintiff had judgment according to the prayer of its complaint. Defendant appeals.

For the reasons stated in Plumas County v. Wheeler, the complaint stated a cause of action, and the demurrer was properly overruled.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.

150 Cal. 12

PEOPLE v. SOEDER. (Crim. 1,283.)

(Supreme Court of California. Oct. 8, 1906.)

1. Criminal Law—Evidence—Admissibility.

That letters offered in evidence to show motive for a homicide were of such character as would prejudice the jury against the defendant could not affect their admissibility if they were otherwise competent.

2. Homicide—Evidence—Admissibility—Motive.

The theory of the state was that defendant had gone abroad and enticed his brother-in-law to this country and murdered him to obtain life insurance money. A series of letters written by defendant while abroad to a young woman showed that he was desirious of marrying her, and was satisfied that to accomplish this that he must immediately obtain a considerable sum of money, and that she would not see or listen to him until such sum was obtained, and it also appeared that he attempted to procure insurance to this same amount. *Held*, that the letters were admissible to prove motive.

3. Criminal Law — Trial — Course of Conduct—Remarks of Judge.

After a witness concluded his testimony, the court asked him if he understood that defendant was charged with murder and his punishment might be death, and after an affirmative answer said that the court had no desire of intimating that the testimony was true or false, but, that he might have an opportunity of correcting the same, informed him that any person who by willful perjury secured the conviction and execution of an innocent person could be punished by death, and inquired whether, with the knowledge of such punishment, the witness had any change or correction to make in his testimony. *Held*, that there was no intimation of opinion on the part of the court constituting misconduct prejudicial to defendant's rights.

4. Same.

It was proper for the jury to know in a homicide case that a witness testified with knowledge of the law that perjury leading to a conviction and execution would render the witness liable to punishment by death.

5. WITNESSES—CROSS-EXAMINATION.

Where defendant testified that he did not kill deceased or employ any one to kill him, it was proper cross-examination to ask him where he was at the hour of the night the homicide was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 980.]

6. SAME—CREDIBILITY AND IMPEACHMENT.

Under Code Civ. Proc. § 2051, defendant, having voluntarily testified in his own behalf, became subject to the same rules as other witnesses, and it was competent for the prosecution to show either by cross-examination or the record of the judgment that he had theretofore been convicted of a felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1113, 1129–1132.]

7. CRIMINAL LAW—TRIAL—CONDUCT OF COUNSEL—ARGUMENT.

Counsel in argument may fully state his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1670.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Leon Soeder was convicted of murder in the first degree, and from an order denying a motion for a new trial, he appeals. Affirmed.

Edward S. Salomon and Alex. Campbell, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., J. Charles Jones, and Lewis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was charged by information filed in the superior court of the city and county of San Francisco with the crime of murder, alleged to have been committed on January 10, 1904, by the unlawful killing of one Joseph Blaise, and, having been convicted of murder in the first degree and adjudged to suffer death, appeals from the judgment and from an order denying his motion for a new trial.

There is not, and could not well be, upon the record before us, any claim that the evidence adduced on the trial was insufficient to support the verdict, and it will, therefore, be unnecessary to state the evidence, except in so far as is essential to a proper understanding of the points made for reversal. Between 8 and 9 o'clock a. m. on January 11, 1904, the body of Blaise was found lying on the west side of Taylor street, between Vallejo and Green streets, in the city of San Francisco. The evidence afforded by the condition of the body and of the ground where it lay was clear and convincing to the effect that Blaise had been foully murdered at that place the evening before, by being first struck down from behind with some blunt instrument, and then killed by a knife driven into and drawn clear across the throat, severing carotid artery and jugular vein. The spot where the body was found was a lonely place, Taylor street at Vallejo street running over the brow of Russian Hill, and between Vallejo and Green streets being a very steep grade without sidewalk and without a house on either side. No one witnessed the killing, and the state was, therefore, without direct evidence as to the identity of the murderer. Blaise, according to the statements of defendant, was the husband of defendant's sister, who lives in Germany, and has never been in this country. He was apparently a laborer and without means, and at the time of his death had been in the United States only about six weeks, and in San Francisco for less than a month, having left his home in Germany with defendant in November, 1903. He was entirely without knowledge of the English language. On January 7, 1904, defendant had succeeded in obtaining two policies of insurance on the life of Blaise, one of which was an accident policy for $3,000, payable to defendant, and the other of which was an ordinary life policy for $3,000, payable to defendant's sister, who, as already stated, was in Europe. The theory of the prosecution was that the defendant, who had lived in this state for several years, went from California to Germany for the purpose of bringing Blaise to this country, so that he might then insure his life here, and subsequently kill or otherwise dispose of him, in order to obtain the insurance money, and that, in pursuance of this plan, he did bring Blaise from his home in Germany to San Francisco and there obtained insurance on his life, and then lured him to this lonely spot on Russian Hill and there killed him, so that he might realize on the investment he had made. Difficult as it is to conceive of a human being so constituted that he could deliberately make and carry into execution such a plan, the evidence sufficiently supports the theory above stated.

1. A portion of the evidence introduced by the prosecution in support of this theory consisted of certain letters written by defendant to a young woman in San Francisco. The admission of these letters in evidence, over the objection of defendant, is claimed to have constituted prejudicial error. It is urged that the letters are of such a character that they must have prejudiced the jury against the defendant. This, of course, would be no sufficient objection to their being received in evidence if they were relevant to any material fact in issue. Evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person for a crime, and thus to solve a doubt "either as to identity of the slayer, the degree of the offense, the insanity of the defendant, or to the justification or excusability of his act," is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes. See People v. Cook (Cal. Sup.) 83 Pac. 43, 46, 50; People v. Suesser, 142 Cal. 354, 363, 75 Pac. 1093. In People v. Brown, 130 Cal. 591, 594, 62 Pac. 1072, this court, quoting approvingly from People v. Stout (N. Y.) 4 Park C. C.

128, said: "Whatever fact tends legitimately and fairly, according to the ordinary operation of the human mind and the ordinary principles of human conduct, to show motive, may properly be given in evidence in proof of any assumed motive for the commission of the crime." Evidence as to a motive for the killing on the part of the defendant is peculiarly material in a case where the identity of the party who committed the crime is a fact in dispute, though, as we have seen, the rule as to its admissibility does not confine it to such cases. See People v. Cook, supra.

We have no doubt that the letters admitted in evidence in this case were admissible upon the question of motive. The evidence of the young woman to whom they were written showed that from April, 1903, to the time of his departure for Germany on October 16, 1903, defendant had been most anxious to win her favorable regard, and especially desirous of showing to her that he was possessed of money. He had been assiduous in his attentions, had made her presents of articles aggregating several hundred dollars in value, and had also represented to her that money had been bequeathed to him by an uncle in Germany, which he would shortly obtain, and that he would be a wealthy man. He left California on October 16, 1903, with the purpose avowed to her of obtaining a portion of the money given to him, telling her that the lowest sum he would come back with would be $10,000, which sum, it may properly be noted in passing, was the exact amount of life insurance that defendant sought to obtain on the life of Blaise, the insurance companies applied to refusing to issue a policy in such a large amount. The letters introduced in evidence, eight in number, were written by defendant between the time of his departure and January 1, 1904, several having been written in New York and France, and at least three in San Francisco after his return. This series of letters, the last of which was mailed December 29, 1903, unmistakably shows that defendant for some reason was most desirous of marrying the young woman, and also that he was satisfied that it was essential to the accomplishment of this that he should immediately obtain a considerable sum of money from some source, and that it would be useless to persist in further attentions, or even to see her, until such money was obtained. It throws some light upon the question as to the ultimate object of the earnest efforts of defendant to obtain insurance in large amounts upon the life of Blaise, indicating an object the accomplishment of which, viz., the immediate obtaining of the insurance money, necessarily included the death of Blaise or his disappearance under such circumstances as to make sufficient proof of death possible. It had a direct tendency to show a motive on the part of defendant for the doing of that which would make the insurance policies payable, as he undoubtedly believed the death of Blaise would do, and thus to show a motive on his part for the killing of Blaise. While the effect in this behalf of the first seven letters may have been somewhat impaired by the last letter, written December 29, 1903, wherein defendant reproaches the young woman for not having answered any of his letters or sent him any word or come to see him, all because he had disappointed her in not sooner procuring money, and declares the engagement broken, and demands a return of his presents, such effect was not destroyed thereby. The letter was of such a character that it certainly cannot be held that it shows, as a matter of law, that defendant had given up all desire or hope of winning the hand of the young woman, or that he did not feel that with money in his possession he could still obtain her.

It is suggested that, as the life policy was payable to the wife of Blaise, defendant could not derive any benefit therefrom, and there was, therefore, so far as such policy was concerned, no possible motive on his part for the killing of Blaise. This suggestion, however, is practically without force when we remember that this wife, if there was such a person, was, according to the testimony, the sister of defendant, and a resident of a country thousands of miles away. In the light of all the facts, it is apparent that defendant expected to himself handle the proceeds of such policy. It must also be borne in mind that we have nothing except the statement of defendant, acquiesced in by Blaise when alive, to show that Blaise was the brother-in-law of defendant, or that he had a wife at all.

2. One Cooper, who was a cellmate of defendant in the county jail while defendant was confined there awaiting trial, and who testified that he had known defendant prior to the killing of Blaise, gave testimony to the effect that the defendant had admitted to him that he killed Blaise for the purpose of obtaining the insurance, and had, with the aid of a pencil drawing which defendant himself admittedly made, given him a detailed statement of the locality where and the manner in which the crime had been committed. He further testified that defendant had asked him to assist in establishing an alibi. After Cooper had concluded his testimony, the court asked Cooper if he understood that the defendant was charged with murder, and that the punishment for murder of the first degree might be death, and Cooper answered in the affirmative. The court then said: "Now, the court has no desire or intention of intimating in either way that your testimony is true or that it is false, but that you may have an opportunity of correcting the same, if any be untrue, I inform you that, under the law of this state, any person who, by willful perjury, secures the conviction and execution of any innocent person is punishable by death. With the knowledge of the punishment at-

tached in such case, have you any change or correction to make in your testimony?" The witness answered in the negative. The district attorney then asked: "You have no change or correction to make?" and Cooper answered: "None." This occurred in the presence of the jury. No objection or intimation that the same was not entirely satisfactory was made by defendant in regard to any of these questions, and no exception was taken to the action of the court or district attorney in the matter.

It is now urged that the court had no right to pursue this course of examination, for the reason that it thereby intimated to the jury an opinion on the part of the court as to the truth or falsity of Cooper's evidence, and also that it was prejudicial to the accused, as it left with the jury the impression that the witness had testified truthfully. Under our system, the trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. The determination of questions of fact must be made by the jury free from the influence that knowledge of the trial judge's views thereon might have. If there was anything in the action complained of that would have the effect of intimating to the jury views on the part of the court as to Cooper's evidence, which were adverse to defendant's interests, defendant would have good ground for complaint. We are, however, unable to see therein any intimation on the part of the court of an opinion unfavorable to the defendant, and in favor of the evidence given by Cooper. If, despite the court's express disavowal of an intent to intimate either way as to the truth or falsity of the evidence given by Cooper, the statement made and questions asked by the court had the effect of conveying any intimation of opinion on its part, such intimation was that the court was inclined to doubt the truth of the evidence, rather than to believe it. If it had been otherwise, there could have been no occasion for making the statement and asking the questions, for certainly it could not have been, and cannot now be, assumed by any one from the nature of the statement and questions, that it was the desire of the court thereby to fortify and emphasize the evidence given by the witness. It may be that the necessary effect of the statement and questions was to intimate a doubt on the part of the court as to the truth of the evidence given by Cooper, but in this there could be no intimation unfavorable to defendant, and he, therefore, cannot complain. So far, therefore, as the remarks and questions of the court are concerned, there was no intimation of opinion upon the part of the court that can be held to have been misconduct prejudicial to defendant's rights. It is unnecessary to here determine whether the objections now made in this matter can be considered without objection made or exception reserved in the trial court.

We see no merit whatever in the objection that the effect of the adherence to his testimony by Cooper, in the face of the information given him by the court as to the penalty for willful perjury resulting in the conviction and execution of an innocent person was to strengthen that testimony in the minds of the jurors. If such was the effect, which may be conceded, it was due solely to the fact that the jurors knew that the witness was testifying with actual knowledge as to the penalty prescribed by law for perjury. This it was entirely proper for them to know and take into consideration with all other matters going to the question of credibility of the witness, in determining the weight that should be given to his testimony.

We are unable to see any merit in the contention of defendant relative to the incident we have been discussing. Everything done by the court was in furtherance of the ultimate object of every judicial investigation, viz., the eliciting of the truth—there was therein no intimation of opinion on the part of the court adverse to defendant's interest —and the only effect thereof was to bring to the attention of the jury a fact which it was proper for them to know in determining the weight to be given to Cooper's evidence.

3. Many rulings of the trial court overruling objections to questions asked the defendant on his cross-examination by the district attorney are complained of, it being claimed that such questions were not proper cross-examination for the alleged reason that they had no reference to matters about which he was examined in chief. Penal Code, § 1323. Defendant had testified very fully on his direct examination as to his conversations with Cooper in the county jail, denying the truth of Cooper's statements, and, testifying explicitly in regard to the diagram made by him showing the place of the homicide, said that he told Cooper at the time that he knew nothing about the place or its whereabouts of his own knowledge, and that he was drawing the diagram solely from his own recollection of a map that had been produced in the police court. This was in direct conflict with the evidence of Cooper as to the conversations between them upon this subject. Several of the questions asked on cross-examination of the defendant were devoted to an effort to show by him that he did, at the time of the conversation with Cooper, know from personal observation as to the whereabouts and character of the place. It may be strongly argued that this was legitimate cross-examination upon a matter concerning which he had been "examined in chief," viz., his conversation with Cooper, for the reason that any answers to the questions asked which tended to show such personal knowledge on his part would impair the force of his direct testimony as to what his statements to Cooper were in this regard, and therefore would

be legitimate cross-examination within the rule laid down in People v. Gallagher, 100 Cal. 466, 475, 35 Pac. 80. It is not necessary, however, to decide this point, in view of the answers given by the defendant to the questions. By those answers he steadfastly denied any personal knowledge as to these matters, and the evidence elicited was of such a nature that prejudice could not have been suffered by defendant on account of such cross-examination.

Outside of the testimony as to the Cooper conversations, defendant had testified on his direct examinations simply as follows: "I did not kill my brother-in-law, Joseph Blaise. I never employed or tried to employ any one to, or make any combination or agreement with anybody to kill him." On cross-examination he was asked: "Where were you on the night of January 10th of this year at the hour of 9 o'clock?" This time, according to the evidence, was about the time of the commission of the murder. This undoubtedly was legitimate cross-examination as to the general statement made by defendant on his direct examination to the effect that he was not the person who had committed the murder. See People v. Gallagher, supra. The defendant having voluntarily testified in his own behalf became "subject to the same rules for testing his credibility before the jury by impeachment or otherwise, as any other witness" (People v. Hickman, 113 Cal. 80, 86, 45 Pac. 175), and it was therefore competent for the prosecution to show either by his cross-examination or the record of the judgment that he had theretofore been convicted of a felony. Code Civ. Proc. § 2051; People v. Arnold, 116 Cal. 682, 687, 48 Pac. 803; People v. Sears, 119 Cal. 267, 271, 51 Pac. 325; People v. Meyer, 75 Cal. 383, 386, 17 Pac. 431. The rulings of the court upon this point were, therefore, not erroneous.

The usual contention is made that the district attorney, in his closing argument to the jury, went beyond the limits of legitimate argument to the prejudice of the defendant. We find no support for this contention in the record. This is not a case like that of People v. Cook (Cal. Sup.) 83 Pac. 43, where the district attorney stated as a fact something most prejudicial to the defendant, as to which there was absolutely no intimation in the evidence. As was said in People v. Romero, 143 Cal. 458, 460, 77 Pac. 163, 164: "Counsel has the right in the argument to fully state his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." In the case at bar, the district attorney, in our judgment, did no more than this.

The transcript on appeal discloses no other point requiring discussion.

The judgment and order denying the motion for a new trial are affirmed.

We concur: SHAW, J.; HALL, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

150 Cal. 6

McANENY v. SUPERIOR COURT OF SANTA CLARA COUNTY et al. (S. F. 4,609.)

(Supreme Court of California. Oct. 4, 1906.)

1. Appeal—Stay of Proceedings—Effect—Alimony—Receivership.

Though, under Civ. Code, § 137, a superior court may require the husband, in action for divorce, to pay temporary alimony, suit expenses, etc., and, under section 140, may enforce payment or security therefor by the appointment of a receiver or by other appropriate remedy, where defendant filed a bond to stay proceedings pending an appeal from orders requiring him to pay temporary alimony, etc., the superior court had no jurisdiction to appoint a receiver to provide security for the ultimate payment of temporary alimony, etc., since Code Civ. Proc. § 946, provides that the perfecting of an appeal shall stay further proceedings in the court below on orders appealed from and matters embraced therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2208.]

2. Prohibition — Grounds — Existence of Another Remedy.

Code Civ. Proc. § 1102, giving the superior court authority to issue a writ of prohibition to arrest proceedings of a tribunal exercising judicial functions in excess of its jurisdiction, being limited by section 1103, providing that the writ will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of the law, the writ will not issue to stay receivership proceedings to provide security for the payment of temporary alimony, etc., from orders for payment of which the husband has appealed, since the writ of supersedeas offered defendant a speedy and adequate remedy to stay the proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4, 5, 13.]

3. Same—Jurisdiction—Issues and Proof—Review.

Where a husband's petition for a writ of prohibition to stay receivership proceedings to secure the payment of temporary alimony, from the orders for the payment of which he had appealed, alleged that he was unable to procure sureties for the amount of the bond required by the superior court to stay proceedings, and the allegations were denied by the answer and the case was submitted without a trial of that issue, the Supreme Court could not determine whether or not appeal afforded the husband a plain and adequate remedy against the receivership proceedings.

4. Same — Presentation of Objection in Original Proceeding.

Where a husband appealed from orders of the superior court requiring him to pay temporary alimony, etc., a writ of prohibition would not issue at his instance to stay receivership proceedings to secure the ultimate payment thereof, where it did not appear that he had objected to the jurisdiction of the lower court to appoint a receiver after appeal from the orders, or that the court was informed of the filing of the undertaking to stay proceedings on the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 66.]

In bank. Application of George B. McAneny for writ of prohibition against the superior court of Santa Clara county and another. Denied.

Jackson Hatch and John E. Richards, for petitioner. H. E. Wilcox and D. M. Burnett, for respondents.

SHAW, J. This is an original proceeding in this court for a writ of prohibition to prevent further proceedings in pursuance of an order of said superior court made in the course of an action for divorce therein pending, wherein Mabel M. McAneny is plaintiff and George B. McAneny is defendant, appointing Walter L. Crow receiver to take charge of the property of the defendant. Prior to the making of the order appointing Crow as receiver the court had made an order in the action for divorce requiring the defendant, George B. McAneny, to pay certain sums of money to the plaintiff for her alimony pending the suit and for her costs and counsel fees in the prosecution thereof, and also a subsequent order for the payment of additional sums as alimony pending an appeal from the first order and for her expenses upon such appeal. From each of these orders the defendant had appealed to the Supreme Court, and had stayed further proceedings on each order pending the appeal by giving the necessary undertakings. The last order for alimony pending the appeal was made on February 12, 1906. Notice of the motion for the appointment of a receiver and the notice of motion for alimony, etc., pending appeal were both served and filed on February 1st, and it was stated in the former notice that the purpose sought to be accomplished by the appointment of a receiver was the securing of the payment to plaintiff of such sums as might be directed to be paid to her for alimony, costs, and counsel fees. The order appointing a receiver was made on March 8, 1906. The court ordered that Crow be appointed receiver, and directed him, as such receiver, to take charge and custody of all the money and property of said defendant, with certain immaterial exceptions, and collect all rents, issues, and profits therefrom. This order recites the terms of the notice, stating the purpose for which the receivership was desired, as aforesaid.

A writ prohibition may be issued by this court to arrest the proceedings of any tribunal exercising judicial functions "when such proceedings are without or in excess of the jurisdiction of such tribunal." Code Civ. Proc. § 1102. By section 137, Civ. Code, power is given to the superior court in actions for divorce to make orders requiring the husband to pay money to the wife for her support pending the action and for her expenses in prosecution or defense thereof. The orders in question, directing the payments of money by the petitioner, were made in pursuance of the authority given by that section. By section 140 of the Civil Code it is provided that the court may require the husband to give reasonable security for making any payments which the court may direct to be made under the provisions of section 137 aforesaid, "and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." Under these provisions a receiver may be appointed either for the purpose of enforcing payment of the alimony and expense money previously ordered paid, or for the purpose of enforcing a previous order requiring the husband to furnish security for such payment, or for the purpose merely of providing such security. Petaluma Bank v. Superior Court, 111 Cal. 495, 44 Pac. 177; Huellmantel v. Huellmantel, 124 Cal. 588, 57 Pac. 582; Sharon v. Sharon, 67 Cal. 202, 7 Pac. 456, 635, 8 Pac. 709.

It must be admitted that the superior court had full jurisdiction to grant the motion for a receiver at all times during its pendency, prior to the taking of the appeal from the order to pay alimony and costs and the filing of the undertaking to stay proceedings on said appeal. The stay of proceedings on the alimony order, thus effected, operated as a supersedeas, and, during its operation, deprived the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver. Ruggles v. Superior Court, 103 Cal. 127, 37 Pac. 211; State I. & I. Co. v. Superior Court, 101 Cal. 150, 35 Pac. 549. If the order appointing the receiver in this case was an act in furtherance of the enforcement of the alimony order which was stayed by the appeal, it was prohibited by the statute, which in such cases forbids further proceedings upon the order appealed from and matters embraced therein (Code Civ. Proc. § 946), and it was, in a certain sense, in excess of the jurisdiction of the court. Notwithstanding the limited scope and purpose of the order appointing the receiver in the present case, as expressed in the notice and recited in the order, we think it was a step taken for the enforcement of the payment of the alimony and expenses allowed. State I. & I. Co. v. Superior Court, supra. The fact that the custody is solely for the purpose of providing security does not change the character of the proceedings. It is security for payment, so that when the final act of enforcement comes—that is, the actual appropriation of the money to the satisfaction of the demand—the money will be ready for that purpose if enough has been secured, or the property will be in the receiver's hands for sale, if it is necessary to resort to a sale, and so it may be said to be a provision for the better enforcement of the order to pay alimony. It could have no other object than the ultimate enforcement of the payment. It is therefore a proceeding which was stayed by the undertaking for the stay of the proceedings on the order of February 12th granting further alimony and attorney's fees.

A writ of prohibition will not be issued where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1103. We have already seen that the proceeding to appoint a receiver was a step toward the enforcement of the alimony order appealed from, and that the effect of the stay bond on the appeal was to stay all proceedings on the order, or in the enforcement thereof. The petitioner has, therefore, a speedy and adequate remedy by means of a motion in this court in the matter of the appeal for a writ of supersedeas to stay the hand of the court below in any proceeding to enforce the order, whether judicial or ministerial. The writ of supersedeas "is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment. * * * If, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order restraining its action." Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 Pac. 123. Such writs have been issued in the following cases: Hoppe v. Hoppe, 99 Cal. 537, 34 Pac. 222; Painter v. Painter, 98 Cal. 626, 33 Pac. 483; Born v. Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; Baldwin v. Superior Court, 125 Cal. 584, 58 Pac. 185; Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61; Brown v. Rouse, 115 Cal. 619, 47 Pac. 601; Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070. This court has even gone so far, upon the granting of a writ of supersedeas, as to quash writs already issued out of the superior court and vacate sales already made in pursuance of the order of that court. Owen v. Pomona L. & W. Co., 124 Cal. 331, 57 Pac. 71. This remedy is more effectual and comprehensive than prohibition in all cases where, as in this case, the acts of the party restrained are proceedings which are stayed by an appeal. The petitioner is also the appellant, and therefore has the right to apply for a supersedeas in aid of his appeal. We are aware that this court has sometimes granted relief by way of prohibition where the exercise of judicial functions were threatened in enforcement of the judgment stayed by an appeal. In the leading case of Havemeyer v. Superior Court, 84 Cal. 342, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, the persons applying for the writ of prohibition were not parties to the action. It was considered doubtful whether they had the right to appeal, and, if so, whether the appeal would be of any value without a bill of exceptions, and hence that remedy was not deemed plain or adequate. Not being parties, they could not move for a supersedeas. In the case of State I. & I. Co. v. Superior Court, supra, and in other cases where prohibition has been entertained at the instance of a party to the appeal, the existence of the remedy by writ of supersedeas does not appear to have been called to the attention of the court, and the effect of such remedy has not been discussed in the opinion.

There is also the remedy by appeal by which the order can be vacated for mere error, as well as for excess of jurisdiction. The defendant has appealed from the order appointing the receiver, and in his petition he seeks to show that this remedy is ineffectual because the amount of the undertaking to stay proceedings thereon has been fixed at $30,000, and he avers that he is wholly unable to procure sureties for that sum. This allegation is denied in the answer, and, as the case has been submitted without a trial of the issue thus raised, we cannot decide whether or not this remedy is plain or adequate in this particular case.

Another objection to the sufficiency of the case made by the petitioner is that it does not appear that the objection to the jurisdiction of the court was ever brought to the attention of the superior court and an opportunity given to that court to recede from its position, a step which is usually a condition precedent to the right to a writ of prohibition in this court. There was not here, as in Havemeyer v. Superior Court, 84 Cal. 403, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, a lack of opportunity to do so, nor is there anything in the record to show that the disposition of the lower court to persist in its course made it useless to object. The proceeding for a receiver was initiated at the same time as the application for additional alimony, and the court, as before stated, had full jurisdiction to proceed at all times prior to the appeal from the alimony order and the securing of the stay of proceedings thereon. The appeal from the alimony order was taken and the stay of proceedings thereon obtained on February 14, 1906. The application for a receiver was postponed from day to day by stipulation of the attorneys, and did not come on for hearing until March 8, 1906, at which time it was granted. There was therefore ample opportunity given to the petitioner to object to the jurisdiction of the court and to give notice to the court of the fact he had taken the appeal and obtained a stay of proceedings. It does not appear that the superior court was ever informed of the filing of the undertaking which operated to stay proceedings. Unless it was aware of that fact, it could have no knowledge that it was proceeding in excess of its power. This case therefore does not come within the exceptions or qualifications to the rule that objection must be made in the lower court which are noted in the opinion in Havemeyer v. Superior Court, supra.

The petition is denied.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

149 Cal. 744

WESTERN UNION TELEGRAPH CO. v. CITY OF VISALIA. (Sac. 1,443.)

(Supreme Court of California. Sept. 25, 1906.)

1. TRIAL—FINDINGS OF FACT—CONSTRUCTION—SUFFICIENCY OF EVIDENCE.

An ordinance purporting to grant a privilege to a telegraph company to use the streets of the city for its poles, regulating the manner of such use and the rights of the city and company therein, nowhere used the word "franchise." The company's officer testified that the ordinance and its acceptance by the company was not a "franchise," or understood to be such, but a mere police regulation. *Held*, that a finding that a "franchise" was created thereby should be construed as meaning that the ordinance and its acceptance by the company operated in law as a franchise, and not that a franchise was applied for and granted eo nomine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 871.]

2. MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISE TO TELEGRAPH COMPANIES—WHAT CONSTITUTES.

An ordinance, to become operative on its acceptance by a telegraph company, purported to grant to the telegraph company a right to use the streets of the city for poles, provided that such use was not exclusive, regulated the manner of such use, fixed the company's liability for damages arising from an abuse thereof, and gave the city a right to use the poles. *Held*, that the other provisions contained in the ordinance did not change its character from an attempted grant of a franchise.

3. TAXATION—CORPORATIONS—FRANCHISES—GRANT OF POWER ALREADY POSSESSED.

Act July 24, 1866, c. 230, 14 Stat. 221, grants a certain telegraph company a franchise of constructing its lines along the post roads of the United States. Rev. St. U. S. § 3964, [U. S. Comp. St. 1901, p. 2707] provides that all public highways are post roads. Pol. Code, § 2618, declares that public highways are roads, streets, and alleys laid out and dedicated to the public. Civ. Code, § 536, authorizes telegraph companies to construct their lines upon any public road or highway. *Held*, that a city ordinance purporting to grant to the corporation referred to in 14 U. S. Stat. a franchise to use the city streets for its poles was a mere attempt to give what the company already had, and did not create a franchise which could be taxed.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Western Union Telegraph Company against the city of Visalia. From a judgment for defendant, plaintiff appeals. Reversed, and remanded with directions.

Brown & Wells, R. B. Carpenter, and Beverly L. Hodghead, for appellant. H. T. Miller, for respondent.

McFARLAND, J. The plaintiff is a corporation organized under the laws of the state of New York and engaged in the telegraph business. It has been in existence as such corporation since before July 24, 1866. The defendant, the city of Visalia, is a municipal corporation organized and existing under the laws of the state of California. Plaintiff has numerous lines of telegraph running through many parts of California and other American states and adjoining countries, and one of its lines runs through the streets of the defendant to the extent of 3 miles of poles and 12 miles of wires. The defendant assessed for the year 1904 all these poles and wires and all other tangible property of plaintiff within said boundaries, and all the taxes levied upon such property were paid by plaintiff, but defendant for said year also assessed plaintiff for "a franchise granted by the city of Visalia, $1,500," and levied a tax thereon of $30, and was about to levy upon and sell all plaintiff's said poles and wires to satisfy said tax, when plaintiff commenced this action to restrain such sale. Judgment went for defendant in the trial court, and, from the judgment, plaintiff appeals, bringing up the judgment roll and a bill of exceptions. As respondent does not make any point as to the remedy asked by appellant, we will assume, for the purpose of this appeal, that the remedy is a proper one and determine the case, as both parties seem to want it determined, upon its real legal merits.

The case was tried by the court, without a jury, upon a stipulated statement of facts, with leave to either party to introduce further evidence, and some further evidence was introduced by plaintiff. The character of plaintiff, and its rights, franchises, and immunities, have been before this court in other cases, and particularly in the case of the City and County of San Francisco v. The Western Union Telegraph Company, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301. It was determined in that case—and is the law—that, by an act of Congress passed July 24, 1866, (14 Stat. p. 221, c. 230) and the subsequent acceptance of its terms by the appellant herein, the appellant was granted the franchise of constructing, maintaining, and operating its lines of telegraph over the public domain, and across and under navigable waters, and along the military and post roads of the United States, in such manner as not to obstruct or interfere with ordinary travel thereon; that, by section 3964, Rev. St. of the United States [U. S. Comp. St. 1901, p. 2707] it was provided—as Congress had the right to provide—that "all public roads and highways while kept up and maintained as such are declared to be post roads," and by section 2618 of the Political Code of this state it is provided that public "highways" are "roads, streets, alleys," etc., laid out, erected, and dedicated to the public; that, by said act of Congress, and its acceptance by appellant, the latter became an instrumentality of the United States in carrying out its govermental functions, and that, therefore, under the principle declared in McCulloch v. Maryland, 4 Wheat. 316, the franchises granted plaintiff by said act of Congress are not subject to state taxation, either directly or indirectly. Therefore the respondent had no authority to assess and tax any federal franchise enjoyed by appellant and exercised upon the streets of respondent. This principle respondent admits, but it contends that the franchise which it assessed was the franchise granted by respondent, and that its assessment was not, therefore, the assessment of a federal franchise, and whether or not this is so is the question to be determined on this appeal.

On the 20th day of February, 1892, the trustees of respondent passed a certain ordinance designated as "ordinance No. 69," which was to take effect only upon the filing by appellant with the clerk of the city a written acceptance of such ordinance. The respondent contends, and the court found, that by said ordinance a franchise was granted to appellant, and it is contended and found that the franchise assessed by respondent is the franchise which is averred to have been created by said ordinance. If that ordinance did not create a franchise then the attempted assessment was on something which had no existence. This case, therefore, differs from Western Union Telegraph Co. v. County of San Joaquin, 141 Cal. 264, 74 Pac. 856, because in that case it did not appear from the pleadings that the plaintiff there did not have some franchise from the city of Stockton different and in addition to its federal franchise. The appellant had erected and was using its lines of poles and wires through what were afterwards streets of the city of Visalia before said city was incorporated; and has ever since used the same line. The said ordinance No. 69, passed February 20, 1892, with its acceptance by appellant is as follows:

Section 1. Be it ordained by the city council of the city of Visalia, state of California, that the Western Union Telegraph Company, its successors and assigns, are authorized to erect and maintain on the streets, alleys and public ways of said city the poles and fixtures and wires necessary for the purpose of supplying the citizens of said city and the public communication by telegraph, or other improved electrical device such use to be and continue upon the terms and conditions hereinafter stated.

"Sec. 2. The location of the poles and lines now in use is hereby approved, subject to the provisions of this ordinance, and provided the same shall be made to conform with the requirements of this ordinance and the location of all poles and lines now in use, or extensions thereof, shall be under the direction and control of the city council of the said city.

"Sec. 3. Said poles and wires shall be placed and maintained so as not to interfere with travel on said highways, and said company shall hold said city free and harmless from all damages arising by reason of any abuse of said occupancy. This grant is made, and is to be enjoyed, subject to such reasonable regulations and ordinances of a public nature as said city council of said city is authorized and sees proper at any time to adopt not destructive to the rights herein granted.

"Sec. 4. The right of use herein given shall not be exclusive and the city council of said city reserves the power to grant a like right of way to any other telegraph company; the same however, not to interfere with the reasonable and proper exercise of the privileges herein granted.

"Sec. 5. In consideration whereof, said Western Union Telegraph Company shall, and by the acceptance of this ordinance does, agree to allow the city council of said city to attach at any time to the top crossarm of any of said poles, where practicable, the city fire alarm and police wires, and said poles are hereby made a municipal instrumentality for that purpose; provided, however, said attachment shall be so made as not to interfere with said company's use, and said attachment shall be made and maintained under the direction of said company's manager in said city of Visalia.

"The said company shall and will furnish for the said city the use of its poles for the attachment thereto of its fire alarm boxes, without charge to said city.

"Sec. 6. This ordinance shall take effect on and after its passage and the filing by said company of unconditional acceptance thereof in the office of the clerk of said city of Visalia, and shall be published in one issue of the Tulare County Times, a newspaper printed and published in said city of Visalia.

"Sec. 7. That whenever said company ceases to operate a telegraph line in said city of Visalia and ceases to use the said poles and lines herein provided for in the operation of its line of telegraph then said company shall remove said lines and poles from the streets and alleys of said city within sixty days from date that said company so ceases to use and operate said lines.

"Sec. 8. This grant is made on condition that all poles used by said Western Union Telegraph Company within the city limits shall be of the uniform height of twenty-six feet above the surface of the ground, and shall be maintained at such height, without any splicing, relative to the sidewalks of said city as the common council may designate.

"Sec. 9. All ordinances and parts of ordinances, orders and resolutions upon the subject of telegraph poles, wires, etc., of previous date, in so far as the same relates to the Western Union Telegraph Company, are hereby repealed and annulled."

"San Francisco, Cal., Feb. 20, 1892. To his Honor, the Mayor, and the Honorable City Council, Visalia, Cal. — Gentlemen: The Western Union Telegraph hereby accepts your ordinance No. 69, passed the 10th day of February, 1892, and files hereby this its unconditional acceptance thereof, in the office of your city clerk. Very respectfully, The Western Union Telegraph Company, by Frank Jaynes, Supt."

The court found that, prior to the passage of this ordinance, "the plaintiff applied to defendant herein the city of Visalia for the privilege and franchise of constructing, maintaining, and operating plaintiff's telegraph lines, poles, and structures in the streets, alleys, and public ways of said city of Visalia," and that said ordinance was passed in pursuance of such application, and that "said ordinance and franchise were duly accepted in writing by plaintiff." If this can be construed to mean literally that plaintiff really applied for a franchise, eo nomine, to construct and operate a telegraph line through the streets of the city, then it would have no support in the evidence, and the judgment would have to be reversed for that reason. The word "franchise" is not used in the ordinance, and there is no pretense in it of the granting of a right to "operate" the telegraph line. The only evidence on the subject is the testimony of plaintiff's superintendent, F. H. Lamb. He said: "I am acquainted with the franchises of the Western Union Telegraph Company on the Pacific Coast. The matter of the application for a franchise, if any were made, would be a part of my duties. We have no franchise in the city of Visalia granted by the city of Visalia or the county of Tulare for any purpose." On cross-examination he was asked: "Now, Mr. Lamb, at any time prior to the month of February, 1892, did not the Western Union Telegraph Company, through you, make an application to the city of Visalia for a franchise to erect its poles along the city streets of Visalia and to string its wires thereon?" and to this question he answered as follows: "I do not understand that that application was made, as it was well understood by this company that the act of Congress of 1866 gave the Western Union Telegraph Company the franchise to erect its telegraph lines and operate them over all portions of the public domain, over all post routes; and also that the state of California gave to all telegraph companies similar authority. The application that was made to the city of Visalia was in the nature of a police regulation in order to settle the question as to the location of our poles, the height of wires above ground, etc., in order to prevent the lines which we erected in the streets from being subsequently disturbed by some whim of a street official. Q. Now, in pursuance of that application, Mr. Lamb, there was an ordinance passed by the board of trustees on February, 1892, which granted to your company some rights in the streets, was there not? A. There was an ordinance passed which prescribed that the location of the poles and wires then erected was approved. Q. It is the same ordinance that has been set forth here in the complaint and statement of fact? A. Yes, sir."

In the face of this evidence we do not think that the court intended to find that the plaintiff applied for what it called or understood to be a "franchise." We think that the finding can be, and should be, construed to mean merely that, in the opinion of the court, the ordinance 69 did, in law, create a franchise, and that, therefore, plaintiff can be said to have applied for a franchise. And, construing it in that sense, the case can now be here decided on its merits, without the necessity of ordering a new trial upon a point that would only cause delay. The real question therefore, is, as before stated, does the ordinance 69 create a "franchise?" and, in our opinion, it does not. If it can be construed as an attempted granting or an original franchise to operate a telegraph line through the streets of the city, it would be merely an empty form of granting what the plaintiff already had and of which the city could not deprive it. The plaintiff had that right not only from the act of Congress above referred to but also from section 536 of our Civil Code, which provides that "telegraph corporations may construct lines of telegraph along and upon any public road or highway." But we do not think that the ordinance purports to grant any "franchise." While the appellate had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel, and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate. But such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise. Indeed, the ordinance and its acceptance by plaintiff—which acceptance was necessary to give it any effect—was in the nature of a contract between the parties. The plaintiff's poles and wires were still in the same place in which they had been for many years, and, by the ordinance, the city agreed in writing that the poles and wires as they then stood were in a proper place and might remain there if plaintiff would agree to allow the city to use them for certain purposes, and plaintiff, by accepting the ordinance, so agreed. Such was evidently the purpose of the ordinance, and we do not see in it the creation of anything in the nature of a franchise. Therefore the assessment was for an asserted franchise which had no existence.

The judgment is reversed, with directions to the court below to render judgment as prayed for in its complaint.

I concur: LORIGAN, J.

SHAW, J. I concur. I think, however, that the ordinance in question was intended to grant a certain right to use a portion of the public streets, and that, as it purports to be a grant by public authority of a right to the use of public property, it does purport to grant a franchise. The fact that it also regulates the manner of the use does not change its character in this respect. But, in so far as it purports to grant such right, it merely attempts to give the plaintiff that which it already had, and was of no legal effect whatever. The assessment, being specifically upon that so-called franchise, was upon a thing which had no real existence and which could not have any value. It was, therefore, necessarily void, and its collection in the manner here attempted should be enjoined.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.

150 Cal. 64

SPIRES v. CITY OF LOS ANGELES et al.

(L. A. 1857.)

(Supreme Court of California. Oct. 11, 1906.)

1. DEDICATION—CITY PARK—USE OF PROPERTY.

The erection by a city on a square dedicated by it as "a public place forever for the enjoyment of the community in general," of a public library for the use of the same public, is not only not inconsistent with the purpose for which the park was dedicated, but is in aid and furtherance of its enjoyment by the public; but the building can be used for strictly library purposes only; so that, while rooms therein may be provided as a meeting place for the board of library directors, they cannot be provided for the board of education.

2. APPEAL—ISSUES NOT RAISED BELOW.

On appeal from a judgment, enjoining a city from erecting a public library on a park dedicated as a public place for the enjoyment of the community in general, the contention of plaintiff below being that the city had under no circumstances any authority to devote any portion of it to a public library, the question of any limitation on such right where the park is small and the building large, cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1137–1140.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by J. H. Spires against the city of Los Angeles and others. Judgment for plaintiff. Defendants appeal. Reversed and remanded.

W. B. Mathews and Herbert J. Goudge, for appellants. Chas. Wellborn, C. E. Woodside, Eugene Overton, and H. T. Lee (H. W. O'Melveny, of counsel), for respondent.

LORIGAN, J. The plaintiff, a resident and taxpayer of the city of Los Angeles, and the owner of certain property abutting on what is claimed to be a public park in said city, brought this suit in conjunction against the city of Los Angeles, the mayor and common council, the members of the board of directors, and the members of the board of park commissioners of that city, to restrain them from erecting a public library on a tract of land owned by said city of Los Angeles bounded by Fifth, Hill, Sixth and Olive streets in that city, and known as "Central Park," on the ground that the city, as owner of said property, had dedicated it to the use of the public for park purposes, and that such purpose would not permit erection therein of a public library building. The Central Park in question is 600 by 330 feet in size, and it was proposed by the municipal authorities to use a space in the center thereof, 100 by 150 feet, upon which to erect a public library. The trial court found that the land in question had been set apart and dedicated by the city authorities of Los Angeles for the use of the public as a public park, and that its official name was "Central Park," and that ever since December 11, 1866, it had been maintained and used by the people of the city of Los Angeles exclusively as a park. Judgment was rendered for the plaintiff in accordance with the prayer of the complaint, and the defendants appeal to this court therefrom. The appeal is from the judgment, accompanied by a bill of exceptions.

The sole points presented on this appeal are whether, first, the block in question was ever dedicated by the city of Los Angeles as a public park, or secondly, if it was so dedicated, would the erection therein of a public library be foreign to the purposes for which said tract was dedicated, inconsistent with its use by the public, and an invasion of public right. Much of the evidence in the case was addressed to the first proposition, whether there was in fact a dedication by the city of the block as a public park, but, in view of the conclusion we have reached on the second point, we do not deem it necessary to pass upon that question. If it be conceded that there was a dedication of the square as "a public place forever for the enjoyment of the community in general," as the principal ordinance, on which reliance is based as showing dedication, declares, still we think that the erection therein of a public library for the use of the same public who are entitled to use the park is not only not inconsistent with the purposes for which the park was dedicated, but is really in aid and furtherance of its enjoyment by the public. It is to be remembered that the dedication here is not one made by a private individual for a specific public use, where the rule of strict construction of the terms of the grant is to be applied. The land which it is claimed here was dedicated as a public park was land acquired by the city as successor to the pueblo of Los Angeles, to which it had been granted by the government of Spain. The city of Los Angeles, when the alleged dedication was made, was the owner in fee, and its dedication was for a general public use, namely, "as a public place forever for the enjoyment of the community in general." This was comprehensive language, and in construing the grant, or rather the extent of the terms of the dedication, no narrow and strict construction should be applied to limit the city in the uses to which the property dedicated may be devoted, as long as they are such as tend to further and promote the enjoyment of the people under the general dedication of them and for their benefit. And that the establishment of a public library, to which the visitors to the park have access, is consistent with such public enjoyment, and tends to enlarge it, we have no doubt.

As matter of public knowledge, we are aware that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like in public parks is common, and we are not pointed to any authority where it has been regarded as a diversion of the legitimate uses of the park to establish them, but, on the contrary, their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit. To instance, in Central Park in New York City there is a museum of natural history and a metropolitan art museum; and in Golden Gate Park in San Francisco, a museum, children's playground, and buildings used in connection with it, and a conservatory. We mention simply these parks and particular features devoted to the public enjoyment, although many other parks might be mentioned where similar buildings have been erected. Now, we are at a loss to perceive why, if the erection of museums, conservatories, and art galleries are sustained as in aid of the enjoyment of property dedicated to the public, the erection of a public library on a public park should be proscribed. Certainly the latter is as much in aid of the enjoyment of the public as the former, and, as far as the right of public access to it is concerned, stands on entirely the same footing. Of course, if a municipality were undertaking to establish on this property a city hall, fire engine station, hospital, or jail; endeavoring to devote the property (assuming it was dedicated for a public park) to the erection of municipal buildings or offices or structures for use in the transaction of municipal business, a different question would be presented, and there would be little hesitancy in holding that it could not do so. But using a portion of said dedicated property for a museum or art gallery or conservatory or library, designed for the recreation, pleasure, and enjoyment of the community in general, is an entirely different proposition, and is a distinction generally recognized by the authorities. Public buildings such as we have last mentioned are for the benefit of the same public that enjoys the advantages of the park. There is nothing exclusive about it, and they are, in fact, erected and maintained as additional and ancillary means to promote the recreation and pleasure of those to whom the enjoyment of the park is devoted. And that among the buildings which may be erected within a public park in aid of and for the better enjoyment of the public, a public library is included, is settled by authority.

An interesting and leading case upon the subject is the Attorney General v. Corporation of Sunderland, 2d Ch. Div. 634. This case directly involved the right of a municipality to erect a public library in a public park. A tract of land was purchased by the borough of Sunderland as an extension to an existing park, and was conveyed to it by a deed which declared that the land was to be used "only for public walks and pleasure grounds." Subsequently the corporation resolved to employ a quarter of an acre as a site for the erection of town buildings, including accommodations for a museum and a library and public offices. Thereupon suit was brought by the Attorney General at the relation of certain inhabitants and rate payers of Sunderland to have the corporation restrained from appropriating any portion of the park "as sites or a site for the erection of any town buildings, or for any erection or building which is not needed, or incidental to, the maintenance of the park as public walks or pleasure grounds." The vice chancellor before whom the case was first argued held that the municipal corporation defendant had power to erect upon the land in question a museum and conservatory, but not any municipal building or a library or school of art, and pursuant to this decision a decree was made restraining the corporation from erecting any town buildings or any building other than a museum or conservatory. The corporation appealed from this decree, and the Court of Appeals modified it by directing that the injunction should not "extend to a free public library, museum, or conservatory open for the use, convenience, and recreation of the persons frequenting such walks and pleasure grounds." In reaching this conclusion opinions were expressed by the justices of the court, James, L. J., after agreeing with the vice chancellor that the corporation had no authority to use any land of the park as the site of a town hall, saying with reference to the erection of the other buildings involved: "The original park was appropriated as 'a place of recreation,' and, according to the act under which the land now in question was acquired, it must be used 'as public walks or pleasure grounds.' These words are not to be construed too narrowly. It is admitted by the information that some buildings are allowable, and the prayer is, as it seems to me, quite correct. The corporation is in the position of a trustee, and the question is whether in building a museum and library, it is improperly executing a trust. The primary object of the trust is to provide a place of enjoyment and recreation. Nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation, in a reasonable exercise of their discretion, consider conducive to it. It is admitted that the erection of a conservatory is allowable, and it is an erection which you would expect, as a matter of course, to find in first-rate pleasure grounds. The erection of a free museum containing botanical specimens and other curiosities appears also to be unobjectionable. A library into which people may turn if the weather becomes unfavorable also seems allowable if bona fide intended for the use of persons frequenting the grounds, as it will tend to promote the convenient use of the grounds. I think, therefore, that the exception in the order ought to be extended, so that the erection of a free library may not be prohibited." Justice Mellish, concurring, said: "I am of opinion, therefore, that no part of it can be used as the site of a town hall and offices. Can, then, any part of it be applied as a site for a museum, library, and conservatory? If the corporations were to acquire land for those purposes only, I think that such a purchase would not be within the act; but public walks and pleasure grounds having been laid out on a piece of land containing 25 acres, it is proposed to apply a quarter of an acre for the erection of those buildings. The question then arises whether this application of a small portion of the ground is not reasonably incidental to the main object, and whether it will not improve the grounds in their character of public walks and pleasure grounds. I am of opinion that it will, for it will increase the enjoyment of persons who go to walk there, and may induce more persons to frequent the grounds. I think that we ought not to put a narrow and strict construction upon the words, but that we ought to see whether the trustees, in what they are proposing to do, are bona fide carrying out the object of the trust." And Justice Baggallay expressed himself to the same effect: "The purposes of the section are that the land should be used for public walks and pleasure grounds, and I should much regret to be obliged to hold that applying a small portion of it for a museum, library, and conservatory, was inconsistent with this purpose. I cannot conceive anything more likely to conduce to the enjoyment of the walks and pleasure grounds than the having these erections attached to them, and I agree with the Lord Justices that the order should be varied to the extent mentioned."

It is insisted, however, by respondent that if this rule, supported by universal custom, and announced in the case just cited, obtains, it can only apply when but a small portion of a public park is taken, and not when the site to be used is so large as to result practically in the destruction of the park as a pleasure ground for the recreation and enjoyment of the public. This argument concedes the general right of the municipality to take a part of the park for buildings erected in aid of the enjoyment of the park by the public, and only insists that it has its limitations. But conceding the limitations, we have nothing to do with its application here. It is not apparent that the erection of this library will tend to the destruction of the park at all. The site for a library is relatively but a small portion of it, and, as we have seen, the erection of such a building therein is in aid of the public enjoyment of the entire park. Aside from this, however, no issue on this point was made in the court below, the contention of plaintiff there being that, as the park in question was dedicated to the use of the public as a pleasure ground, the city had no authority whatever to devote a portion of it, large or small, to a public library. No point was made as to any limitation on the right of a city by reason of the size of a site proposed to be taken in a public park for a library, but the right to do so was denied under any circumstances.

There is nothing further to be said in this matter. Under the view we entertain on the subject, the city of Los Angeles has a right, notwithstanding it be conceded that Central Park was dedicated for the benefit and enjoyment of the public, to build a public library on it, and the court was in error in granting a decree to plaintiff enjoining it, and its officers from doing so. This view, of course, necessitates a reversal of the judgment. While the municipality has the right to establish upon the public park a public library it cannot devote any of the rooms therein to administration purposes. It appears from the evidence set forth in the bill of exceptions accompanying this appeal that it is the purpose of the city to provide rooms therein as a meeting place for the board of library directors of such city, and that application has been made to such board of directors to provide rooms therein for the board of education. As far as the board of directors is concerned, this would seem permissible on account of their control of the library. But as to the board of education this cannot be done. The library building can be used for strictly library purposes only, and cannot be devoted to the establishment of municipal offices therein or used for municipal administration purposes other than as indicated relative to the board of library directors. If any part of such building could be used for one administration purpose, it might gradually be devoted to another. If one municipal board or municipal officer of the city having no direct relation to the library can be located therein, so may another, and so the building which the city has a right to erect as a library building solely in aid of the public enjoyment of the park may be gradually invaded for administration purposes and ultimately devoted to those purposes. Upon a new trial it shall be the duty of the trial court under the views we have suggested to ascertain whether the city of Los Angeles proposes to use the library to be erected for any municipal purpose at all, except as to a meeting room for said board of library directors, and, if so, to enjoin such use; the right of the city to erect the proposed library on the public park to be limited to its use solely for public library purposes. The judgment is reversed, and the cause remanded for a new trial.

The appellant is entitled to costs on appeal.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; BEATTY, C. J.; HENSHAW, J.

150 Cal. 21

LOS ANGELES & R. R. CO. et al. v. NEW LIVERPOOL SALT CO.

(L. A. 1,657.)

(Supreme Court of California. Oct. 11, 1906.)

1. Reformation of Instruments — Lease — Construction—Mistake.

A lease granted premises, described on a blue print attached, reserving from the said "leased premises" that portion lying between the tracks of the L. Railroad, as shown on such blue print, and also reserving a strip of land 10 feet on either side of said railroad tracks. Another clause granted the lessee an option to purchase the said "leased premises" at a certain price. *Held*, that the saving clause was not a reservation of an easement merely, but reserved from the operation of the lease the fee of the portion reserved, and, such reservation having been omitted from a deed executed on the exercise of the option, the grantor was entitled to have the mistake corrected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 69–71.]

2. Same—Defenses—Negligence.

A lease, having attached thereto a plat of the premises, contained an option for sale, on the exercise of which the plat and lease were sent to an abstract company by the grantor's attorney with instructions to prepare a certificate of title, and also a description for insertion in the deed. The description written on a slip of paper was returned to the attorney, but, in some unexplained manner, an exception or reservation mentioned in the lease was not inserted in such description, and with this mistake it was copied into the deed by the typist. *Held*, that the negligence was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party to relief from the mistake by reformation of the deed.

Department One. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Bill by the Los Angeles & Redondo Railroad Company and others against the New Liverpool Salt Company. From a judgment and from the order denying a new trial, defendant appeals. Affirmed.

Purcell Rowe and J. S. Chapman, for appellant. Borden & Carhart, for respondents.

SHAW, J. This is an action to correct a mistake in a deed executed by the plaintiffs to the defendant. The plaintiff Redondo Improvement Company was merely a nominal party to the deed as well as to this action. In mentioning the plaintiff in this opinion, we refer only to the railroad company.

The mistake alleged to have been made consisted of the failure to insert in the description of the property an exception which, if inserted, would have excluded from the description certain territory embraced within the lines of a tract described in the deed by metes and bounds. The court found that the mistake was made as alleged and gave judgment for the reformation of the deed as prayed for. The principal contention upon the appeals, which are taken from the judgment and from the order denying a new trial, is that the evidence does not sustain the finding or judgment. In July, 1901, the plaintiff executed to the defendant a lease, for the term of seven years, upon certain described property. The lease contained a clause to the effect that, at any time during the term the defendant, at its option, might purchase of the plaintiff the leased premises for the price of $12,500. In May, 1902, the defendant elected to buy the property in pursuance of the option. The deed in controversy was executed in compliance with the obligation to convey, which, by the exercise of the option, became operative and binding upon the plaintiff. There is no pretense on the part of the defendant that there was any new or additional agreement, or modification of the old agreement, whereby the plaintiff became bound to convey any other property, or greater quantity of land, than was embraced in the option. The claim of the defendant is that there was no mistake; that the option covered the entire tract of land, including that reserved or excepted from the description in the lease, and that it was, therefore, in precise accord with the intention of the parties and necessary in order to comply with the option agreement, that the space of ground reserved from the operation of the lease, should be conveyed to the defendant upon the exercise of the option, and that the exception, or reservation, which constituted part of the description in the lease, was purposely and properly omitted from the deed. Unless this construction of the option contract is correct, there can be no doubt that there was a mistake, and that the evidence amply supports the findings and judgment.

We are of the opinion that the option cannot be so construed. The description of the land leased is as follows: "Situate at Redondo Beach in the county of Los Angeles, state of California, and being a portion of the property known as and called the 'Pacific Salt Works Tract,' a portion of said tract hereby leased being more specifically delineated and described upon the blue print hereunto attached and made a part hereof, the said leased premises being inclosed in red lines upon said annexed blue print and consisting of two parcels, the larger of which contains, as shown upon said blue print, 17.07 acres of land and the smaller of said parcels, as shown upon said blue print, containing 2.31 acres of land; saving and reserving from the said *leased premises* that portion thereof lying between the tracks of the Los Angeles & Redondo Railway Company, as shown on said blue print, and also saving and reserving a strip of land twenty feet in width, being ten feet on either side of the center line of said railroad tracks as the same are now constructed, excepting, however, such portion of said twenty-foot strip so reserved as is at the date of this indenture occupied by the building or vats of the said lessee." The option clause, so far as material, is in these words: "It is further agreed that at any time during the existence of this lease the said lessee * * * shall have, and it is hereby granted an option to purchase the said *leased premises* at the price of $12,500 to be paid in gold coin of the United States at the date of the conveyance of said real property unto said lessee by said lessor." (The italics in both clauses are our own.)

The claim of the defendant that the term "leased premises" in the option clause was therein used in the same inaccurate sense which appears to have been given to it where it is used in the reservation clause in the description, and, consequently, that the option covered the entire area inclosed in the red lines, including the railroad tracks, is shown to be untenable by the context, the surrounding circumstances and the conduct of the parties, as well as by the natural meaning of the words. Conditions in the lease require the lessee to "maintain on said leased premises" the present salt plant, and also require of the lessee a certain method of operation of the "leased premises," and provide that, upon a breach of the conditions, the lessor may resume possession of the "leased premises." In each of these instances the phrase does not embrace the excepted area. The lessee did not take possession of the railroad tracks, and claimed no right to do so, until long after the execution of the deed in question, and the lessor operated the tracks continuously during the whole of the intervening period. The short section of the tracks included within the red lines was but a small part, in length, of the spur tracks of the plaintiff, and was absolutely necessary to the use of the part extending beyond these lines and which would be cut off from connection with plaintiff's main line if plaintiff were prevented from crossing the land with its cars. Its traffic over these spur tracks was important and valuable. The short pieces of track within the red lines would be of no substantial value to the defendant. The saving clause in the description is not a reservation of an easement, merely, over a part of the leased premises. Its effect is to save and except from the operation of the lease the fee of the area between the tracks and for 10 feet on each side of the center thereof, and hence the lease did not transfer any estate in that part of the space inclosed in the red lines. That space formed no part of the leased premises, and was not covered by the option clause giving the right to purchase the premises actually leased. Sears v. Ackerman, 138 Cal. 586, 72 Pac. 171; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596. There is, therefore, no foundation for the defendant's contention that the evidence is insufficient to prove a mistake in the preparation and execution of the deed. It is not important to determine whether it was a mutual mistake, or a mistake of plaintiff alone, known or suspected by the defendant. The complaint was in two counts and alleged the mistake in both forms. If either was proven the plaintiff was entitled to the relief given.

There is no merit in the objection that the mistake was due to the forgetfulness of the attorneys and officers of the plaintiff who drew and executed the deed, or by their neglect in failing to compare the description in the deed as prepared, with that in the lease. The course of decision in this state has not been entirely consistent on the general subject of the effect of neglect as a reason for refusing relief in equity. The decisions in Hawkins v. Hawkins, 50 Cal. 558, Senter v. Senter, 70 Cal. 619, 11 Pac. 782, Metropolitan L. A. v. Esche, 75 Cal. 513, 17 Pac. 675, and Crane v. McCormick, 92 Cal. 181, 28 Pac. 222, are cited by defendant as authority for the proposition that a written contract will not be reformed in equity on the ground of mistake at the instance of a party who neglected to read the instrument when he had a full opportunity to do so before its execution, and the defect is of such a character that he could easily have discovered it if he had read it with attention. The cases do not sustain the proposition to the full extent necessary to its application to the present case, although some expressions might seem to go so far as that. Hawkins v. Hawkins was criticised and explained in Wilson v. Moriarity, 88 Cal. 213, 26 Pac. 85. It was not, technically, a suit to correct a mistake in the written contract for the sale of the grain in question. It was an action to cancel the writing and to recover a balance due on the alleged previous verbal contract of sale. The preliminary statement of facts, made by the reporter, if correct, would seem to make a clear case of mistake of one party known to the other, in which case, under the principles stated in sections 3399 and 3402 of the Civil Code, the plaintiff might have had the written contract corrected, and might have recovered the balance that would be due according to its terms as revised. Such relief was not asked, and the opinion, which is very general in its terms, seems to treat the cause of action as one founded upon alleged fraud, and applies the principle that, before entering into a contract, one must use the opportunities open to him to discover the facts affecting it, and, if he negligently fails to do so, he cannot obtain relief from the fraud which, by his neglect, he suffered to be practiced upon him. It does not hold that the failure to read a contract with sufficient care to perceive a mistake in its terms will, of itself, prevent relief by way of a correction of the mistake. In Senter

v. Senter, the mistake as to the description of the land was induced by false statements of the defendant to plaintiff concerning the same, and was held that the plaintiff was entitled to have the correction made. Hawkins v. Hawkins is cited and is declared to be not in point. In Metropolitan L. A. v. Esche, the alleged mistake was made by sureties in a bond for the performance by the principal of certain duties to the obligee during a term of office. The obligee was not aware of any mistake on the part of the sureties, and accepted the bond and allowed the principal to continue in its service upon the faith of it. There was, therefore, neither mistake nor fraud of which the sureties could complain. Crane v. McCormick was a similar case and the facts were declared not to make out a case of mutual mistake.

It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly. In Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881, the plaintiff signed a contract believing that it contained a certain stipulation agreed on. The defendant knew that it did not contain the stipulation and also knew that the plaintiff believed that it did. The plaintiff had an opportunity to read the contract before signing. It is said that the conditions on which a contract may be reformed are specified in section 3399 of the Civil Code, and that, as that section does not authorize the refusal of such relief because the party asking it might have discovered the mistake before signing, the court is not at liberty to exact such diligence as a condition. Perhaps the court there should have added that the carelessness did not constitute a neglect of legal duty, within the meaning of section 1577 of the Civil Code. In Wilson v. Moriarity, 88 Cal. 213, 26 Pac. 85, it was held that the neglect of the plaintiff, when the lease was read to her by the notary, to pay sufficient attention to discover that it was for 10 years, instead of five years, as she supposed, was not sufficient to defeat her action for its reformation in that particular. In Sullivan v. Moorhead, 99 Cal. 159, 33 Pac. 796, the deed was executed in compliance with a previous contract of sale, and in that respect it was similar to the case at bar. The contract was for the sale of lots 10, 11, 12, and 13 in a certain block. The deed described the land as lots 10, 11, 12, and "a part of 13." The plaintiff read the deed, but did not observe the variance. The court said: "The fact of his having read the instrument would not prevent the court from finding that it was made under a mistake." There are many authorities from other states to the effect that a written contract will be corrected in equity, although the mistake was patent on the face of the document, and could have been discovered if read with attention. Albany C. S. I. v. Burdick, 7 N. Y. 46; Story v. Gammell (Neb.) 94 N. W. 982; Andrews v. Gillespie, 47 N. Y. 487; San Antonio v. McLane (Tex.) 70 S. W. 201; Kelley v. Ward, 94 Tex. 289, 60 S. W. 311; Lloyd v. Phillips (Wis.) 101 N. W. 1092; Taylor v. Glen Falls I. Co. (Fla.) 32 So. 887; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Synder v. Ives, 42 Iowa, 162.

There was, it is true, some negligence on the part of the plaintiff in the case at bar. But it was an inadvertence of a character which will sometimes occur in the conduct of men of prudence and caution. The plat and lease were sent to an abstract company by plaintiff's attorney with instructions to prepare a certificate of title and also a description for insertion in the deed. This was done, and the description, written on a slip of paper, was returned to the attorney, but in some way not explained the exception mentioned in the lease was not inserted therein. It was copied into the deed by the typewriter in this erroneous form. The attention of all the parties was particularly directed to other features of the transaction and to other parts of the description, the omission of the exception clause was not observed by any of them, and all signed the deed believing that the description therein was the same as in the lease. The negligence was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party aggrieved to relief from the mistake.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(150 Cal. 31)

BELL v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,591.)

(Supreme Court of California. Oct. 11, 1906.)

COSTS—TAXATION OF COSTS—PROCEEDINGS—STATUTES.

Code Civ. Proc. § 1034, provides that a party claiming costs awarded to him by the appellate court must deliver to the clerk of the court below a memorandum of his costs, etc. Section 1033 provides that a party claiming costs on recovering a judgment, must file and serve a memorandum thereof on the adverse party, and if the latter is dissatisfied with the costs claimed, he may move to retax them. *Held*, that a party seeking to have costs, awarded generally in the appellate court, taxed in the lower court, must comply with the provisions of section 1033 with respect to the service of notice on the adverse party, as otherwise section 1034 would be violative of Const. art. 1, § 13, providing that no person shall be deprived of his property without due process of law, which means a notice and an opportunity to be heard in the matter in which the judgment follows.

Shaw, J. dissenting.

In Bank. Writ of Review to Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Petition for a writ of review by Teresa Bell against the superior court of the city and county of San Francisco and another. Writ dismissed.

T. Z. Blakeman, for petitioner. Edmund Tauszky and Wallace A. Wise, for respondents.

LORIGAN, J. This is a petition for a writ of review. On November 19, 1904, in the case of Teresa Bell v. Mary E. Pleasant et al., on appeal to this court, the judgment and order of the superior court, denying the motion of plaintiff for a new trial, was reversed (Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61), and the cause remanded to the superior court for a new trial, with costs allowed said plaintiff on appeal. On the day plaintiff filed the remittitur from this court in the superior court, she also filed in said court a memorandum duly verified of her costs on said appeal, amounting to the sum of $269.50, and subsequently had an execution issued thereon as upon a judgment, as provided by section 1034 of the Code of Civil Procedure. Upon the issuance of said execution, the defendants served and filed a notice of motion in said action for an order of the superior court striking from the files thereof the memorandum of costs of plaintiff, and to vacate and annul the said execution. Said motion was based upon the ground that neither said memorandum of costs allowed on appeal, nor notice of the filing thereof had ever been served upon defendants, and supported the motion by an affidavit showing the fact of such nonservice, which was not controverted. Upon the hearing the superior court made an order granting said motion, and struck out said memorandum of costs, and vacated and annulled said execution. Thereupon this proceeding was commenced by plaintiff to have these orders of the superior court, striking out said memorandum of costs and quashing said execution, set aside and annulled as in excess of its jurisdiction.

Proceeding now to a consideration of the matter on its merits. In the chapter in the Code of Civil Procedure on "Costs," it is provided by section 1033 thereof, stating its provisions generally, that a party in whose favor judgment is rendered, and who claims costs, must file and serve a verified memorandum thereof upon the adverse party within a given time, and that if the party so served is dissatisfied with the costs claimed, he may, within a certain time, move to retax them. Section 1034, immediately following, provides that "whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment." It will be observed that this latter section does not, in terms, provide for service of any notice on the adverse party relative to such memorandum, and it is insisted by petitioner that, as he complied literally with the provision of that section by filing his cost bill within 30 days after the filing of the remittitur, that is all that the law required of him, and he was entitled to execution; that not only is no notice required to be given by that section, but that the section itself contains no specific provision for retaxing costs, and that if illegal or excessive items of costs are charged, application must be made to this court for relief, or an independent action in equity be brought for that purpose. But this court has nothing to do with the particular items of costs to which a party may be entitled under a judgment rendered therefor by this court. The effect of our judgment is simply that a party is entitled to costs. What they are, the specific amount which he would be entitled to have fixed or allowed therefor, are matters to be determined by the trial court to which the cause is remanded, or to which the remittitur runs. The determination of that court on the subject necessarily constitutes the definite and specific judgment concerning which the general right to recover was declared by this court. There is no provision of law authorizing this court to tax or retax the costs it allows on appeal from a judgment, or order of the superior court, either reversed or affirmed. That is a matter solely for consideration in the lower court.

And, it is true that section 1034 does not provide for any right of the party against whom costs are claimed to have them retaxed. The section, as literally construed, provides neither for a notice of the filing of the cost bill, nor for any right to the adverse party to be heard concerning the legality or propriety of any of the items in it. And herein rests the vice of the section if it is to be construed as contended for by plaintiff, that there is no provision in the law requiring notice of the filing of the memorandum, or affording defendants a right to be heard concerning its items, because, under such circumstances, costs are imposed and the judgment for them obtained without affording any right or opportunity to defendants to be heard in the matter. Any and all kinds of illegal and excessive charges may be made. No authority is conferred on the court by the section to revise them. The memorandum is simply filed with the clerk, and execution therefor may immediately be issued and the property of defendants taken upon such execution under judgment for costs obtained against them without notice. It hardly needs to be suggested that if the section in question is to be so construed, that it is violative of the constitutional provision (Const., art. 1, § 13) that no person shall be deprived of his property without due process of law which is held to mean upon notice and an opportunity to be heard in the matter in which the judgment follows. Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. There is nothing in the point that the defendants may have their action in equity. Certainly it has no force here. If the order or judgment for a specific amount of costs under the section referred to is void for want of notice and an opportunity to be heard, the method adopted here is a proper proceeding for annulling it, and it is immaterial what other redress, if any, defendants might have.

It is suggested, too, that the section itself was notice to the defendants that within 30 days after the filing of the remittitur the plaintiff might file a memorandum of costs, and that it was the duty of defendants to look out for such filing, and, if they questioned the items of the memorandum, to file a motion to retax costs. But, if we assume that the section is itself notice, still the constitutional objection is not obviated, because there is nothing contained in section 1034 conferring any right upon the adverse party to question the tax bill, by either a motion to retax, or in any other manner. He is given no right whatever to be heard, assuming that the section gives notice. He is given only a partial measure of his constitutional rights—notice—but the right to be heard before a judgment which may deprive him of his property on execution thereunder is made is not given him at all. Hence the claim of petitioner as to the section giving notice, does not obviate the constitutional difficulty, which the failure to confer any right upon the adverse party to be heard, presents. In view of our discussion so far, relative to section 1034 alone, this situation presents itself, that, while this court is authorized under the law to award costs upon appeal, and the lower court to which our mandate runs, is the tribunal where they are to be specifically ascertained, yet the judgment of this court as to such award is rendered ineffectual because no provision is made, in the section in question under which such costs are to be ascertained, for notice to the party sought to be charged with their payment, or an opportunity afforded him to be heard in the lower court relative to them; in effect that if the right of the prevailing party to have his costs on appeal fixed and an execution issued therefor depends solely upon the provisions of section 1034, then no such right exists, as the section is unconstitutional on account of its failure to provide for notice and an opportunity for the adverse party to be heard. It is with extreme reluctance that courts feel constrained to hold any law unconstitutional, and only do so when no other alternative presents itself whereby it can be avoided. In the present case, however, we think that it can be avoided by treating sections 1033 and 1034—sections found in the general chapter on "costs"—as analogous, as was done by the Supreme Court of Montana, where kindred provisions of the statute of that state were before it for consideration.

In the state of Montana the Code of Civil Procedure there, in the general chapter concerning costs, contains provisions identical with the sections of our Code above referred to, and the same question presented here was presented to the Supreme Court of that state in a proceeding similar to this. Section 1867 of the Montana Code corresponds with section 1033 of ours, and the Montana Code section 1869 with section 1034 of this state. The same point was raised in the Supreme Court of Montana as raised here, namely, that section 1869 of the Montana Code (section 1034 of ours) in failing to provide for notice to the adverse party of the filing of the memorandum of costs and providing an opportunity for him to be heard relative thereto, was unconstitutional as depriving one of his property without due process of law. In discussing the points the court there said: "We do not think it necessary to hold section 1869 unconstitutional. The chapter of which this section is a part has to do with costs and the mode by which they may be collected. Section 1867 points out the mode to be pursued for the collection of costs in the district courts, and also in original proceedings in this court; at least it does not in terms apply to district courts exclusively. Section 1869 points out the mode by which they may be collected when awarded on appeal; but we think that all the analogies, as was stated in State ex rel. Hurley v. District Court, supra, 27 Mont. 40, 69 Pac. 244, require notice of the claim to be given under the provisions of section 1867, or that they should be denied. While the exact point now before the court was not raised in State ex rel. Hurley v. District Court, supra, yet what was there said as to the necessity of notice was not impertinent, and is wholly applicable in this case. This rule must govern or the conclusion is inevitable that section 1869 is invalid, and that parties have no means provided by which they may collect costs awarded to them by this court on appeal. Section 1867 clearly does apply to proceedings in this court in some respects. We think it must be held to apply also to the method of claiming in the district court costs awarded by this court on appeal, and that the method pointed out must be pursued, else the court has no power to settle controversies in any manner concerning them. * * * Costs, as costs, are allowed only by statute and can be collected only by the method pointed out by the statute. Citing authorities. When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party. For these reasons we think that the district court, in proceeding to tax and allow any portion of the bill in controversy, was wholly without jurisdiction, and the order must be annulled." State ex rel. v. District Court, etc. (Mont.) 85 Pac. 367.

The effect of the ruling of the Montana Supreme Court was that, while the section of the Montana Code (section 1869) like our section 1034 did not provide, in terms for notice to the adverse party of the filing of a cost bill in the lower court, for costs awarded by the appellate court, still by analogy the provisions of section 1867—our corresponding section 1033—providing for the presentation and settlement of cost bills where judgments were obtained in the trial court controlled, and that the same notice required there to be given, should be given when it is sought to have costs awarded generally in the appellate court, specifically taxed in the lower court after the appellate judgment allowing them. We are satisfied with the reasoning in the Montana Case, and with the conclusion reached in support of the constitutionality of the section in question, when considered in connection with the other section relative to the matter of taxing costs in the trial court to which we have referred. It is a reasonable and warranted construction which aids in securing to one the benefit of a judgment for costs given to him by the appellate court and of which he would be deprived, at least as far as section 1034 is concerned, were a different result arrived at. As both sides have presented this matter on the merits we have so disposed of it regardless of any question as to whether this application for a writ is the proper remedy.

The petition for the writ is dismissed.

We concur: HENSHAW, J. SLOSS, J. McFARLAND, J. ANGELLOTTI, J.

SHAW, J. I dissent. I do not think it is necessary to declare section 1034 unconstitutional. Section 1033, in my opinion, was not intended to apply to the costs on appeal, and section 1034 is valid without aid from the preceding section. The fact that no notice is expressly required in section 1034 should not render the provision invalid. Nor should it be held that the provision that an execution for such costs may be issued without notice, invalidates the entire section unless the clause of section 1033 in regard to notice is read into section 1034 also. It does not follow from the lack of an express provision in the Code for a previous or contemporaneous notice, that the entire proceeding would be unconstitutional. The court has inherent power to afford an ample remedy for any injustice that may be attempted by the filing of an excessive cost bill. The entire argument of the prevailing opinion is based on a false premise which is not stated, namely, that the superior court cannot entertain any motion, nor afford any relief in a case by any procedure, unless the motion or mode of relief is prescribed in the Code or by some statute. This I hold to be a mistake. The superior court is a court of general jurisdiction, possessing all the usual and ordinary powers of the former courts of law and equity, and it may, therefore, in any emergency not provided in the Code, follow the practice of the common law and chancery courts in similar emergencies, and may adopt any procedure suitable to the exigencies of the case over which it has jurisdiction. Code Civ. Proc., § 187. The statute allows the prevailing party on appeal to file his cost bill without notice. This, of necessity, cannot conclude the adverse party. An unsettled question, the correct amount of costs, remains for determination in such a case, and the court retains jurisdiction for that purpose. The losing party may at any reasonable time thereafter. either before or after the issuance of an execution, avail himself of this jurisdiction and move the court to retax the cost by striking out the items not allowable, and reducing those which are excessive. And no doubt proceedings on execution could be stayed pending the determination of such motion, and the execution could be corrected after the motion was decided. The only restriction upon the right to this motion is that the party must not, after he has notice of the bill, unreasonably delay moving to retax, else he may be defeated by his laches. All these matters, in the absence of statutory provisions on the subject, are within the inherent power of the court. No statute is required to give the court the necessary power to protect the rights of parties to the litigation. In many of the states the costs are taxed by the clerk, without notice to either party, and no statutory procedure for retaxing is provided, and yet motions by either party to retax such costs are among the most frequent of proceedings in those courts, and the power to decide them has never been doubted. The time within which they must be made is a matter for adjustment in such states by judicial decision. The same power must exist in this state in cases for which the Code makes no provision. The courts are as capable as the Legislature of framing a rule and procedure that will be reasonable and just to all parties, and no evils are to be apprehended from the exercise by the courts of the power in this respect which the Legislature has committed to them by section 187 aforesaid. In my opinion the court below should not have granted the motion to strike out the costs, except upon a showing that they were not legally allowable. The appellant has followed the plain letter of the statute and the effect of the majority decision will be that she will be now entirely deprived of her costs, and this is done by means of a strained and unnatural construction adopted to avoid a difficulty which does not exist.

149 Cal. 790

UNION COLLECTION CO. v. SUPERIOR COURT OF CITY & COUNTY OF SAN FRANCISCO et al. (S. F. 4,608.)

(Supreme Court of California. Oct. 2, 1906.)

1. Courts — Jurisdiction — Statutory Provisions.

Code Civ. Proc. § 187, provides that, "when jurisdiction is by the Constitution or by this Code, or by any other statute conferred on a court or judicial officer, all the means necessary to carry it into effect are also given, and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or by the statute, any suitable process or mode of proceeding may be adopted which may appear most comformable to the spirit of this Code." *Held*, that this section does not confer jurisdiction, but merely enables the court to exercise a jurisdiction otherwise created.

2. Discovery—Jurisdiction.

Const. art. 6, § 5, granting to superior courts jurisdiction in all cases in equity, confers on the court the power to compel a discovery in all cases in which under the established rules of chancery practice existing at the time of the adoption of the Constitution a party would have been entitled to this relief.

3. Same—Nature and Scope of Remedy.

In an action against the stockholders of a corporation, plaintiff was unable to ascertain the whereabouts of all of the defendants, and subpœnaed a witness to appear before the court to give information as to the whereabouts of some of the defendants. *Held*, that such a proceeding was not one for discovery, as matters sought to be discovered must be material to the existing suit or to one which is to be instituted.

4. Same—Examination before Trial.

Plaintiff in an action against the stockholders of a corporation, being unable to ascertain the whereabouts of all of the defendants, subpœnaed a witness to appear before the court to testify as to the whereabouts of some of the defendants. *Held*, that the plaintiff was not entitled to examine the witness in such a manner or for such purpose, and the court properly refused to compel her to be sworn.

[Ed Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 10.]

In Bank. Application for writ of mandate by the Union Collection Company prayed to be directed against the superior court of the city and county of San Francisco and the Honorable James M. Troutt, judge thereof. Proceeding dismissed.

J. S. Reed, for petitioner. C. H. Sooy and Eastin, Sooy & Dorn, for respondents.

SLOSS, J. An alternative writ of mandate having been issued by this court, the respondents demur to the petition, and thus raise the question whether the following facts, set forth in the petition, are sufficient in law to authorize the granting of the relief sought: The Union Collection Company, petitioner herein, commenced an action in the superior court of the city and county of San Francisco against some 240 defendants, stockholders of the El Dorado Exploration Company, a corporation, to compel the payment by such defendants of the unpaid subscription price of their shares for the purpose of satisfying a judgment against said El Dorado Exploration Company, held by petitioner. Summons was issued, and was served on some of the defendants, but petitioner has been unable to ascertain the whereabouts of many of the defendants, and these have consequently not been served, nor have they appeared in the action. In order to get the information necessary to enable it to make service, the petitioner filed in the superior court an affidavit alleging that it could not ascertain the whereabouts of many of the defendants not served except by examining persons connected with the El Dorado Exploration Company; that one of such persons was Mrs. Elizabeth M. Ustick, who refused to give any information which would enable the petitioner to cause summons to be served, and praying for an order requiring Mrs. Ustick to appear before the court to be examined "concerning her knowledge as to the whereabouts of the defendants not served." An order was made as asked, and a subpœna issued and served on Mrs. Ustick. She appeared at the time set and objected to the court proceeding in the matter, upon the ground that the court had no jurisdiction. The court sustained her objection, refused to cause her to be sworn, and ordered that she be discharged from further appearance in the matter. The purpose of the present proceeding is to obtain a writ of mandate directing the respondent court and judge to require Mrs. Ustick to be sworn as a witness and to give her testimony in respect to the matter stated in the affidavit. The sole question to be determined is whether the superior court of this state has jurisdiction to compel the defendant, or a stranger to a pending action, to appear before it, prior to trial, and be examined as to the whereabouts of certain defendants, in order that they may be served with summons.

It is not contended by the petitioner that the proposed examination of Mrs. Ustick was authorized by the provisions of the Code relative to the taking of depositions. On the contrary, the argument is that, because there is no specific statutory method applying to such a case as this, the court should compel the giving of the desired information in some suitable mode to be adopted by it. This position is based upon section 187 of the Code of Civil Procedure, which reads: "When jurisdiction is, by the Constitution, or by this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or by the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." If the superior court, in which an action is pending, has jurisdiction to compel the giving of information as to the whereabouts of defendants whom it is desired to serve with summons, it may be assumed, for the purpose of this discussion, that the "process or mode of proceeding" employed was suitable and conformable to the spirit of the Code. But section 187 obviously does not attempt in itself to confer jurisdiction. It merely operates to enable the court to exercise a jurisdiction otherwise created. Tulare County v. Kings County, 117 Cal. 195, 203, 49 Pac. 8. We are thus brought back to the original question of the power of the superior court, by any mode of procedure, to compel the giving of the information here sought to be obtained from Mrs. Ustick. The alleged power is sought to be derived from the constitutional grant to the superior courts of jurisdiction in "all cases in equity" (Const. art. 6, § 5), including, as is claimed, the power to entertain proceedings in the nature of bills of discovery. It is not necessary here to decide the question adverted to, but not definitely determined, in Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145, whether a bill of discovery can, under any circumstances, be maintained in this state. Whatever may be the ultimate conclusion on this mere matter of procedure, we have no doubt that the superior court, under the constitutional provision cited, has the power, by some sort of process, to compel a discovery in all cases in which, under the established rules of chancery practice, existing at the time of the adoption of the Constitution, a party would have been entitled to this relief.

Is the present case one for a discovery under these rules? We think not. A bill of discovery seeks the disclosure of facts within the knowledge of the defendant, or of papers in his possession, in aid of some other action or proceeding. The discovery may be sought in the same suit in which the ultimate relief is pursued, or it may be sought merely in aid of some other proceeding pending or to be brought. But whether the bill be for discovery and relief, or for discovery only, it is well settled that the matters as to which discovery is sought must be material to the existing suit or to the one which is to be instituted. 6 Ency. of Pl. & Pr. 740; Bisp. Prin. of Eq. (4th Ed.) § 560; 1 Pom. Eq. Jurisp. (3d. Ed.) § 201. See, also, many cases cited in 16 Century Digest, cols. 1991 & 1992. Here the action in aid of which the plaintiff claims the right to a discovery was already pending. The matters as to which disclosure is sought are in no way material to the issues presented by the main action in the court below, and a disclosure of them will not assist the plaintiff therein (petitioner here) in establishing its case. The facts constituting the cause of action are fully known to the plaintiff, and have been set forth by it in its complaint. What it seeks now is not the disclosure of facts relevant to the cause of action or which will assist in establishing it, but of facts, entirely collateral to the merits, which will enable it to bring defendants within the jurisdiction of the court. No case has been cited which extends the right of discovery to a state of facts such as is here presented. In Post v. Toledo, etc., R. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, the plaintiff, creditor of a corporation, was allowed a discovery of the names of stockholders, in order that he might enforce the individual liability of such stockholders. But the names of such stockholders constituted information which was essential to plaintiff in order that he might frame his proposed declaration or complaint, and institute his action. While the name and identity of the proposed defendants are certainly material to a cause of action about to be instituted, the whereabouts of defendants who are known and who have been made parties, cannot be said to be material to an action already pending against them. Hoppock's Executors v. United N. J. R. R. & C. Co., 27 N. J. Eq. 286 (reversed, on a ground not here involved, in 28 N. J. Eq. 261), is similar in principle to Post v. Railroad Company. The other cases cited by petitioner have no bearing upon the particular point now under discussion.

Since the information sought was not material to the action in aid of which the proceeding against Mrs. Ustick was instituted, the petitioner could not, under any system of procedure, have maintained a bill of discovery against her. For the same reason, such petitioner was not entitled to examine her as a witness in the manner here attempted, and the court properly refused to compel her to be sworn.

The proceeding is dismissed.

We concur: ANGELLOTTI, J.; SHAW, J; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

150 Cal. 51

HUNT BROS. CO. et al. v. SAN LORENZO WATER CO. (S. F. 3,572.)

(Supreme Court of California. Oct. 11, 1906.)

1. Damages—Breach of Contract — Consequences Within Contemplation of Parties.

Under Civ. Code, § 3300, fixing the measure of damages for breach of contract as the amount which in the ordinary course of things will be likely to result therefrom, the damages recoverable for a breach of contract are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract as the probable result of the breach, in the light of the facts known, or which should have been known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 58.]

2. Same.

Where a contract calls for a continuance of an instituted water service for the purpose of extinguishing fires, loss by fire as the consequence of a breach may be reasonably supposed to have been within the contemplation of the parties, and therefore recoverable.

3. Same.

A manufacturer and a water company entered into an agreement whereby the company agreed to lay a main to a point near the manufacturer's premises, connect the premises by a service pipe to supply the manufacturer with water at a specified rate, and erect and install a fire hydrant near the premises to be used by the manufacturer in case of fire. No time was prescribed for the completion of the work, or for the commencement of the service, except that it was to commence on the installation of the necessary pipes and hydrant. Subsequently the company promised to commence work immediately. No special circumstances were known to the company or to the manufacturer making it essential to the protection of its property from fire that the contemplated service should be commenced within any particular time. *Held*, that damages by fire to the manufacturer's property before the installation of the fire hydrant were not recoverable, for they could not reasonably be supposed to be within the contemplation of the parties.

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the Hunt Bros. Company and others against the San Lorenzo Water Company. From a judgment for defendant rendered on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Van Ness & Redman, for appellants. E. S. Pillsbury, Alfred Sutro, and Pillsbury, Madison & Sutro, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment given in favor of defendant; a demurrer to plaintiffs' amended complaint having been sustained, and plaintiffs having failed to amend.

The action was brought to recover $124,496.98, damages, resulting from the destruction of certain property, the injury to other property, and a loss of profits from an established business, all occasioned by a fire, which occurred on April 12, 1901, which fire occurred without any fault on the part of plaintiffs. The corporation, Hunt Bros. Company, which will hereafter be called the plaintiff, was the owner of all said property. The numerous other plaintiffs were insurance companies which had, at the time of the fire, policies in force covering, respectively, various portions of said property, insuring plaintiff against loss by fire, and which had paid plaintiff upon said policies, on account of said loss, amounts aggregating $91,221.42, and, having received assignments from plaintiff of its claim against defendant to the extent of the amount so paid by them, are here endeavoring to collect the amount paid by them, from defendant. The plaintiff was engaged in the business of fruit canning, packing, manufacturing cans, storage of fruits, canned goods, etc. The property injured and destroyed consisted of certain buildings used and occupied in the conduct of said business, machinery, and other implements used in such business, and the stock on hand, and 74 cottages occupied by employés of plaintiff. All this property was situated on certain premises occupied by plaintiff in Hayward, Alameda county, Cal. The allegations of the complaint upon which it is sought to hold defendant liable for the amount of this loss are substantially as follows: Defendant was a water company, engaged in the business of supplying water to the inhabitants of Hayward by means of mains laid in the streets of the town, and pipes running therefrom to the premises of its customers. Some time between September, 1900, and March, 1901, plaintiff and defendant entered into an agreement, whereby defendant agreed to lay a six-inch main from one of its mains charged and supplied with water, to a point near one corner of plaintiff's premises, to connect said premises with this new main by a service pipe, and to thereupon supply plaintiff, by means thereof, with 100,000 cubic feet of water annually, at the rate of 25 cents per 100 cubic feet, and as much more as might be required at 20 cents per 100 cubic feet; plaintiff agreeing to consume annually 100,000 cubic feet, and pay for it at the 25-cent rate. Defendant further agreed that it would erect and install a fire hydrant near said premises, to be used by plaintiff in case the premises should take fire, and connect the same with said main, and supply plaintiff, by means thereof, with water for the purpose of extinguishing any fire which might occur on said premises, in consideration of the payment by plaintiff to defendant of $2.75 a month, which plaintiff agreed to pay. No time was specified for the commencement or completion of this work. Defendant laid the new main to a point near one corner of plaintiff's premises, as agreed, but failed to install the service pipe or the fire hydrant. On March 14, 1901, plaintiff remonstrated with defendant because of its failure to do these things, and defendant, on March 15, 1901, promised in writing that it would "immediately commence the work" of putting in the service pipe to connect the premises with the main, and also that it would "immediately commence the work" of erecting and installing said fire hydrant and connecting the same with the main. It failed to commence to do either of these things prior to the fire.

It is alleged that, if defendant had commenced the work of connecting said premises with the main, and the work of erecting, installing, and connecting the fire hydrant, as it had agreed to do, and had prosecuted said work to an end with ordinary diligence, said premises would have been so connected and said fire hydrant installed and connected and ready for use in March, 1901; and that, if said hydrant had been so installed and connected at the time of the fire, said fire could and would have been extinguished, by means of the water which would have thereby become available, before it had damaged the property to the extent of $5,000; and that therefore the additional loss and damage were wholly due to defendant's neglect and failure to comply with the terms of its agreement. We are satisfied that the damages alleged cannot be recovered as a consequence of the breach of contract alleged. In so saying we do not dispute the proposition, made by learned counsel for appellant, to the effect that a failure to furnish water, under a contract requiring one to do so, may, under some circumstances, entitle the other party to the contract to recover, as damages for such breach of contract, the value of such of his property destroyed by fire as would have been saved by the water, had it been furnished in accordance with the contract. We have examined the cases cited from other states by counsel upon this proposition, and find that with practical unanimity they appear to support the conclusion that the circumstances may be such as to make the person who agreed to furnish water for the extinguishment of fires liable for the failure to furnish it as agreed, in the value of such property destroyed by fire as would have been saved by the water, if it had been furnished. New Orleans, etc., Co. v. Meridian Waterworks, 72 Fed. 227, 18 C. C. A. 519; Middlesex Water Co. v. Knappman Whiting Co., 64 N. J. Law, 240, 45 Atl. 692; Paducah Lumber Co. v. Paducah, etc., Co., 89 Ky. 340, 12 S. W. 554,

13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; Gorrell v. Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; Planters' Oil Mill v. Monroe Water Co. (La.) 27 South. 684; Lenzen v. City of New Braunfels (Tex. Civ. App.) 35 S. W. 341; Atkinson v. Water Co., L. R. 6 Exch. 404. See, also, Ukiah v. Ukiah, etc., Co., 142 Cal. 173, 179, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107.

The cases cited are, however, all cases where the contract had been executed to the extent of installing and commencing the contemplated service, and the respective parties to the contract were acting thereunder; the one purporting to supply water for the purpose designated by the contract, viz., the extinguishment of fires, and receiving the agreed consideration therefor, and the other paying for such service, and relying upon the continued observance of the contract by the water company as a protection against such fires as might occur on the premises. As to such a situation it may well be said, as was, in fact, said in some of the cases cited, that, in view of the fact that water may be supplied in such quantity and manner as to usually extinguish a fire before serious damage is done, when promptly and efficiently used, it may reasonably be supposed to have been within the contemplation of the parties that a loss by fire would be the probable result of a failure to comply with the contract at the time the fire occurred. It could only be upon such a theory that one party would pay for the continuance of the service for fire purposes, and the other receive the sums so paid. And it is solely by reason of the fact that, in such cases, damage by fire may reasonably be supposed to have been within the contemplation of the parties as a consequence of a breach of the contract to furnish water, that the liability for such damage may be held to attach, for it certainly cannot be held that any such liability would exist for the breach of a contract to simply furnish water for no particular designated purpose, or for designated purposes not including the extinguishment of fires, even although it might be that, if there had been no breach, the fire would have been extinguished in its incipiency by the water furnished, and such breach therefore would have been indirectly and remotely the cause of the loss. The law of damages does not concern itself with such remote causes. As said in Martin v. Deetz, 102 Cal. 55, 68, 36 Pac. 368, 372, 41 Am. St. Rep. 151: "Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages." Field, in his work on Damages (section 10), says: "To trace remote effects of causes would often be a difficult, if not an infinite, task. It would require an infinite mind. Each cause produces results that in turn, alone or by combination with other causes, produces other effects, and so ad infinitum. It is a subject too abstruse and complicated for the human mind. In the quaint language of Lord Bacon 'It were infinite for the law to consider the cause of causes, and their impulsion one on another.'" No case cited goes to the extent of holding that one may be liable for a breach of contract to furnish water, in the value of property destroyed by a fire, unless the case was such that damage of this kind might reasonably be supposed to have been within the contemplation of the parties to the contract as a consequence of a breach thereof, and, in the case of Beck v. Kittanning Co. (Pa.) 11 Atl. 300, it was expressly declared that, as the plaintiff, who had a contract for water for general use, had no contract with the defendant for a supply of water for the extinguishment of fire, he had no cause of action on his contract for damages resulting from destruction of his property by fire.

It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote. In this lies the distinction between damages for breach of contract and damages for tort; the rule as to tort being that the injured person may recover for all detriment proximately caused thereby, "whether it could have been anticipated or not." Section 3333, Civ. Code. Such, as we understand it, is the rule declared by section 3300 of the Civil Code, as that section has always been construed by this court, and it is the rule enunciated in the leading case of Hadley v. Baxendale, 9 Exch. 341, which has been universally accepted and followed. See Mitchell v. Clarke, 71 Cal. 165, 11 Pac. 882, 60 Am. Rep. 529. As has often been suggested by writers upon this subject, the remote effects of slight causes are so beyond all possible conception of the parties to a contract, both in character and extent, that any other rule would practically preclude the making of contracts altogether, for no sane person could be expected to assume such uncertain and limitless liability. This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow in the ordinary course of things, from a breach, and therefore to have, in effect, stipulated against. The understanding and intention of the parties in this regard must, of course, be ascertained from the language of the contract, in the light of such facts. See Sutherland on Damages, § 45.

Where a contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, loss by fire as the consequence of a breach may, as already suggested, be reasonably supposed to have been within the contemplation of the parties. This may also be true in the event of such a service contracted to be commenced at a certain definite time in the future, especially if the special circumstances are such as to make it essential that the particular protection from fire to be thereby afforded should commence at that time, and those circumstances were made known to the person or company contracting to furnish the service. As to this, however, it is not necessary here to decide. The contract here alleged was, in effect, first, to lay and install certain pipes through which water for general use might be supplied, and to install one fire hydrant, through which water for use in the event of fire might be supplied; and, second, such pipes and fire hydrant having been installed, thereupon to commence supplying water for those purposes, and to continue supplying it at certain prescribed rates. No time whatever was prescribed for the completion of the work essential to the furnishing of such water, or for the commencement of the water service, except that it was to commence upon the installation of the necessary pipes and hydrant. We attach no importance to the subsequent "promise" of March 15, 1901, on the part of defendant, that it would "immediately commence the work" essential to the installing of the service for the various purposes designated. Giving this additional promise full force as a part of the contract between the parties, there was therein no undertaking on the part of defendant that the work so to be commenced would be completed and the water service instituted at any certain definite time. There was no allegation whatever as to any special circumstances known to defendant, or, for that matter, to plaintiff, making it essential to the protection of the property from fire that the contemplated service should be commenced within any particular time. The case presented, then, is one where the parties simply agreed upon the installation and commencement of a water service for various purposes, including one hydrant to be used for the extinguishment of possible fires, upon the installation and commencement of which the plaintiff was to commence paying, at certain prescribed rates, for the water furnished; no definite time for the commencement of such service being fixed, and no special circumstance appearing, by reason of which it might be anticipated that it was essential to the protection of plaintiff's property from fire that the service should be commenced within any particular time, or, as plaintiff claims, within a reasonable time.

Under such circumstances, it appears very clear to us that damage by fire to plaintiff's property cannot reasonably be supposed to have been within the contemplation of the parties, as possible to be caused by a failure on the part of defendant to commence the water service agreed upon. The plaintiff not having stipulated for the limited protection against fire, to be furnished thereby, to commence at or within any particular time, and, under the terms of the contract, paying for such protection only from the time of the actual commencement thereof, could not, until the actual commencement of the service, be considered as relying on such protection, or on the commencement thereof at any particular time, in the slightest degree, and there was nothing to warrant even a supposition on the part of defendant that plaintiff did so rely. The utmost that can be reasonably contended to have been within the contemplation of the parties in this regard was that, when at some future indefinite time the hydrant had once been installed, and the service actually commenced, water would thenceforth be available, by means of the hydrant, for the extinguishment of possible fires, and that any failure to then have it so available, in the event of a fire, might cause damage to plaintiff's property. This was the full extent of the contract of the parties, and the parties could not be understood as stipulating for such protection prior to the actual commencement of the service. This being so, whatever might be the proper measure of damage for a breach of contract in failing to install the service within a reasonable time, loss of property by fire could not be an element thereof. Until the actual assumption of the duty of such protection, damage by fire could not be held to be within the contemplation of the parties as a possible consequence of a breach, and in no legal sense of the words could such damage be held to have been caused by the breach alleged, although, if it had not been for such breach, water might have been available for the extinguishment of the fire. The case is no different in principle from one where water is furnished by contract for other than fire purposes, and a fire occurs which could have been extinguished by such water if it had been available, but, owing to some failure of the person furnishing the water, no water is available, and the property is destroyed. As already stated, although in such a case the breach is, in one sense of the words, a cause of the loss, there could be no recovery, for the water company has not assumed the duty of protecting the other's property from fire, and loss by fire is not therefore damage possible within the contemplation of the parties to the contract. Here, although water was ultimately to be furnished for fire purposes, the defendant had not, under the terms of its contract, assumed the duty of so protecting plaintiff's property at the time of the fire.

We are of the opinion that the amended complaint did not show any damage for which recovery might be had, and that the demurrer was therefore properly sustained.

The judgment is affirmed.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

150 Cal. 39

PAVKOVICH v. SOUTHERN PAC. RY. CO. et al. (L. A. 1,459.)

(Supreme Court of California. May 24, 1906. On Rehearing Oct. 11, 1906.)

1. Deeds—Reservation—Construction.

A deed granted and conveyed certain land "for the purpose and with the limitation that the rock and material taken therefrom by the grantee, its lessees or assigns, is for railroad purposes, and the grantee is not to carry on the business of furnishing rock for any other purpose, or for such purposes and in such business as the party of the second part may be engaged." Another clause provided that the conveyance was on condition that the grantee, within two years, construct a railroad to certain quarries, otherwise the conveyance should be forfeited. *Held*, that the subsequent clauses were not in irreconcilable conflict with the premises within the rule that they should be disregarded, but they qualified or limited the estate granted, reserving to the grantor a contingent estate, with the restriction for its benefit as to the taking of rock.

2. Same.

The limitation as to the removal of rock was for the benefit of the grantor, and therefore, under the express terms of Civ. Code, § 1069, was to be interpreted in his favor, and as so construed the grantee had no right to furnish rock taken from the premises to others.

3. Same—Covenants.

Whether or not the restriction be construed as a covenant running with the land, it was a covenant binding on the assigns of the grantee.

4. Contracts — Validity — Restraint of Trade.

The deed was not to be construed as giving the grantee right to remove any quantity of rock he desired and then limiting the use he might make of such rock, and was not, therefore, in restraint of trade.

5. Waste—Complaint—Sufficiency.

In an action to enjoin waste and for damages, an allegation that plaintiff was the owner in fee simple of all the lands described, "subject only to the terms and provisions" of a certain deed of a portion of the land, reserving a right to the grantor, sufficiently showed that plaintiff was the heir or assign of the original grantor.

6. Same—Injunction—Damages.

The owner of a contingent estate in premises might enjoin waste in the taking of rock, but, not having a vested interest in the rock removed, could not recover damages therefor.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by John L. Pavkovich against the Southern Pacific Railway Company and the California Construction Company. From a judgment sustaining demurrers to the complaint, plaintiff appeals. Reversed.

Charles S. Allison, Davis & Rush, and A. W. Hutton, for appellant. Bicknell, Gibson & Trask, for respondents.

SHAW, J. Since the taking of this appeal the plaintiff has died and Spiro B. Radovich, as the executor of his last will, has been substituted as plaintiff in his stead. The appeal is by the plaintiff from a judgment in favor of the defendants, upon the sustaining of a demurrer to the complaint based on the ground that the complaint does not state a cause of action. The action purports to be for damages caused by the removal of rock from certain land, and to enjoin further waste of the same character. On April 25, 1888, Declez and Beaudry were the owners in fee simple of the land in question, the same being a part of section 35, township 1 south, range 6 west, San Bernardino base and meridian. They also apparently owned the entire section, or a considerable part thereof. On or near to this section were certain stone quarries known as the "Declez Quarries," but whether or not Declez and Beaudry had any interest therein does not appear. On the day mentioned they executed to the Pacific Improvement Company a deed, conveying to said company certain strips of land in said section, to be used as ways for a railroad connecting said quarries with the main line of the Southern Pacific Railroad from Los Angeles to Yuma, and certain spur tracks necessary for the convenient working of the quarry, and also the tract from which the defendants are now taking rock, which tract contains seven acres of land. The conveyance of this seven-acre tract of land was expressly made subject to certain limitations, upon the effect of which the plaintiff's right of action depends. After the execution of this deed the Pacific Improvement Company conveyed all its right, title, and interest thereunder to the defendant, the Southern Pacific Railroad Company, and the plaintiff became, and still is, the owner in fee simple (but subject to the rights of the defendant under the deed of Declez and Beaudry to the Pacific Improvement Company) of all the lands described in said deed, including the seven-acre tract. The California Construction Company is building for the United States the breakwater in the harbor at San Pedro, and for that purpose, by agreement with the Southern Pacific Railroad Company, is quarrying and removing rock from the seven-acre tract, and using the same in the construction of the breakwater. The plaintiff in this action seeks to recover damages for the rock that has been taken from this tract for that purpose, and to enjoin the further taking thereof for such purpose.

The right of the defendants to take this rock, and of the plaintiff to maintain this action, depends on the effect of certain clauses of the deed of Declez and Beaudry to the Pacific Improvement Company. This deed first conveys the strips of land intended for the rights of way. Then follow the paragraphs purporting to convey the seven-acre tract and the qualifying clauses. This part of the deed is as follows: "And the said parties of the first part also grant and convey onto the said party of the second part a tract of land in said section 35, described as follows: [here is described the seven-acre tract in controversy]. The conveyance of the tract of land last-above described to the party of the second part is for the purpose and with the limitation that the rock and material taken therefrom by the party of the second part or by its lessees or assigns is for railroad purposes, and the party of the second part or its lessees or assigns is not to carry on the business of furnishing rock for any other purpose than that of railroad purposes, or for such purposes and in such business as the party of the second part may be engaged. This conveyance is made to the party of the second part on condition that the said party of the second part shall construct a railroad from the main line hereinbefore described within two years from the date hereof, and shall operate the same; and in the event that said railroad is not constructed within the time above mentioned, or if the said party of the second part shall fail to operate said railroad or abandon the same as a railroad, then and thereupon the estate hereby granted shall be forfeited to the parties of the first part, their heirs or assigns, and this conveyance shall become null and void. This conveyance is made for the purpose and to the end that a railroad shall be constructed and operated over the line aforesaid from the main track of the Southern Pacific Railroad to the quarries herein mentioned, and that the same be completed and operated within two years from this date."

The plaintiff claims that the effect of the qualifying clauses quoted is to limit or qualify the estate which would otherwise pass by the words "grant and convey," so that the estate actually transferred is not a fee simple, but a fee qualified by the limitation that the grantee, or its lessees or assigns, shall have no right to remove from the seven acres any rock, except such as should be found necessary or convenient for the building or maintenance of railroads, or for use in some other business in which the grantee might engage; that the provision for a forfeiture upon the violation of the condition subsequent, in effect, reserved to the grantor a contingent estate in the land granted, which could be, and has been, transferred to the plaintiff, and that the ownership of this estate in the land invests the plaintiff with a right to enjoin the taking of rock therefrom for any other purposes than those specified in the limitation. The defendants contend that the limitation clause does not purport to withhold from the grantee the right to take rock from the land in such quantity as it should choose, even extending to all the rock therein contained, but that it merely limits and restricts the uses to which such rock may be devoted after it is removed; that it is a purely personal covenant, binding only upon the Pacific Improvement Company, and not upon its assigns; that it does not run with the land, and that, in effect, it is a provision that the grantee shall not use rock taken from the land, except for certain purposes, and is a restriction repugnant to the estate conveyed by the granting clause, and therefore void; and hence, that the Southern Pacific Railroad Company cannot be enjoined from the removal of any or all of the rock, and, being a grantee of the Pacific Improvement Company, it is not liable in damages in an action on the covenant, which binds no one but the original parties.

A reservation or exception in a grant is to be interpreted in favor of the grantor. Civ. Code, § 1069; Code Civ. Proc. § 1864; Martin v. Lloyd, 94 Cal. 203, 29 Pac. 491; Sears v. Ackerman, 138 Cal. 586, 72 Pac. 171. The rules of interpretation in such cases are well stated in Barnett v. Barnett, 104 Cal. 300, 37 Pac. 1050, as follows: "A grant is to be interpreted in the same manner as any other contract (Civ. Code, § 1066), so as to give effect to the intention of the parties, if it can be ascertained (section 1636), and, for the purpose of ascertaining that intention, 'the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other' (section 1641). * * * The rule that, if the habendum is repugnant to the premises, it is to be disregarded, is only another form of the rule that, 'if several parts of a grant are absolutely irreconcilable, the former part prevails' (Civ. Code, § 1070). The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantee intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum clause will prevail over the granting clause. It is in such case to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." In other cases it is said that: "The tendency of modern decisions is to uphold conveyances, and give effect to the intention of the parties, regardless of technical rules of construction." Faivre v. Dailey, 93 Cal. 671, 29 Pac. 258. "It matters little what name we give to the rights reserved to the grantor in a deed. Attempts to create symmetry in the law by classification and designation of classes of different kinds of rights connected with, and springing out of, lands are always hazardous" (Painter v. Pasadena, etc., Co., 91 Cal. 84, 85, 27 Pac. 542); and "to arrive at this intention, the situation of the parties and the subject-matter at the time of contracting should be considered" (Stockton v. Weber, 98 Cal. 439, 33 Pac. 334; Brannan v. Mesick, 10 Cal. 106). The clause immediately following the description of the seven acres, which we designate as the limitation clause, is loosely and awkwardly drawn, and discloses the work of one not skilled in the use of language nor familiar with technical definitions. Upon a consideration of the whole instrument and the circumstances appearing therefrom, the intention of the parties is not difficult to ascertain. The main object of the grantors, which is expressed in the last clause, was to secure railroad transportation to the Declez quarries, and the other clauses manifest a clear purpose to give nothing not necessary to attain that object. They were careful to insert a provision forfeiting the granted estate upon the failure to build the road within two years, or to operate it thereafter, so that, upon failure to secure the object, the grantors would lose nothing and the grantee would obtain nothing. The seven acres were manifestly demanded by the grantee in order to get rock therefrom for use in its business of railroad construction. The purpose of the limitation clause, though awkwardly expressed, was to define and restrict this right as the parties understood it to be given. It qualifies the grant for the benefit of the grantors, and consequently is, in effect, a reservation to be interpreted in their favor. The design was, in part at least, to protect the contingent estate so that, if it became vested, the grantors would not find it stripped of the rock not required for the uses allowed. To construe it as providing that all the rock could be removed by the grantee, but that, when removed, no use could ever be made of any of it, except the limited use mentioned, so that the remainder could be taken for no purpose at all, except to violate the agreement, or wantonly to injure the grantors, would render the clause, to that extent, foolish, ridiculous, and vicious. A construction producing such results is to be avoided if any other reasonable meaning is possible. In view of the objects to be accomplished, the provision that "the conveyance is for the purpose and with the limitation that the rock taken from the land by the grantor is for railroad purposes," may reasonably be understood to have been intended to prohibit the taking of rock for any other purpose. The doctrine that, where the habendum, or other subsequent clause, is repugnant to the premises, the premises must prevail, applies only where the two are irreconcilable. And it does not apply where it appears from the whole conveyance, or from the language of the subsequent clause, that the grantor intended thereby to qualify the granting clause, or where the grantee will receive an estate of value even if the granting clause be modified as may be necessary to give effect to all parts of the deed. Barnett v. Barnett, supra; Faivre v. Dailey, supra; Morrison v. Wilson, 30 Cal. 344; Pellissier v. Corker, 103 Cal. 518, 37 Pac. 465; 1 Devlin on Deeds, § 215a; Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 162; Fogarty v. Stack, 86 Tenn. 610, 8 S. W. 846; Bassett v. Budlong, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404; Gay v. Walker, 36 Me. 54, 58 Am. Dec. 734; Cooney v. Hayes, 40 Vt. 478, 94 Am. Dec. 425; Cravens v. White, 73 Tex. 577, 11 S. W. 543, 15 Am. St. Rep. 803. The clause is, therefore, in effect, a limitation upon the estate of the grantee in the seven-acre tract to the extent that it could not take rock therefrom except for the purpose therein stated. Hence it follows that the grantee had no right, as against the grantors, to take the rock for the purpose of constructing a breakwater.

In support of the position that the limitation clause is a mere personal covenant, binding on the Pacific Improvement Company alone, the defendants rely on the decision in Los Angeles Terminal Land Co. v. Muir et al., 136 Cal. 36, 68 Pac. 308. The clause considered in that case followed a clause purporting to grant an estate in fee simple, and it was expressed in these words: "It is hereby covenanted and agreed by and between the parties hereto, that, in consideration of this conveyance, no saloon business or business of vending malt, vinous, or spiritutous liquors, shall ever be carried on upon said lot, neither shall said lot be used for any business or store purpose other than for hotel, lodging house or club purposes." It did not purport to be made by, or on behalf of, or for the benefit of, the assigns or lessees of either party, but ran to the parties only, and the deed contained no reservation to the grantor of any interest, conditional or otherwise, in the land granted. Herein it was essentially different from the instrument here in question. In that case the original grantee was not a party to the action, and the court, upon the point that the covenant was personal and binding on the grantee only, and hence not enforceable in equity against a subsequent grantee, say that the plaintiff in that case, who was the grantor, "could have inserted a covenant which would have inured to the protection of plaintiff's grantee or successor in interest, and would have expressly bound the Yacht Club [the grantee in the deed]. It did not do either, but contented itself with a covenant, in its terms purely personal, purporting to create a restriction upon the use of the property so long only as the vendee should retain the title, * * * and as there is no personal contract relation between the parties to this action, the plaintiff is not entitled to any relief against the defendants, unless the evidence shows with reasonable certainty that the use of the lot for ferry purposes would materially injure the remaining property of the plaintiff." In the present case the clause in question, treating it as a covenant not to take rock except for certain uses, expressly purports to bind the grantee, and also its lessees and assigns. There is also a condition subsequent whereby there is reserved to the grantor a contingent estate in the identical rock which the defendants are removing. This contingent estate is a species of property and may be transferred. Civ. Code, § 699. It has been transferred to the plaintiff, who, it is alleged, is now the owner thereof. There is, therefore, an existing contract relation and privity of estate between the parties to the action. The removal of this rock, of necessity, will materially injure the value of the contingent estate in the land, and, being removed for a forbidden use, it constitutes sufficient ground for the interposition of equity. It is our opinion that the restrictive clause may be considered as a limitation in favor of the grantors upon the use of the estate granted, and against the grantee, its lessees, and assigns, made for the purpose of feeding and protecting the grantors' contingent estate reserved by the next succeeding clause of the deed, and that it is also a personal covenant binding on the successors in interest of the grantee, by which they are prohibited from removing the rock for the use they are making of it; and hence that they may be restrained from so doing. We do not consider the question whether or not the covenant was one which runs with the land to be material to the decision of the case.

The objection that the complaint does not show that the plaintiff is an heir or assign of the original grantors is not well taken. It alleges that the plaintiff is, and has been ever since November 10, 1900, the owner in fee simple of all the lands described in the deed in question, "subject only to the terms and provisions" of the said deed. This means that he is the owner of all the estate and rights reserved therein to the grantors. He could only become such owner by descent or purchase from the grantors or their successors in interest; and hence he is either an heir or assign. Respondents also contend that, if the qualifying clauses of the deed are to be considered effectual to forbid the sale or other disposition of the rock taken from the seven acres, they constitute a contract in restraint of trade, and are void for that reason. This claim is based on the theory, which we hold untenable, that the deed does not forbid the quarrying or removal of rock, but only forbids certain uses of it after such removal. Where a grantor reserves a contingent estate in the land granted, and a condition or covenant is inserted in the deed forbidding the grantee from removing for certain uses a part of such realty, the removal of which would lessen the value of such contingent estate, such condition or covenant is a lawful contract for the protection of the grantor's interest, and cannot be deemed a contract in restraint of trade. By the terms of the covenant the parties are not to be restrained from engaging in the business of quarrying or selling rock in general, but only from taking for that purpose certain rock in which the plaintiff has an interest.

It is further contended that an action to recover damages for waste, or to restrain waste, cannot be maintained by one having only a contingent estate, to become vested only upon a forfeiture for a violation of a condition subsequent. So far as the claim for damages for waste already committed, based upon the ownership by the plaintiff of such contingent estate, is concerned, this contention must be sustained. The plaintiff's interest is not vested (Civ. Code, §§ 693, 695); and hence he has no present property in the rock removed, for the value of which damages can be computed, or to which he could have the right of present possession. Hunt v. Hall, 37 Me. 363; Peterson v. Clark, 15 Johns. (N. Y.) 205; Sager v. Galloway, 113 Pa. 500, 6 Atl. 209; Brasher v. Macey, 3 J. J. Marsh. (Ky.) 93; Cannon v. Barry, 59 Miss. 289; Gordon v. Lowther, 75 N. C. 193. But the rule is different with regard to the equitable remedy by injunction. The owner of a contingent interest may protect that interest against deterioration or destruction by enjoining a threatened waste. This is well settled by the authorities. Hayward v. Stillingfleet, 1 Atk. 422; Robinson v. Litton, 3 Atk. 209; Brashear v. Macey, supra; Cannon v. Barry, supra; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; Petersen v. Ferrell, 127 N. C. 169, 37 S. E. 189; Cowand v. Meyers, 99 N. C. 198, 6 S. E. 82; Gordon v. Lowther, supra; Braswell v. Morehead, 45 N. C. 26, 57 Am. Dec. 586; Lewisburg University v. Tucker, 31 W. Va. 621, 8 S. E. 410. It comes within the rule that an injunction will be granted to prevent an injury to real property which consists of the removal or destruction of the substance of the estate, or where the party injured cannot be adequately compensated in damages, or where the resulting damages cannot be measured by any certain pecuniary standard. Richards v. Dower, 64 Cal. 63, 28 Pac. 113; Silva v. Garcia, 65 Cal. 592, 4 Pac. 628; More v. Massini, 32 Cal. 595; 16 Am. & Eng. Ency. of Law, 361.

With respect to the breach of the covenant not to take rock, except for the permitted purposes, the breach of such a contract, of itself, constitutes a cause of action for at least nominal damages. Whether, in view of the nature of the plaintiff's interest, anything more can be recovered, is a question not discussed by counsel, and, as it is not necessary to the decision of the case, we express no opinion in regard to it.

From the conclusions we have reached, it necessarily follows that the demurrer should have been overruled.

The judgment is reversed.

On Rehearing.

BEATTY, C. J. Upon a careful reconsideration of this case after rehearing ordered, we find no occasion to modify our original opinion. Nor do we deem it necessary to undertake a discussion of the proper construction of our Code provisions relating to covenants running with the land. Our conclusions are not rested upon those provisions, and they contain nothing inconsistent with what we have decided. Conceding that there is no covenant running with the land in a strict legal sense, we still hold that the plaintiff, as the owner of a contingent future estate in the land, is entitled in equity to enjoin a threatened destruction of that estate by the tenant in possession, whether such threatened destruction be total or partial. When land is conveyed subject to a condition, breach of which will work a forfeiture of the estate granted, the grantor retains an interest in the land, the value of which will be impaired by the pulling down of houses, the cutting of timber, or the quarrying and removal of stone or any other valuable material contained in the soil, and it would be strange if the law afforded him no means of protecting his interest. It may be that there is a presumption in such case that there will be no breach of the condition subsequent and that there is a probability that the estate will never be forfeited, but, in dealing with the rights of the grantor, a court is bound to assume, as the parties by their deed have assumed, that there may be a breach of the condition, and to hold that the grantee has no right, in the meantime, to make way with the very substance of the estate. If, in such case, the deed contained no express provision restraining the removal of the soil, or cutting of timber or other destructive use of the land, we are clearly of the opinion that a court of equity would enjoin a threatened injury of the magnitude alleged in this case. But here the deed expressly limits the purposes for which stone may be taken, and this imposes a practical limit to the quantity that will be taken, and the right of the grantor, or his successor, to enjoin the transgression of that limit is even clearer than the right to an injunction would have been in the absence of such express provision. Of course, there are exceptional cases to which the doctrine here asserted does not apply. One of them is defined in section 819 of the Civil Code—the lease of a going mine or quarry. But such exceptions only fortify the general doctrine.

As to the objection so strongly urged that the stipulation in question is not binding upon the successors of the Pacific Improvement Company, and does not inure to the successor of the grantors, our opinion remains unchanged, and ought not to be misunderstood. The assigns of the grantee are expressly named in the deed, and whatever right the grantors had to protect their interest in the land passed by their conveyance of the land to their grantee. Their estate was alienable, and the right to sell an estate includes the right to transfer the means of protecting it.

Our decision rests, of course, upon the case as presented in the record before us. If there are other facts or circumstances, proof of which would have a legitimate bearing upon the true construction of the deed to the Pacific Improvement Company, nothing we have said will prevent the defendant from alleging and proving such facts.

The judgment of the superior court is reversed.

SLOSS, J. I concur in the judgment. What the plaintiff's rights would have been if the deed had contained no provision limiting the grantee's right to take rock is a question not involved in this case, and I express no opinion upon it. It is enough to say that the deed under which the defendants hold did restrict the right of the grantee and its successors in interest to do certain acts destructive of the substance of the estate, and that this estate might, on breach of a condition subsequent, revert to the grantor. Such restrictions may lawfully be annexed to the conveyance of an interest less than an unqualified fee, and will be enforced at the suit of the holder of the future estate. Blake v. Peters, 1 DeG. J. & S. 345.

We concur: HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

McFARLAND, J. I dissent, and think that the judgment should be affirmed.

4 Cal. App. 288

BIESCAR v. PRATT. (Civ. 275.)

(Court of Appeal, Second District. California. Sept. 18, 1906.)

1. Sales — Remedies of Seller — Resale — Collection of Draft Deposited.

Under Civ. Code, § 3311, fixing the rights of the seller on breach of contract by the buyer, and section 1670, providing that a provision in a contract for a stipulated amount as damages is void except where it would be difficult to fix the actual damage, where a seller, on refusal of the buyer to complete the contract, sells the goods elsewhere at an advanced price, he is not entitled to collect a draft deposited as part of the price.

2. Appeal — Harmless Error — Amount of Recovery.

Any error in not requiring a seller to return to a buyer a cash deposit on the price is not prejudicial to the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4060, 4061.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Henry Biescar against T. H. Pratt. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Milton K. Young, for appellant. Frank James, for respondent.

SMITH, J. Appeal from a judgment for the defendant and an order denying the plaintiff's motion for a new trial. This is a suit by the indorsee against the indorser of a draft on a New York bank, the payment of which was refused by the bank under the defendant's instructions.

The case, as shown by the answer and findings, is: The plaintiff, by written contract of date December 26, 1903, agreed with the defendant and one Bassett to sell them "the business, consisting of stock, hardware, and fixtures now in building," described in the agreement, at invoice prices, etc., and the draft sued upon constituted a part of "the deposit of $500" made by the vendees to the vendor, and which, it is provided, should "be forfeited by them to said first party" in the event of failure of the second parties to pay the balance of the purchase price. The defendant and his co-vendee, on account of certain alleged misrepresentations of the plaintiff as to the aggregate value of the property and certain other matters alleged in the answer, refused to proceed with the contract, and, on the 11th day of January, 1904, attempted to rescind the contract, notifying the plaintiff thereof and demanding the repayment of the cash deposit and the surrender of the draft. The plaintiff refused to comply with this demand, but, it is alleged and found, continued to carry on the business, "and has sold much of the said stock of goods therein * * * and has received the price therefor and made a profit thereon;" and finally, it is found, shortly after the commencement of this suit, sold the whole of the stock of goods and fixtures "for a price in excess of the invoice price, or amount agreed to be paid therefor" by defendant and his partner. This finding is attacked by appellant as not supported by the evidence, but we think without grounds. It is further found "that plaintiff has not been damaged or injured by any act of the defendant, or at all." The court below was of the opinion (1) that the plaintiff, by continuing to carry on the business and to sell the stock, and by finally selling the stock previously unsold for a larger price than the sum agreed upon, acquiesced in the rescission of the contract and thus became liable to return the deposit; and (2) that the provision as to forfeiture of the deposit was "void as being an attempt to liquidate damages in an unauthorized case."

In this opinion of the court we concur. The remedies of the vendor in a case of this kind are clearly defined. Civ. Code, § 3311; Gay v. Dare, 103 Cal. 458, 37 Pac. 466; 2 Benjamin on Sales, § 1117, and note. They do not include the right to sell the goods at an advanced price and to retain the purchase money paid on the contract, either as liquidated damages (Civ. Code, § 1670), or on any other ground. The appellant claims the contrary, and cites in support of his contention the decision in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. But the contract there involved was for the sale of real estate, and contained a provision that time should be of the essence of the contract. To such cases it was held on the authorities cited that a peculiar rule applied. It has no application to such an agreement as here involved to sell personal property.

It is also objected that, upon the principle of the decision of the court below, defendant was entitled to a return of the cash deposit. This, we think, was the case, but the error is one that the plaintiff cannot complain of.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 294

MEEKER v. SHUSTER et al. (Civ. 246.)

(Court of Appeal, Third District. California. Sept. 20, 1906.)

1. JUDGMENT—RES JUDICATA.

A judgment in ejectment, declaring the deed under which plaintiff claimed to be a mere mortgage from defendants, is res judicata in an action between the same parties to have the deed declared a mortgage, and to forcelose it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1244, 1245.]

2. MORTGAGES — DEED AS MORTGAGE — EVIDENCE.

Evidence, in an action to have a deed declared a mortgage and to foreclose it, *held* sufficient to sustain a finding that it was a mortgage.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by M. C. Meeker against Sarah E. Shuster and others. Judgment for plaintiff. Defendants appeal. Affirmed.

See 47 Pac. 580.

J. A. and E. C. Barham and T. J. Butts, for appellants. J. M. Thompson, for respondent.

BUCKLES, J. This is an action to have a certain deed declared to be a mortgage, and to foreclose the same. The defendants were in possession of the land mentioned in said deed while the legal title thereto was in one Aaron Barnes. The complaint alleges that on December 3, 1883, the said Barnes entered into a contract and bond with the Shusters whereby he obligated himself to convey by bargain and sale deed said land to the Shusters on or before December 3, 1893, upon the Shusters paying to him the sum of $11,000 in sums not less than $100 and interest at the rate of 9 per cent. per annum. This contract and bond was duly recorded on the same day it was made. On October 5, 1892, the Shusters still owed $8,440 to said Barnes. To enable them to pay this debt, the plaintiff loaned them $8,440. The money was paid over to Barnes, the Shusters released and satisfied the contract and bond on the records and requested the said Barnes to and he did make, execute, and deliver to the said plaintiff a deed to said land as security for the payment to him by said Shusters the said sum of $8,440, with interest thereon at the rate of 8 per cent. per annum, and the plaintiff gave the Shusters his bond for a deed for said land in which he agreed to convey said land to the Shusters on or before 10 years from October 5, 1892, upon the payment to him of the $8,440, with interest as aforesaid, by the said Shusters. That no part of the principal or interest of said debt was ever paid, and that at the time the suit was commenced there was due and unpaid the sum of $18,513.26. That in a suit in ejectment in which the plaintiff and the defendants were the same as in this action, tried in the superior court of Sonoma county, a judgment was duly rendered and entered on December 14, 1894, by which it was adjudged that the payment of the said sum of $8,440 by plaintiff to the Shusters and by them to said Barnes was a loan by plaintiff to said defendants, and that the deed executed and delivered by Barnes to plaintiff was a mortgage to secure the payment of said sum. Judgment was for defendants. An appeal was taken to the Supreme Court and the judgment affirmed.

The answer contains a specific denial and a setting forth the transaction of plaintiff paying over the $8,440 and the circumstances of Barnes making the said deed and the plaintiff making the said contract and bond to the Shusters, claiming in effect that such transaction did not constitute a mortgage, but a sale and conveyance of title of said land to the plaintiff, and also pleads bar under the statute of limitations. The only oral testimony as to the transaction between plaintiff and the Shusters was that given by the plaintiff. A short time before the deed was made one of the Shusters asked plaintiff to buy the land, and plaintiff replied: "I do not need the land. I really have more land now than I know what to do with," but then announced his willingness to furnish the money to pay the debt due to Barnes. Again when plaintiff and the Shusters were all together at the time the arrangements were agreed upon which were afterward carried out he says: "I told them I had the money now to let them have * * * and I asked them how they wanted to do the transaction and they said they would take a deed from Barnes * * * and give me a mortgage. I then objected to taking a mortgage from them. Then they didn't really know how to do it, and I said it's like this, I will let you have the money to pay Barnes off, and you will discharge the record, and then I will give you a bond to purchase the property, and will give you 10 years' time, and will pay all taxes on the property during this 10 years' time, and you pay me interest at the rate of 8 per cent. per annum." The testimony shows that neither Meeker nor Barnes had ever been in possession of the said land. There is no evidence whatever to indicate the Shusters were intending to sell the land to Meeker. The court below found that the Shusters solicited from Meeker a loan of $8,440 for the sole purpose of paying said Barnes the sum due him, to wit, $8,440, and then agreed with Meeker to repay him the said sum in 10 years; and that no agreement was ever made by plaintiff with said Barnes for the purchase of said land. The evidence abundantly supports these findings. Many errors are alleged in the court's rulings on the admission of evidence, but as all the testimony offered to which there was objection and exception seems to have been properly admitted we see no necessity of taking up the time and space to state them here. Independent of the findings and judgment of the case, Meeker v. Shuster (Cal.) 47 Pac. 580, the ejectment suit heretofore referred to, we think the oral testimony in this case with the bond and deed, show the transactions to have been one of money loaning by Meeker to the Shusters, and a giving of the deed of Barnes to Meeker and the bond of Meeker to the Shusters, simply the means of securing the repayment of said loan and that therefore said deed must be treated as a mortgage. Besides this the suit reported in 47 Pac. 580, supra, was a suit between the same parties in relation to the same property, and involved a construction of the same deed, and we think the judgment in that case is conclusive that the said deed was intended as a mortgage. The judgment roll in the case 47 Pac. 580, supra, was placed in evidence over the objection of the defendants, and this is alleged as error. But the very question in issue was made a question there, and the conclusion reached in that case was the same sought to be reached in this case. The parties were the same there as they are here, and the testimony here substantially the same as in the ejectment suit. McDonald v. McCoy, 121 Cal. 57, 53 Pac. 421; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000. If the deed in that case, the case of ejectment, and the same deed that is being construed here, conveyed to the plaintiff in that case the title to the land, then the defendants would have been ejected, and that would have ended the contention as to the right to the land. But the court said in effect that it was a mortgage and the equity of redemption of the Shusters could not be foreclosed in an ejectment suit, besides the time for bringing an action to foreclose had not then accrued. In the ejectment suit the court found the Shusters to be the owners in fee of the land, and such a finding in this case could not contradict the proceedings in that case. If the deed was a mortgage in that case it was a solemn finding of a competent court when the same parties were before it, and when exactly the same subject-matter, the same deeds, the same contracts, and the same bonds were being considered and exactly the same question there was litigated as is the paramount question here:

Was this deed intended as a mortgage? We think that the defendants in this case are absolutely estopped by reason of the judgment in that case from asserting in this that the said instrument was a deed conveying all their interest in said land, and therefore and further because that judgment was made an issue in this case the judgment roll was properly admitted.

Irrespective of the former judgment the testimony of the plaintiff in this case shows that he never intended to purchase said land and the deed and bond simply constituted his security for the money he had loaned the Shusters. The lower court found the deed of Barnes to plaintiff was intended by defendants to secure to plaintiff the payment of said sum of $8,440, and that plaintiff did not and never did intend to purchase said land and that the statute of limitations has not run against the cause of action set forth in plaintiff's complaint, and that said action is not barred. These and all the findings are warranted by the evidence in the case. As conclusions of law the court found that said deed is a mortgage and a lien upon the lands described therein and in plaintiff's complaint. The judgment was that the deed was a mortgage, and to foreclose the same. The findings support the judgment.

The judgment and order denying a new trial are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

4 Cal. App. 298

MARTIN v. MOLERA. (Civ. 259.)

(Court of Appeal, Third District. California. Sept. 20, 1906.)

EJECTMENT — PLEADING — CROSS-COMPLAINT —RIGHT TO FILE.

Under Code Civ. Proc. § 442, providing that whenever defendant seeks affirmative relief against any party, affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint, defendant in ejectment was entitled to file a cross-complaint pleading a judgment rendered in a prior action between plaintiff and defendant's predecessor in interest, involving the title and possession of the land in controversy, and alleging that the action was contrary to equity and intended to annoy defendant by compelling him to relitigate the questions determined by such judgment.

Appeal from Superior Court, Monterey County; M. T. Dooling, Judge.

Action of ejectment by James Martin against E. J. Molera. From a judgment overruling plaintiff's demurrer to defendant's cross-complaint, plaintiff appeals. Affirmed.

D. M. Delmas and J. J. Wyatt, for appellant. Chas. W. Slack, for respondent.

McLAUGHLIN, J. It is alleged in the complaint herein that on a specified date the plaintiff was the owner, seized in fee and in the possession of a designated tract of land, and, at the time the action was commenced, he was the owner and entitled to the possession of said land. This is followed by an averment that on the date mentioned the defendant entered upon and ousted and ejected plaintiff to his damage in the sum of $1,000. The prayer demands restitution of the premises with damages in the sum stated. The defendant filed an answer denying each of the allegations of the complaint and pleading a judgment rendered in an action between plaintiff and defendant's predecessor in interest, involving the title and possession of the land here in controversy, which judgment was affirmed by the Supreme Court. See De Molera v. Martin, 120 Cal. 544, 52 Pac. 825. In connection with this special defense it was alleged that in the complaint in the former action one of the calls in the description of the land read, "south 82 degrees west, 3.35 chains to station," and by reason of a clerical misprision and mistake this call read, "south 82 degrees west 5.35 chains to a station," as inserted in the judgment pleaded. Immediately following this, in a portion of the pleading designated a cross-complaint, the defendant pleaded the facts touching the former action between plaintiff and defendant's grantor, and inserted a copy of the judgment in said former action. The above-mentioned mistake in one of the courses and distances as inserted in the judgment was then set forth, and this was followed by three paragraphs specifically fixing the starting point in the description of the tract of land involved in the former judgment, and more particularly describing one of the boundaries of the tract with reference to the old channel of the Salinas river and the cabin of Buckskin Joe, which was destroyed by fire after the commencement of said action. The cross-complaint further contained specific allegations to the effect that the lands described in the complaint herein are a part of the lands involved in the former action and that the present action is contrary to equity and good conscience, and is intended to harass, vex, and annoy defendant by compelling him to relitigate the same questions which were tried and determined in the action of De Molera v. Martin, and that cross-complainant has no plain, speedy, or adequate remedy at law. The plaintiff demurred to the cross-complaint on the ground that it did not state facts constituting a cause of action. The demurrer was overruled and plaintiff answered, but later withdrew his answer and elected to stand on the demurrer to the cross-complaint. His default was thereupon entered and the court proceeded to hear evidence touching the averments of the cross-complaint, all of which were found to be true as pleaded. Judgment was thereupon entered in favor of defendant, and from such judgment this appeal is prosecuted.

Appellant contends that the court erred in overruling his demurrer to the cross-complaint, and this contention presents the only point urged in the brief filed in his behalf. It is urged that in cases like the one at bar a cross-complaint is always unnecessary and improper, and Doyle v. Franklin, 40 Cal. 106, is cited as supporting this view. Waiving the fact that the court expressly declined to pass on this particular point in that case, an examination and analysis of this and cases of like tenor, shows that our highest court has simply decided that, where the relief demanded in the cross-complaint can be had upon the denials and averments of the answer, a cross-complaint is unnecessary. Nelson v. O'Brien, 139 Cal. 629, 73 Pac. 469; Miller v. Luco, 80 Cal. 261, 22 Pac. 195; Wilson v. Madison, 55 Cal. 8. This, however, is far from saying that a cross-complaint may not, under some circumstances, be both proper and necessary. The rule in ejectment is identical with the rule in actions to quiet title, and the reason underlying one supports the other; hence authorities applying to the latter class of actions apply with equal force to actions in ejectment. In Winter v. McMillan, 87 Cal. 264, 25 Pac. 407, 22 Am. St. Rep. 243, the Supreme Court, in passing upon the question before us here, said: "Appellants contend that the demurrer to the cross-complaint ought to have been sustained; that a cross-complaint is improper in actions of this kind. In support of this contention, they cite Wilson v. Madison, 55 Cal. 8. All that case decides is that, where the relief demanded by defendant can be had upon the denials and averments of his answer, a cross-complaint is unnecessary. But there may be cases in which full relief cannot be given the defendant upon answer, and, as in ejectment, a cross-complaint in such cases is recognized as a proper pleading so that the whole controversy may be settled in one action." This doctrine has received express or implied sanction in a number of cases where the point was involved. Angus v. Craven, 132 Cal. 698, 64 Pac. 1091; Islais & S. W. Co. v. Allen, 132 Cal. 438, 64 Pac. 713; Am. & Eng. Ency. Pl. & Pr., vol. 17, pp. 354, 356.

Under section 442, Code Civ. Proc., whenever the defendant seeks affirmative relief affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint. That the affirmative relief demanded by the defendant related to the property to which this action relates cannot be gainsaid. That such relief involved more than title and right of possession seems equally clear. The plaintiff was bound by the former decree if the property in controversy here formed part of the land embraced in the prior litigation. The defendant was entitled to relief against harassing. annoying, and vexatious attempts to relitigate questions already adjudicated and settled, and, if so, we can conceive of no better time or place to seek such relief than in an action practically identical with the case already determined against the plaintiff's assertion of right. It is not necessary to consider the propriety of thus litigating some questions arising out of facts stated in the amended cross-complaint. The single question presented for determination here is whether the cross-complaint states facts sufficient to entitle the defendant to any affirmative relief. Having concluded that it does, the judgment must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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4 Cal. App. 347

SUMNER v. NEVIN. (Civ. 258.)

(Court of Appeal, Second District, California. Oct. 16, 1906.)

1. Assignments — Contract for Personal Services.

Where a servant of a real estate broker made a contract with another person, whereby the servant, on his own behalf, became the agent for the sale of such person's land, the contract was founded on personal qualities; and hence, in a suit by the master, an assignment of the contract could not be directed, or the same decreed to be held in trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 30.]

2. Master and Servant — Accounting by Servant.

Whatever the servant received on account of his services in selling the land during the term of his contract with the master belonged to the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 68, 70.]

3. Same.

Civ. Code, § 1986, makes it the duty of an employé on demand, to render to his employer just accounts of all his transactions in the course of his business as often as may be reasonable. A real estate broker made a demand upon his servant for an accounting, which was refused, and subsequently the contract of employment was terminated. During the employment the servant had received, on his own behalf, commissions for effecting a sale of real estate. *Held*, in an action by the broker against the servant, that the broker was entitled to an accounting as to the amount of commissions received.

4. Same—Nature of Relation.

Civ. Code, § 2295, defines an agent as one who represents another in dealings with third persons. Section 2009 defines a servant as one employed to render personal services to his employer and who remains entirely under the control and direction of the latter. *Held* that, where defendant agreed to devote his entire time and attention to the interests and business of plaintiff, a real estate broker, defendant's compensation to be a specified percentage of commissions, the relation between the partes was that of master and servant and not that of principal and agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1-3; vol. 40, Principal and Agent, §§ 3-12.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by C. A. Sumner against W. G. Nevin. From a judgment in favor of defendant, plaintiff appeals. Reversed, and remanded for further proceedings.

Works, Lee & Works, for appellant. T. J. Norton and E. W. Camp, for respondent.

ALLEN, J. Judgment for defendant entered upon an order sustaining a demurrer, without leave to amend, from which plaintiff appeals.

It appears from the amended complaint that plaintiff, in November, 1901, held an exclusive agency for the sale of certain real property in the city of Los Angeles; that, while such agency was in force, plaintiff and defendant entered into a contract, by the terms of which plaintiff employed defendant in said business of real estate and in such other capacity as he might elect, and the second party agreed to devote his entire time and attention to the interests and business of said first party upon such business as said first party may direct, receiving as compensation therefor 10 per cent. commission on all policies of insurance placed by him with said first party, and one-half of the net commissions received on all loans, rentals, real estate deals, and other transactions brought to plaintiff by defendant. It was agreed that such contract of employment might be terminated by either party upon 15 days' notice in writing, and that all deals pending at the time of the termination of said contract were to be closed and the proceeds divided under the contract. After the execution of this contract of employment, the agency of the plaintiff in relation to said tract first mentioned terminated, and plaintiff directed defendant to enter into negotiations with the owners for an extension of such exclusive agency in plaintiff's behalf. It is averred that defendant, instead of procuring an extension in behalf of plaintiff, took from the owners in his own name a contract of agency, by the terms of which defendant personally obtained the exclusive agency at a commission less than that originally agreed to be paid to plaintiff; that on August 10, 1902, defendant notified plaintiff of the termination of his contract of employment, and at the same time notified him that he had taken the exclusive agency of the tract in his own name, and thereafter proceeded to the sale of lots in said tract, some of which were by him sold after July, 1902, and before September 1st, the amount of which sales aggregated $3,300, and, under the contract of defendant with the owners of the tract, would have entitled him, at a commission of 7½ per cent., to the sum of $247.50, gross commission. There is no specific statement as to any other lots sold prior to the termination of employment. The plaintiff demanded judgment that the contract of agency between the owners of the tract and defendant be decreed the property of the plaintiff, and that he have an accounting of the amount of commissions received by defendant, and a judgment for one-half the net amount thereof. The theory upon which the plaintiff proceeds is that he was entitled to the services of the defendant until 15 days after notice of the termination of the employment, to wit, until August 26, 1902; and that the contract entered into by defendant before such date last mentioned, while in the name of Nevin, was the property of plaintiff.

While plaintiff in his complaint speaks of the various dates of the termination of the contract and of the service of notice as being in the year 1904, the written notice itself is set out in the complaint, which bears the date of 1902, and, taking the whole complaint together, it is clearly indicated that a typographical error has occurred, and that the transaction spoken of was intended to have been alleged in the year 1902. The contract of employment between plaintiff and defendant was a personal one, and by its terms the relation of master and servant arose, under the definition of section 2009, Civil Code, rather than that of principal and agent, as defined by section 2295, Civil Code. While, under the admitted allegations of the complaint, defendant violated his duty towards his employer in accepting other employment inconsistent with the duties which he owed to plaintiff, yet the personal character of the contract which he entered into with the owners of the tract would prevent plaintiff from having any assignment thereof or benefit therefrom other than such benefit as inured to him while defendant was actually in his employ. This contract entered into between Nevin and the tract owners being special and founded upon personal qualities, was unassignable without the consent of all parties thereto. Taylor v. Black Diamond Coal Co., 86 Cal. 590, 25 Pac. 51. The same, therefore, not being assignable in its character, a court could not direct the assignment or decree the same to be held in trust. Were it to do so, it would be to say that a court might decree relief to which the party was not entitled in virtue of the contract and under the law; that equity instead of following the law should disregard the same. The obligation, however, of defendant under his contract with plaintiff was to devote his entire time and attention to the interests and business of plaintiff while this employment existed. It follows, therefore, that whatever defendant received during the life of this contract with plaintiff on account of his services in similar lines of employment, whether under this contract with the tract owners or otherwise, belonged to his employer. This would be true, also, of any property acquired, which, in virtue of his employment, ought to have been taken for his employer, yet as to the latter, it can only apply to such property received by the employé assignable or transferable in its character.

There is no question of damages involved in the action, in that it is nowhere averred in the complaint that defendant could have procured a contract in behalf of plaintiff similar to the one taken in his own name, nor any damages on account of the nonperformance of the duty required by plaintiff of defendant. It is admitted, however, in the complaint that, while the employment between plaintiff and defendant was in force, defendant received, as agent of these tract owners, certain commissions, a part of which are specifically set forth as aggregating the sum of $247.50, with an additional averment that during that time he sold other lots and blocks, but plaintiff is unable to state the number of any of such lots or blocks, or of any of them, or the price for which the same or any thereof, were sold, or the dates of the sales. Section 1986, Civil Code, makes it the duty of an employé, on demand, to render to his employer just accounts of all his transactions in the course of his business, and as often as may be reasonable, without demand, give prompt notice to his employer of everything he receives for his account. There is an admitted allegation that a demand has been made upon defendant for such accounting, which has been refused. We think the complaint states facts sufficient to entitle plaintiff to an accounting of the amount of commissions actually received during the term of the employment, with a statement of the outlay incident thereto, that the net amount thereof might be determined, and one-half of such amount awarded to plaintiff. That the right to an accounting is to be determined from the situation of the parties with reference to the accounts, and not because of any particular relation which one bears to the other, appears to be the doctrine of Coward v. Clanton, 122 Cal. 451, 55 Pac. 147. The subject of accounting is one cognizable in equity, over which the superior court has jurisdiction. We are of opinion, therefore, that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, and cause remanded for further proceedings.

I concur: GRAY, P. J.

I concur in the judgment: SMITH, J.

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4 Cal. App. 333

ROGERS et al. v. OVERACKER. (Civ. 263.)

(Court of Appeal, Third District, California. Sept. 27, 1906.)

1. WATERS AND WATER COURSES—DIVERSION OF WATER—IRRIGATION—PRIOR USE—EVIDENCE.

Evidence that defendant diverted water from a stream into a ditch which he testified had a 20 year old growth of brush in it was not evidence that defendant's predecessors in interest had ever diverted the waters of the stream for irrigation purposes.

2. SAME—RIPARIAN PROPRIETORS—RIGHT TO USE.

A lower riparian proprietor cannot acquire a right to water flowing in a stream either by prior appropriation, prescription, or adverse user as against an upper riparian proprietor whose rights antedated such appropriation and user.

3. SAME — UPPER RIPARIAN PROPRIETOR — NONUSER.

Mere nonuser of waters flowing in a stream by an upper riparian proprietor and the fact that he permitted the waters to pass down to the lands of the lower owner cannot make the latter's use of the water adverse or strengthen the lower proprietor's claim of appropriation or prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 150.]

4. SAME—TRIAL—FINDING—FAILURE TO FIND.

Where, in a suit to restrain an upper riparian proprietor from diverting substantially all the water of the stream for irrigation, the complaint alleged no priority of user of the waters for domestic purposes by plaintiff over the rights of the defendant, it was not necessary for the court to make a finding on the allegation in the answer that it was necessary for defendant to use the waters for irrigation and if it was not used to a reasonable extent defendant would sustain irreparable injury.

5. SAME—DIVERSION—IRRIGATION—RIGHTS OF RIPARIAN PROPRIETORS.

Where upper and lower riparian proprietors had an equal right to take water from a creek and it was admitted that at times there was an abundance of water to supply the wants of both and at other times only enough for the use of the lower proprietor, the latter was entitled to restrain the upper proprietor from diverting all the waters of the creek for the irrigation of his riparian land.

6. SAME—JUDGMENT—UNCERTAINTY.

In a suit by lower riparian proprietors to restrain the upper proprietor from diverting all the waters of a creek, a judgment enjoining defendant from diverting such waters for the purpose of irrigation at such times or in such quantity or amount or in such a manner as will prevent the waters of the creek from flowing to and upon plaintiffs' riparian land in a sufficient quantity to supply plaintiffs with fresh water for their natural wants and their domestic purposes, etc., was fatally defective for uncertainty as to the amount of water defendant was required to permit to flow down the creek for plaintiffs' benefit.

7. SAME — JUDGMENT — DETERMINATION OF RIGHTS—ESTOPPEL.

Such judgment did not constitute a complete determination of the rights of either party and could not, therefore, be pleaded as an estoppel.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Suit by T. G. Rogers and others against H. Overacker, Jr. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

Mullaney, Grant & Cushing and F. E. Johnston, for appellant. W. F. Henning, for respondents.

BUCKLES, J. This is a suit in equity to enjoin the defendant from diverting certain waters from Conn creek in Napa county. After a trial had, the court made findings and entered judgment therein in favor of the plaintiffs. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The complaint alleges that Conn creek has its source in Howell Mountain in said Napa county, and runs thence in a natural defined channel in a southerly direction until it enters Napa creek near the town of Yountville and flows along over the lands of both plaintiffs and defendant a distance of about four miles, and that the lands of defendant are nearer the source of said Conn creek and higher up on the said creek than any of the lands of plaintiff; that the lands of plaintiffs and defendant have always been used by themselves and their predecessors in interest for stock raising, grazing, and farming, and the waters of said creek have always been used by them for domestic use other than irrigation, until about two years ago, and then only the defendant has at times diverted and claims the right to divert all of the water of said creek so as to flow the same entirely upon his own lands solely for the purpose of irrigation, which diversion is by means of dams erected in said creek and flumes and ditches leading the water out and upon his said land, and has thus deprived the plaintiffs of the use of said water and that there is now no water running in the channel of said creek on or by their lands; that they need said water for their stock and pasturage; that they will suffer irreparable loss unless defendant be enjoined from using said water for irrigation; that defendant has no right, by purchase, prescription, or otherwise, to said water other than as a riparian owner, and no right to deprive plaintiffs of the natural flow of the water of said creek in the natural channel thereof.

The answer alleges that defendants, grantors, and predecessors in interest have from time to time for many years diverted the waters of said creek for purposes of irrigation at a greater or less extent than the same have been used by him, and that he used the ditches made and used by his grantors. Denies that defendant at any time diverted or claimed the right to divert all the waters of said creek, and has never at any time diverted more than one-half of said waters, and that for irrigation, and that he never deprived the plaintiffs of the use of said waters. That when diverted he uses said waters for irrigation and for domestic purposes. Denies that plaintiffs are dependent upon the waters flowing in the channel of said creek for watering their stock and other domestic uses. Denies that he is now diverting, or ever has diverted, the whole of said water, and alleges that he does and has diverted only a reasonable portion thereof, and alleges that there is water enough flowing in the channel of said creek to supply all the riparian owners along the said creek with ample water for domestic use and their stock and to irrigate more lands than have ever been irrigated by the defendant. Alleges that, by reason of the failure of the complaint to show that the waters claimed by plaintiffs are to be used on the lands riparian to said creek and by reason of the failure of plaintiffs to allege the amount of stock which they claim the right to water from said creek, the defendant is unable to determine the actual amount of water claimed by them. Alleges that the tract of land planted to alfalfa which he diverts the water to irrigate is land belonging to defendant and riparian to said creek and naturally drained into said creek and that it is necessary to use a reasonable amount of said water to keep the alfalfa growing on his said land so irrigated. There is no averment in either complaint or answer of the amount of water required by either plaintiffs or defendant, nor of the approximate amount of water flowing in said creek. It does appear, however, that from about July 15, 1902, and 1903, to the time when the cool weather comes the water has ceased to flow upon the surface of the channel of said creek at some places below the lands of defendant.

The court finds, as matter of fact, that all the lands described are riparian to said creek; that all these lands have always been used for stock raising, grazing, and farming and the waters of said Conn creek have been used by plaintiffs for domestic purposes and watering stock to a greater or less extent, and the waters of said creek have never been used to any appreciable extent for irrigation until within the years 1902 and 1903; that plaintiffs are dependent upon the water of said creek during the dry season of the year for watering their live stock; that in July, 1902, defendant diverted a considerable portion of the water of said creek out of the channel to and upon his lands through a flume six by eight inches, for purposes of irrigation; did this again in 1903; that for 20 or 30 years before the diversion of said water by defendant the waters of said creek had flowed upon the said lands of plaintiffs so that, during the dry season of the year, there was abundance of fresh water in said creek for their domestic purposes and watering their stock; and that, by reason of diverting said waters by defendant for irrigation purposes in the dry season of 1902–03, the plaintiffs were deprived of necessary water for domestic use and watering their stock. As conclusions of law the court found as follows to wit: "The right of plaintiffs to a sufficient flow of water of Conn creek, in the county of Napa, state of California in the natural channel thereof to and upon the riparian lands of plaintiffs * * * all seasons of the year sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of live stock kept or maintained by plaintiffs upon their said riparian lands, are primary and paramount rights to the right of defendant to divert or use any of the waters of said Conn creek for the purposes of irrigation. Plaintiffs are entitled to judgment enjoining defendant from so diverting such quantity of the waters of said Conn creek for the purposes of irrigation as will prevent said creek from flowing to and upon the riparian lands of plaintiffs in quantities sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of live stock kept or maintained by them on their said riparian lands." The court does not find the amount of water each riparian owner is entitled to, but finds the defendant's diversion and use of said waters for irrigation purposes (one-half or one-third) as shown by defendant's answer and by the evidence is not reasonable, and, if continued, would cause plaintiffs irreparable injury. The judgment enjoins defendant from diverting the waters of Conn creek from the natural channel thereof upon his lands for the purposes of irrigation at such times, or in such quantities or amounts, or in such manner, as will prevent such waters from flowing to and upon the riparian lands of plaintiffs in a sufficient quantity to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of live stock kept or maintained by the plaintiffs on their said riparian lands.

All the testimony for the plaintiffs showed that the water ran in the channel of Conn creek in abundance for their use for domestic purposes and for watering their stock for all the years up to 1902 and that, during 1902 and 1903, and until the suit was commenced in September, 1903, the water ceased to run by their lands about July and August of those years, and was not sufficient for all their needs. There was no substantial conflict in the evidence for the plaintiffs. The testimony for the defendant showed that defendant put in his first dam at his place in July, 1902, and during 1902 he took out about one-third of the volume of the water flowing in the said creek. When cutting the alfalfa, the water in the flume was allowed to run on to waste land. Irrigated about 20 acres of alfalfa. His flume connected with an old ditch which he cleared out and which he testified looked like it had 20 years' growth of brush, etc. Never used the water much on other places than alfalfa, but let it run on one place below his cellar and on another place for pasture. He testified: "During July and August the amount flowing in Conn creek gradually lessens, but there is a large flow all summer and as soon as the days begin to get cooler and the nights get longer the water in the creek begins to rise." This testimony applies simply to conditions existing on defendant's land. "All the water that passes my dam and all the water that flows or seeps back from the alfalfa patch flows down Conn creek into the lands of plaintiffs. * * * This irrigated tract * * * is on the northeast side of Conn creek and * * * is riparian to the creek. * * * Without irrigation, it would be impossible to keep the alfalfa alive."

Appellant claims error because the court did not find on certain issues raised by his answer. There is no specific finding as to this allegation in the answer, to wit: "That it is necessary for defendant to use said waters on said land in order to keep the alfalfa growing on said irrigated tract alive, and, if said water is not used to a reasonable extent upon said lands, great and irreparable injury will result to this defendant thereby." If it was not necessary to irrigate the land then clearly defendant had no right to divert the water of the creek onto it. And, if the court's view that the lower riparian owners had the paramount right to all the water flowing in said creek, then this allegation of the answer would become an immaterial allegation and no finding would be necessary thereon. Louvall v. Gridley, 70 Cal. 511, 11 Pac. 777. There was no testimony of a prior use by defendant or his predecessors of the waters of said creek for purposes of irrigation except what might be inferred from what defendant said about running the water he diverted into a ditch which had a 20 year old growth of brush in it, and we think it can be hardly be said that this bit of testimony furnished any evidence that defendant's predecessors in interest had ever diverted these waters for purposes of irrigation. The court found as follows: "Before the diversion of water of said creek by defendant for a period of 20 or 30 years the water of said creek had always flowed to and upon the lands of all these plaintiffs, so that during the dry season every year there was maintained on their said premises abundant fresh water for domestic purposes, including the watering of their stock." Then in its conclusions of law finds: "The rights of plaintiffs to a sufficient flow of water of Conn creek * * * in the natural channel thereof to and upon the riparian lands of plaintiffs * * * in a sufficient quantity at all seasons of the year sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of livestock kept or maintained by plaintiffs upon their said riparian lands are primary and paramount rights to the right of defendant to divert or use any of the waters of said Conn creek for the purposes of irrigation." If the law is as the court thus finds, then no matter how it may have found as to said allegation the judgment must have been for plaintiffs. But we do not so understand the law. The rule seems to be as laid down in Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158, and Hargrave v. Cook, 108 Cal. 72, 41 Pac. 30, 30 L. R. A. 390. In the first case it was said, approving the latter case, that a lower riparian proprietor cannot acquire a right, either by prior appropriation or by prescription or adverse user, as against an upper riparian proprietor whose rights antedate the appropriation and user, and the mere nonuser of the water by the upper proprietor and his permitting the water to pass down to the lands of the lower owner cannot make the user of the lower owner adverse or strengthen his claim of appropriation or prescription. The complaint alleges no priority of user of said waters for domestic purposes, over the defendant. We do not think the court erred in failing to make a finding of the said allegations. The plaintiffs were entitled to a judgment restraining the defendant from diverting all the water from said creek for irrigating his said land riparian to said creek.

The plaintiffs having an equal right to take the water, and it being admitted that at times there is abundance of water flowing in the creek to supply their wants and the defendant for irrigating his alfalfa, and plaintiffs claiming that at times only enough for the use of plantiffs, it becomes necessary to know just how much water must flow down said creek to their lands, for they are entitled to just so much and the defendant to so much. A judgment which enjoins the defendant from diverting such waters "for the purpose of irrigation at such times or in such quantity or amount, or in such manner as will prevent the waters of said Conn creek from flowing to and upon the riparian lands of plaintiffs described in the amended complaint in this action in a sufficient quantity to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of live stock kept or maintained by plaintiffs upon their said respective lands," is not a judgment that informs either plaintiffs or defendants just what to do. It must be observed that there is no adjudication whatever as to the amount of water the plaintiffs will need, no mention of the number of stock to be watered, and no means is provided in the judgment by which the defendant can determine just how much water he must let flow down the creek in order that plaintiffs may have their proper and necessary amount of water. The judgment is fatally uncertain, and, although it follows the findings, it gives no information as to the quantity of water which is due to plaintiffs. In Riverside Water Company v. Sargent, 112 Cal. 230, 44 Pac. 560, which was an action to determine the relative rights of plaintiffs and defendants to the use of water flowing in the Santa Anna river, the court said: "The decisions of this court establish that, in cases like the present, the findings and judgment must fix the extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount, otherwise the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation." Citing Dougherty v. Haggin, 56 Cal. 522; Alhambra Water Company v. Richardson, 72 Cal. 604, 14 Pac. 379; Lakeside Ditch Company v. Cram, 80 Cal. 182, 22 Pac. 76; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Lillis v. Emigrant Ditch Company, 95 Cal. 553, 30 Pac. 1108; also Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139, and Steinberger v. Meyer, 130 Cal. 156, 62 Pac. 483. In all these cases the judgment was set aside because of uncertainty. In the case at bar the judgment can never be legally enforced because of its uncertainty as to the amount of water defendant must let pass to the riparian lands of plaintiffs and it could not be pleaded as an estoppel (section 1908, Code Civ. Proc.) because the rights of neither party are fully determined thereby.

There are other errors complained of, mostly in relation to the findings, but, as the judgment must be reversed and a new trial had, we will not consider them.

The judgment and order are reversed, and the case sent back for a new trial, and it is suggested that the pleadings be so amended that the court upon a new trial may be able to determine specifically the relative rights of the parties.

We concur in the judgment: CHIPMAN, P. J.; McLAUGHLIN, J.

4 Cal. App. 352

LADD v. MYERS. (Civ. 265.)

(Court of Appeal, Second District, California. Oct. 16, 1906.)

1. PLEDGES — WHAT CONSTITUTES — AGREEMENT TO PLEDGE.

The payee of a note in the hands of a pledgeholder to secure another obligation having purchased property under an agreement to execute his note therefor and secure it by his interest in the pledged note, in company with the seller requested the pledgeholder to hold the note as collateral to the two claims against the payee, and pay them out of the proceeds thereof. *Held* to constitute an actual pledge to the seller and not an agreement to pledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 34.]

2. BILLS AND NOTES—ASSIGNMENT—PLEDGED NOTES—EXTENT OF PLEDGE.

One who accepts an assignment of a pledged note in the hands of one holding the pledge as security for two claims of different persons, takes it burdened with both claims, and cannot, by failing to make inquiry, occupy the position of an innocent purchaser without notice as to one of such claims.

3. APPEAL—REVIEW—HARMLESS ERROR—CORRECTION OF FINDINGS.

There is no prejudicial error in the correction of a clerical error in the findings where, owing to the fact that it does not affirmatively appear that findings were not waived, the judgment is supported in the absence of findings.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by C. B. Ladd against John W. Myers. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

M. C. Hester, for appellant. Scarborough & Forgy, for respondent.

ALLEN, J. Action originally brought by plaintiff against defendant bank to recover a sum alleged to be in the hands of said bank due plaintiff. Defendant Myers, being made a party, answered, claiming such funds. Thereupon the defendant bank deposited the same in court, and, upon the trial, findings and judgment went for defendant Myers. Plaintiff appeals from such judgment, and from an order denying a new trial.

The facts are these: One Heart, the owner of a promissory note for $2,000 theretofore executed by one Newton, placed the same in the hands of the First National Bank of Santa Ana, as pledgeholder, to hold the same as collateral to an obligation owing from Heart to one Walker, with instructions upon collection to pay Walker a specified sum and the balance to Heart. Afterwards Heart purchased certain personal property from defendant Myers, and, in consideration thereof, agreed to execute his promissory note to Myers for $1,000 and secure the same by his interest in the Newton note, and accordingly, in company with Myers, visited the bank and directed the cashier thereof to hold the Newton note as collateral to the Walker and Myers claim, and out of the proceeds pay such claim. Afterwards Heart made a written assignment of said Newton note to plaintiff, and, when the bank collected the Newton note, plaintiff demanded the proceeds thereof in excess of the amount required to pay the Walker claim. The bank declined to recognize plaintiff's claim as superior in right to that of Myers, and plaintiff brought this action against the bank, which brought the funds into court for distribution under its order. Myers having been made a party and having filed his answer, upon the trial the court found the facts as above set out, and directed judgment for Myers to the extent of the note held by him so executed by Heart.

Appellant's chief point is that the evidence is insufficient to support the findings. There is nothing in this contention. The evidence is clear and convincing as to the agreement between Heart and Myers, and upon the faith of which Heart obtained the possession of personal property for which the $1,000 note was given. It was not an agreement for a pledge, but an actual pledge. Plaintiff, when he purchased the note in the hands of the pledgeholder, took the same burden with the actual agreement under which the pledgeholder held the same as collateral, and cannot, by avoiding inquiry into the extent of the pledge, occupy the position of an innocent purchaser without notice.

There was no prejudicial error in the action of the trial court in correcting a clerical error in the findings. It does not affirmatively appear that findings were not waived; hence, the judgment is supported even in the absence of findings. Mulcahy v. Glazier, 51 Cal. 626; Baker v. Baker, 139 Cal. 626, 73 Pac. 469.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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7 Cal. Unrep. 309

PINNEY v. WILSON et al. (Civ. 250.)

(Court of Appeal, Third District, California. Sept. 25, 1906.)

New Trial—Evidence.

In an action for compensation for the sale of mining claims for $235,000, where plaintiff's witnesses testified that 10 per cent. was a reasonable compensation, and defendant testified that he offered $7,500, and that plaintiff offered in writing to take $10,000, but no such writing was introduced in evidence, and there was a verdict for plaintiff for $7,500, an award of a new trial to plaintiff was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 130, 146–148.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by George M. Pinney against Homer Wilson and others. From an order granting plaintiff's motion for a new trial, defendant Homer Wilson appeals. Affirmed.

Gavin McNab, for appellant. Geo. M. Pinney and Carter, Rickets & Dolph, for respondent.

BUCKLES, J. This was an action to recover the sum of $40,000 as a reasonable compensation for plaintiff's services rendered in procuring a purchaser for the defendant's mining claims, situated in Trinity county, known as the Chloride-Baily, Jenny Lind, and Maple group of mines. The action is based on a written promise, contained in a letter written by defendant to plaintiff, "to pay you a reasonable compensation for such service." In another part of the letter he says: "To pay you such compensation as in equity and good conscience you are entitled and the margin of profit therein will permit." The case was tried with a jury, which returned a verdict in favor of the plaintiff in the sum of $7,500, and judgment was given for that amount. Plaintiff moved for a new trial, which was granted, and defendants appeal from the order granting a new trial.

At the trial it was shown that plaintiff introduced to Wilson (defendant and appellant) one Charles Sweeny, who purchased of Wilson the said mines for $235,000. Every witness produced for the plaintiff testified that 10 per cent. on the amount for which mining property should sell was a reasonable compensation for the services in finding a purchaser. There was no testimony on the part of defendant, except that given by defendant himself. He testified that when he gave plaintiff the letter referred to, in which he promised a reasonable commission, he offered to give the sum of $7,500; that he considered it reasonable. Then, when the sale was made, he testified that plaintiff came to him and offered to take $10,000 for the services rendered. Defendant said this offer to take $10,000 was contained in writing brought to him by the plaintiff. No such writing was offered in evidence. We do not think there was any abuse of discretion in granting the new trial. The order granting the new trial is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

7 Cal. Unrep. 309

LOEHR v. LIGHT. (Civ. 272.)

(Court of Appeal, Second District, California. Oct. 16, 1906.)

APPEAL—FINDINGS OF COURT—CONCLUSIVENESS.

It being the province of the trial court to determine the weight and sufficiency of the evidence offered where there is testimony tending to support a finding, it will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3979.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by William Loehr against J. E. Light. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Henry M. Willis, for appellant. Curtis & Curtis, for respondent.

ALLEN, J. There is nothing presented in the record other than specifications of error based upon the insufficiency of the evidence to support certain findings. An examination of the record discloses that a conflict in the evidence exists in relation to each and every of such findings. It is the province of the trial court, which has before it the witnesses, to determine as to the weight and the sufficiency of the evidence tendered, and this court, under the well-established rule, where there is testimony in the record tending to support any particular finding, will not disturb the same upon appeal.

The judgment and order are therefore affirmed.

We concur: GRAY, P. J., SMITH, J.

4 Cal. App. 314

PEOPLE v. FERNANDEZ. (Cr. 29.)

(Court of Appeal, Third District, California. Sept. 26, 1906.)

CRIMINAL LAW — LIMITING ARGUMENT OF COUNSEL—DISCRETION OF COURT.

A trial for assault on a female child with intent to rape lasted five days. The testimony occupied 350 pages of the transcript. The evidence was conflicting. The testimony of the child raised the question whether it could be safely considered. *Held*, that an order of the court, limiting the time of the argument to 1¾ hours to each side, was an abuse of discretion requiring a reversal on it appearing that the counsel for defendant objected thereto, and showed that he could not complete his argument within the time limited, though he was allowed 20 minutes additional time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1657.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

A. Fernandez was convicted of an assault on a female child with intent to rape, and he appeals. Reversed and remanded.

Ben Berry and F. G. Ostrander, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was charged by information with having feloniously assaulted one Stephini Granado, a female child about 7 years old, with intent to commit rape. He was convicted, and sentenced to imprisonment in the state prison for the period of six years, and appeals from the order denying a new trial, and from the judgment of conviction.

1. It appeared by evidence that the child was living with her uncle, Eduardo Enriquez, and his wife, Altagratio Enriquez. Some time after the noon hour of October 17, 1905, Eduardo was at his work of clearing some ground from timber near his home, and, needing the help of his wife, called her to him. Soon thereafter she returned to the house, and, looking in, saw a man apparently in sexual contact with this child. The wife called to her husband, who came at once. The man ran away as soon as he was surprised by Altagratio. One of the strongly contested facts in the case, as to which the evidence is by no means clear, was whether either the husband or wife recognized the alleged assailant of this child. Altagratio testified that she saw the accused in the act of making the assault, and testified to circumstances tending to corroborate the fact of an assault being made at the time. The husband and wife went to the girl, and at once chastised her for her conduct, and began interrogating her as to the facts. Over the objection of defendant the witness Altagratio was permitted to testify to what the child told her of the occurrence. She testified: "I scolded the little girl, and told her, and I asked her what had happened her, and why she hadn't called me. Then she told me that this man had told her—then the little girl told me she hadn't called because this man had put an axe to her head, and told her not to call. Mr. Ostrander (attorney for defendant): We move to strike it out if the court please, upon the ground this is hearsay. The Court: The motion will be denied. Mr. Hoar (prosecuting attorney): Did the child tell you what the name of the man was that was with her? Mr. Ostrander: We, of course, interpose our objection to that on the same line. I want to make it specific everywhere. The Court: Yes. Mr. Ostrander: And we except. The Witness: Yes, sir; because none of us have seen him before this Sunday. Q. When did the child tell you what the name of this defendant was? A. Why, at the same moment, because I wanted to know. * * * Q. Was it immediately after you discovered the defendant? A. Yes, immediately after I

saw the dirty act because I thought he had killed the little girl like any villain with a child might do. Q. What did the little girl tell you the name of the man was? A. Albero" (the first name of defendant). The motion to strike out was not directed to any particular part of the witness' answer, part of which as given in the record, was free from the objection. The court and counsel probably understood that the objection was made to the hearsay statement, and the record would seem to warrant our treating the objection as directed to that particular statement above the threat made by her assailant. The point, however, arises also on the question as to the name of the girl's assailant where the objection was specific. The evidence shows that the witness saw enough herself, if the jury believed her, to establish the assault, and that what the child told the witness was in response to questions asked by Mrs. Enriquez after the assailant had fled. The rule on this subject is well settled, and has been often approved of by our Supreme Court. It is found stated in People v. Lambert, 120 Cal. 170, 52 Pac. 307, People v. Wilmot, 139 Cal. 103, 72 Pac. 838, and in many earlier cases cited in these two cases. It was said in People v. Wilmot: "It is well settled that in prosecutions for rape the people may prove that the injured party made complaint of the injury while it was recent, and that this may be shown both by the prosecutrix, and those to whom the complaint is made. While such evidence would ordinarily be hearsay, its admission in this class of cases is justified upon the ground that in such cases, when restricted to the fact of complaint, it is, in the strictest sense, original evidence." Mr. Greenleaf says: "This complaint constitutes no part of the res gestæ; it is only a fact corroborative of the testimony of the complainant." 3 Greenleaf on Ev. § 213. It was further said in People v. Wilmot: "It is clear that to allow any mere statement of the prosecutrix as to the details of the affair, or as to the name of the person accused by her, to be given in evidence would be to allow hearsay evidence to prove the offense." Citing People v. Lambert, supra. In the present case the reason for admitting proof of the complaint is lacking, for the offense was witnessed by the person to whom it was sought to show what the child said had occurred. No question of force or of consent could arise as essential to the crime, and no fact to which the child might testify could be corroborated by her hearsay statements beyond the fact of the complaint. Indeed, it can hardly be said that the child made any complaint at all. What she said was drawn from her by the questions of Mrs. Enriquez.

2. Exception was taken to the opening statement of the district attorney, and prejudicial error is claimed for the alleged misconduct. It appeared that defendant, his brother, and two other men were engaged in gathering corn husks not far distant from the Enriquez house at the time of the assault. Suspicion became directed to these persons in some way, and the sheriff arrested all of them. Enriquez was called upon to point out the one against whom he had made complaint, and defendant was held in custody, and the others released, and went their way. While riding with the sheriff and before the parties separated, the four men, who were Mexicans, were engaged in talking in the Spanish tongue, none of which conversation the sheriff understood. The district attorney told the jury in his address that after the defendant had been separated and taken away by the sheriff it would be proved that the brother of defendant attempted to bribe the complaining witness, Enriquez, to dismiss the case. Also that similar attempts were made by defendant's partner, Rodriquez. It was not claimed by the district attorney that the defendant knew of this, or had authorized any such attempt. And subsequently, when he offered to prove the fact by Enriquez, the defendant objected to the evidence, and the objection was sustained. The district attorney justified his statement and his offer on the ground that agency might be inferred from the fact that while riding along with the sheriff the parties were talking of the defendant's guilt, and that the attempt to bribe Enriquez was the subject of the conversation. Also that the fact that the attempt at bribery having been made by defendant's brother shortly after they had separated was a circumstance corroborative of his agency to make the attempt. All these facts were stated to the jury in his opening statement with considerable amplification, and against defendant's frequent and persistent objection. The court stated that it was difficult to place restrictions upon counsel in making their statements to the jury; that it could not anticipate what connection the evidence might have with the case, or how counsel would connect it; that when offered, the court would then rule upon it, and, in fact, the court did refuse the evidence when offered, and directed the jury to disregard the circumstance. It is not necessary now to hold that a new trial should be granted for this alleged misconduct alone. But we are quite satisfied that the district attorney overstepped the bounds of propriety in stating that he would prove facts, in their nature calculated to prejudice the defendant, which facts he must have known were not admissible as evidence, unless he could connect them with the knowledge and approval of defendant, and this he did not pretend could be done, except from the two circumstances above stated. The court very properly took the view that the jury could not infer from so unsubstantial a basis that defendant had authorized his brother or Rodriquez to commit a felony. But the mischief which defendant sought to prevent was already to some extent done. It seems to us that counsel should, in their opening

statements, refrain from stating that they would prove facts which they know cannot be established by competent evidence, or by evidence which they have reason to believe to be inadmissible to establish the facts claimed to exist. Courts frequently, to protect the rights of parties, refuse to allow offers of evidence to be made in the presence of the jury which the opposing party has reason to believe is inadmissible and may prejudice his case by being stated in the presence of the jury. Cases are sometimes reversed where counsel persist in seeking to obtain advantage by offering evidence in the presence of the jury which they know is incompetent or inadmissible. For somewhat the same reason, counsel should avoid taking undue advantage, in the opening statement to the jury, by accomplishing at that stage of the case what they know they will not be allowed to accomplish when they come to offer their evidence.

3. At the conclusion of the evidence the court made an order limiting the argument to an hour and three-quarters to each side, to which defendant objected, and the objection having been overruled, the defendant excepted. In support of the motion for a new trial Mr. Berry, one of defendant's attorneys, made affidavit, which is not contradicted, that five days were consumed in the trial of the case; that the testimony and proceedings occupy 350 pages of the transcript as compiled by the reporter; that the testimony of two witnesses taken at the preliminary examination of the defendant, and the testimony of one witness taken at a former trial of said cause, consisting of 100 pages, was admitted by stipulation; "that it was utterly impossible to submit a full and fair argument of the cause to the jury in that time; that by reason of the limitation, counsel for the defendant were prevented from presenting to the jury many material points, which would have been presented, but for the order of the court limiting the time for argument, and he believed the rights of defendant were prejudiced by the said order of the court." It appeared that Mr. Ostrander closed the argument for defendant, and was given five minutes' additional time, and, not having concluded his argument, he was offered 15 minutes of the district attorney's time, which he used and closed his argument.

The principal cases in this jurisdiction where the question is discussed are People v. Keenan, 13 Cal. 581, and People v. Green, 99 Cal. 564, 34 Pac. 231. The cases where the point has arisen are quite fully shown in note to Yeldell v. State, 100 Ala. 26, 14 South. 570, 46 Am. St. Rep. 23. It was said in People v. Green, supra: "That a defendant being tried on a charge of felony has a constitutional right to be fully heard in the defense by counsel, which it is not within the discretionary power of the court to deny or abridge, is not questioned. Yet it has been found impossible to formulate any abstract rule or definition by which the extent of this right may be ascertained in all cases. It is also well settled that the court has a discretionary power to restrain what has been termed, perhaps, not quite appropriately, an abuse of this right by which is meant very little more than that counsel may be restricted to a discussion of matters relevant to the case, and restrained from wasting the time of the court by useless repetition. But it must always be a difficult as well as a delicate matter, in a case like this, for the court to determine in advance what limitation should be imposed upon counsel against their consent (Williams v. State, 60 Ga. 369, 27 Am. Rep. 412); and, as was said in the case of People v. Keenan, 13 Cal. 581: 'If it [the court] imposes a limitation of time upon counsel against their consent, this must be done at the risk of a new trial if it be shown by uncontradicted affidavit that the prisoner was deprived by the limitation of the opporunity of a full defense; for this is his constitutional right, without which he cannot be convicted.'" In People v. Green the court gave a skeleton of the testimony and the issues of fact "to test the truth of the affidavits of counsel, to the effect that the time to which they were limited was insufficient." In that case the charge was robbery and the limitation put upon counsel for defendant was one hour, and the court held it to be an abuse of discretion. It is not possible to derive much benefit from a comparison of the facts in other cases with the one in question. The length of the trial and the quantity of testimony taken are not always or necessarily determinative of the question. Nor is it a safe guide for the judge to determine the limit by the time in which he might think he could adequately present the case fully for the defendant. The character of the testimony and the issues raised by it; its conflicting nature as well as the nature of the charge itself must be considered; as was said in People v. Keenan, supra: "It is difficult for a judge to determine what effect a given line of argument may have upon a jury, or some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client. The minds of men are so differently constituted that one advocate may require much more for the statement and elaboration of his views than another."

Where counsel are limited to a stated time deemed by them too short, they may find it necessary to omit points of importance in order to give more attention to others deemed of greater importance. Or the elaboration of essential points deemed important may be prevented in order to make all the points desired. Then, too, counsel, speaking under limitations of time which they feel to be wholly inadequate, are under constraints not conducive to their best efforts, and to the full protection of defendant's rights. The uncontradicted affidavit of counsel is that within the time limited it was "utterly impossible to present a full and fair argument of the cause to the jury" and that counsel were thereby "prevented from presenting to the jury many material points which would have been presented but for the order of the court limiting the time for argument." We cannot very well skeletonize the testimony in support of counsel's affidavit without to some extent indicating our impression of the sufficiency or insufficiency of the evidence to justify the verdict, and this we must avoid, as the case must go back for a new trial. Suffice it to say that the peculiar circumstances surrounding the case, as well as the nature of the charge; the many contradictory statements of material facts by witnesses for the prosecution; the tender age of the child, and the importance of her testimony given under conditions justly raising the question for the jury whether it could safely be considered by them in certain material respects; the conflict in the testimony of witnesses at the preliminary examination, and at the first trial, and at the last or present trial, and the alleged self-impeachment of important witnesses for the prosecution; the testimony as to the alibi claimed by defendant; the conflict in the testimony as to whether Enriquez truthfully repeated what witness Pete Rodiquez said to him about compromising the case which went into evidence to show bias of the witness; that the medical experts did not agree as to the results of a miscroscopical examination to discover spermatozoa on the child's clothing; the fact that much of the testimony was given by witnesses who could not speak or understand the English language, and testified by an interpreter; these and other considerations which might be suggested lead us to the belief that counsel's affidavit is true, and being uncontradicted by the district attorney, or by the condition in which we find the record, we must conclude, under the authorities cited, that there was prejudicial error in making the order complained of.

4. It seems to us that in view of the theory of the prosecution and of certain facts attending the alleged assault, for example, that previously thereto her assailant gave the child freely of wine to drink, instruction numbered 19 given for the people, to which objection is taken, should be more specific. It was as follows: "In a charge of assault to rape a female under the age of consent, it is not necessary to show that the defendant intended to gratify his passion, at all events, or to use force, but it is enough that he intended to have intercourse, *and took steps to that end.* The uncorroborated testimony of the female upon whom the assault is made, *if you believe her testimony to be true, is sufficient to establish the charge.*" The objection of defendant is directed to the italicized portions of the instruction. The first point made is that the intention alone is not sufficient; that there must be in this, as in all crimes, a union of act and intent (Penal Code, § 20); and that there were in this case, as claimed by the people, several steps taken to the end sought which would not constitute an assault, or attempt to commit the crime, and yet the instruction might lead the jury to so consider them as justifying conviction. Attention is called to People v. Johnson, 131 Cal., at page 515, 63 Pac., at page 844, where similar language is used, but after the words "and took steps looking towards such intercourse," the following appears: "And laid hands upon her for that purpose, although he did not mean to use any force to complete his intent if it caused the child pain, and desisted from his attempt as soon as it hurt, he would yet be guilty of an assault with intent to commit the crime charged in the information." As the instruction reads something in itself short of touching the child might be understood by the jury as constituting an assault with intent to commit the crime charged. Force is not an element of an assault where the female is under the age of consent, but there must be contact of some sort with the child or taking hold of her in such a manner as to indicate the intent to have carnal knowledge of her. But this intent, of course, may be judged by the facts and circumstances.

The second point of objection brings the instruction dangerously near the cases of People v. Johnson, 106 Cal. 289, 294, 39 Pac. 622, and People v. Barker, 137 Cal. 557, 70 Pac. 617, where the instruction read: "If you believe the prosecutrix it is your duty to render a verdict accordingly," and new trials were granted for the error. The principle is well settled that the defendant may be convicted upon the uncorroborated testimony of the prosecutrix, or, as in this case, upon the uncorroborated testimony of the female upon whom the assault was committed; People v. Fleming, 94 Cal. 308, 29 Pac. 647; People v. Gardner, 98 Cal. 127, 32 Pac. 880, and other cases; but the rule should be so stated that the instruction would not be obnoxious to the objection that it is a charge with respect to matters of fact. People v. Johnson, supra; People v. Barker, supra.

5. The claim is made that the court abused its discretion in allowing the child Stephini to testify, after her examination on her voir dire. It was said in People v. Craig, 111 Cal. 460, 44 Pac. 186: "The burden is upon the person who objects to the child being a witness, to show that he is incapable, and the determination of the judge upon such objection and an examination of the child, is not a matter for review, any more than his ruling upon the capacity of an adult who may be offered as a witness." In People v. Daily, 125 Cal. 104, 67 Pac. 16, the court seems to have regarded the question as one of discretion, inferentially holding that if abused, the appellate court might review it. However this may be, the case would have

to be very clear before we should disagree with the trial judge as to the mental competency of a witness. His opportunity to pass upon the matter is much better with the witness before him than ours can be by reading the cold record. Although permitted to testify, the jury would, doubtless, take into consideration the immaturity of the child's mind in passing upon the weight of its testimony. We cannot say that in this instance the court erred in permitting the child to testify.

Other questions presented may not again arise, and we will therefore not notice them.

The judgment and order are reversed, and the cause remanded for a new trial.

I concur in the judgment: BUCKLES, J.

I concur, but base my concurrence wholly on People v. Keenan, and People v. Green, supra, which I deem as binding on this court: McLAUGHLIN, J.

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7 Cal. Unrep. 311

E. P. VANDERCOOK CO. v. WILMANS CO. (Civ. 191.)

(Court of Appeal, First District, California. Sept. 21, 1906.)

1. Brokers — Action for Compensation — Sufficiency of Evidence.

In an action for compensation for the sale of real estate, evidence *held* sufficient to sustain findings that the plaintiff procured a purchaser who was ready, able, and willing to purchase, and thereby completed its services and earned its commission.

2. Same—Right to Commissions—Necessity for Actual Sale.

Under a contract whereby the owner of land gave plaintiff exclusive authority to sell it and agreed to pay a commission on any amount for which the property should be sold, the plaintiff was entitled to his commission on procuring a purchaser able, ready, and willing to purchase though the sale was not actually completed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 75-81, 91-96.]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by the E. P. Vandercook Company against the Wilmans Company. From an order denying defendant's motion for a new trial, he appeals. Affirmed.

John S. Partridge, for appellant. Snook & Church, for respondent.

COOPER, J. This action was brought to recover $791.87 as commissions for the sale of real estate under a written contract. The case was tried before the court, findings filed, and judgment ordered and entered for plaintiff. Defendant has appealed from the order denying its motion for a new trial. The court found that, pursuant to the authorization contained in the contract, the plaintiff procured a purchaser for the lands therein described who was ready, able, and willing to purchase, and thereby completed its services and earned its commissions. The defendant contends that the evidence does not support the findings of the court in this regard. The findings are conclusive upon us if there is substantial evidence to support them, even though the evidence may be conflicting or may preponderate in favor of defendant.

The defendant was, at the times mentioned in the pleadings and findings, a corporation. Its capital stock was divided into 300 shares, and was, at the time the contract was made, owned and held by J. M. Wilmans, F. W. Wilmans, Lillian W. Wilmans, Clara E. Wilmans, and Martha J. Wilmans. J. M. Wilmans was the secretary and managing agent, and owned two-thirds of the shares of the capital stock of the corporation. Its assets consisted of about 1,400 acres of land situate in Stanislaus county in this state. The managing agent of defendant, J. M. Wilmans, spoke of the defendant's property as his own land and as being mortgaged for $75,000, or, in his language: "I owed $75,000 on the whole property." There is evidence to the effect that on May 21, 1903, Merle, the agent of plaintiff, was in Stanislaus county with one Witcher, who was looking at lands with a view of purchasing, and Merle was showing Witcher different tracts of land. They saw the lands belonging to the defendant, and Witcher seemed to be pleased with them, and to desire to purchase them, or at least a part of the land owned by the defendant. Merle procured from defendant, through J. M. Wilmans, its agent, with admitted power to act, a contract in writing, authorizing the plaintiff, exclusively, to sell a tract of land described therein, containing 310 acres, at $100 per acre, and another lot containing 2¼ acres at $300 per acre. The contract contained the clause: "If said property is sold, or a purchaser is found by E. P. Vandercook Co., or through their agency, we agree to pay the said E. P. Vandercook Co. 2½ per cent. commission on any amount for which said property shall be sold." The contract was to continue for one month from date, May 21, 1903, and was continued by written extensions to July 20, 1903. It contained a clause that it should be irrevocable until withdrawn by written notice.

Merle testified that he showed the property to Witcher and "Witcher said he would take that particular piece of property described in the contract. He was to take 310 acres for $100 an acre and 2¼ acres at $300 an acre. * * * Mr. Witcher said if everything was all right the abstract of title was correct, he would take that amount of land. He made no other objection than that the abstract of title should be correct. We had been at the ranch a couple of hours driving around the premises. This particular 300 acres was pointed out by Mr. Wilmans on the map and we drove down and saw the land. Mr. Witcher did not tell Mr. Wilmans at the ranch that he would take the land; he told him so at the hotel." Witcher testified that he was ready at the time the contract was made; that the purchase looked all right to him.

Now, after the plaintiff had procured for the defendant a purchaser for the land described in the contract who was able, ready, and willing to take the land, there arose some question in the mind of Witcher as to whether or not the amount of land described in the contract would be sufficient for his purposes. Wilmans suggested that he would sell Witcher a half interest in the whole ranch. Merle testified that, while this proposition was pending, he went to Wilmans and asked him as to the plaintiff's commissions in case Witcher purchased half the ranch instead of that described in the contract, and that Wilmans replied: "I will stand by my agreement; will pay you your commission as I agreed on the purchase price, which was $31,000." Witcher testified that he heard this conversation, and that Wilmans said: "We will pay the commissions on the sum of $37,675 at the rate of 2½ per cent., but that was in reference to the 312½ acres in reference to the first deal." Wilmans testified in regard to this conversation with Merle: "Then he asked about the commission; I told him that if the trade went through, if he made any trade, that I would see that he got his commission of 2½ per cent."

It therefore appears clear that the minds of the seller and purchaser were first brought together by the plaintiff on the sale of the lands described in the contract. It is admitted that Witcher was able to purchase. It is a significant fact that he gave Wilmans $2,400 while the contemplated sale under the contract was in progress. It is now claimed both by Wilmans and Witcher that this $2,400 was a loan and had nothing to do with the contract, but the claim that it was a loan seems to have been an afterthought. Witcher testified as to this payment: "This thing had been dragging along from May 23d to June 24th. Mr. Wilmans stated to me that he was in need of $2,400 to pay some money due in San Francisco. * * * I said to Mr. Wilmans, 'I have some idle money, I will lend you that $2,400; if I ever buy anything from you it can be applied to the price. If I don't, it is an ordinary loan to be returned to me when the note becomes due.'" The witness could not remember the length of time of the note, nor whether it was given by the corporation or Wilmans. Wilmans testified that he "owed some money in the bank, and I was anxious to pay it. I asked him if he would advance it and take may note for it, and if there was nothing went of this I had to pay him back." Wilmans did not remember whether he gave his personal note or the note of the corporation. No security was asked or given. The note was not produced in evidence. Before the sale of the lands described in the contract was completed the arrangement was changed at the suggestion of Wilmans, and Witcher agreed to buy the shares of capital stock of defendant corporation belonging to the Wilmans. He took an option on them in August, 1903, bought half of them in September and the balance in October of the same year. Witcher testified: "I think the suggestion that I should buy the stock of the corporation came from Mr. Wilmans." Witcher was asked: "Q. Mr. Witcher, if you had not bought the stock of the corporation, would you have purchased any part of the ranch? A. Well, I probably would have in time, though I never did get around far enough to close up the deal." Wilmans testified on the same point: "I suggested that he take the 500 acres, and he said he would entertain it about the 1st day of August. I suggested to him along about the 1st of August that he take stock in the company." It is a significant fact that, although the parties had been brought together by the plaintiff, and Witcher had given the defendant $2,400, after the suggestion of the sale of the stock to the contemplated purchaser, the sale of the stock was not made until the contract with the plaintiff had expired. The sale of the stock of the corporation to Witcher was, as to the owners of the stock, the equivalent of the sale of the ranch. The sale is spoken of by Wilmans as a sale of the land. He testified: "Some of that land is not worth any $100 an acre, while there is a portion of the property would be worth $110, and some down at $80. So in fixing it all up, in adjusting the value, I put it on that basis, $91.50 for the 1,400 acres."

At the time the plaintiff was employed the Wilmans were the owners of all the stock of defendant and thus owned all that defendant owned. Defendant owned the ranch of 1,400 acres and nothing else. The Wilmans were, for the purposes of this case, the corporation, and they desired to sell the lands described in the contract and pay their debts. They did, in effect, sell the lands described in the contract, together with all the lands owned by the corporation. They sold to the purchaser found by plaintiff. The defendant promised to pay plaintiff the commissions when it made the contract, and it again promised when the contract was changed so as to include other lands. It has not paid the commission, and it is no defense that the sale was made by a different mode from that contemplated in the contract. The purchaser produced by plaintiff has, in fact, become the owner of the lands which defendant desired to sell. It is true that Witcher, who purchased the land by purchasing all the shares of stock of defendant, was not a party to the contract, but he knew of it when he purchased the stock. He heard Wilmans promise to pay the commissions. He will not be allowed in this way to defeat the claim of plaintiff against defendant.

When the sale of the capital stock was completed Witcher retained $30,000 out of the amount to be paid by him "as a guaranty that the company was not further obligated than what the books showed." The company was under the obligation to plaintiff to pay the commissions due it, whether the books showed it or not. The transaction must be stripped of all its intricacies and viewed in the light of common sense. It was, in substance, a sale of the ranch of the Wilmans to Witcher. The corporation was only the instrument by which the title was held for the owners of the capital stock, and by its duly authorized agent it agreed to pay plaintiff for its services. The services have been performed and the defendant must pay for them. If the corporation had sold the ranch to Witcher and made its deed under its corporate seal, and he had paid the money to the corporation, the title would have passed. The title is now in the corporate name of defendant, but as Witcher holds all the shares of the capital stock of defendant he holds that which is equivalent to the title. We therefore conclude that the findings are supported by the evidence.

The contention of the appellant that the commissions were to be paid only out of the purchase money when an actual sale should be made is without merit. The agreement was to pay plaintiff "2½ per cent. commission on any amount for which said property shall be sold." This does not make the commissions payable only out of a particular fund. When plaintiff procured a purchaser, able, ready, and willing to purchase, defendant could not by its own act, in suggesting and carrying through a different scheme, take the benefit of the plaintiff's services without compensation. Courts will not readily lend their assistance to aid parties in escaping their just liabilities through technicalities.

The order is affirmed.

We concur: HARRISON, P. J.; HALL, J.

MEMORANDUM DECISIONS.

THOMPSON v. WHEELER. (Civ. 216.) (Court of Appeal, Third District, California. Aug. 27, 1906.) Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge. Action by Anna Thompson against C. M. Wheeler. From a judgment for plaintiff, defendant appeals. Submission set aside. A. H. Carpenter, for appellant. Ashley & Neumiller, for respondent.

PER CURIAM. The submission is set aside and vacated, and the cause ordered to be placed on the next calendar for argument, especially upon the following points: (1) Was the delinquent tax list legally filed? (2) Did the lien given by statute rest in the purchaser? (3) To what extent and as to what facts connected with the sale is the deed conclusive evidence? (4) What constitutional limitations are placed upon the Legislature to make the facts recited in the deed conclusive evidence of the holder's title to the land? (5) Was it incumbent upon defendant to make proof of the ordinance under which the tax levy was made?

CALIFORNIA REPORTER

88 PACIFIC REPORTER

150 Cal. 59

CITY OF LOS ANGELES v. DAVIDSON.

(L. A. 1,850.)

(Supreme Court of California. Oct. 11, 1906. Rehearing Denied Nov. 9, 1906.)

MUNICIPAL CORPORATIONS—GRANTS OF FRANCHISES — CITY COUNCIL — VETO POWER OF MAYOR.

Act March 1, 1901 (St. 1901, p. 265, c. 103), provides that an applicant for a street railroad shall file with the governing body an application therefor, and thereupon such governing body shall advertise the fact stating the character of the proposed franchise, that sealed bids will be received therefor, and that such franchise shall be sold by said governing body to the highest bidder in gold coin, who shall thereupon be required to file within five days a certain described bond. Such act was amended Act March 3, 1903 (St. 1903, p. 90, c. 82), so as to provide that after filing the bond the said franchises shall be granted by ordinance to the person, firm, or corporation to whom it has been sold. The Los Angeles city charter provides that all legislative power of the city is vested in the council, subject to a veto by the mayor, and shall be exercised by ordinance; that every ordinance passed by the council, before it becomes effective, shall be submitted to the mayor; and that it shall not be operative unless approved by him, or unless upon his veto it shall be again passed by the council by a two-thirds vote. An applicant for a franchise to construct a street railroad made application to the city council, which application was duly advertised and sale of the franchise ordered, pursuant to which such franchise was struck off and sold to the applicant, who duly executed the statutory bond, which was approved by the city council, who thereupon passed an ordinance whereby the franchise was in form granted to the applicant, which ordinance was presented to the mayor and vetoed. No action was taken on the veto. *Held*, that the applicant did not acquire the franchise.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the city of Los Angeles against A. N. Davidson. From a judgment for plaintiff, defendant appeals. Affirmed.

J. S. Chapman and Ward Chapman, for appellant. W. B. Mathews, for respondent.

McFARLAND, J. The plaintiff is a municipal corporation, and Tenth street is a public street lying within its boundaries. At the time of the commencement of this action the defendant was engaged in digging up part of the surface of said Tenth street, with the intention of constructing and operating thereon a street railroad, claiming to have the franchise for the construction and operation of such railroad; and this action was brought to obtain an injunction restraining defendant from digging upon said street and from constructing or maintaining a railroad thereon. A temporary restraining order was granted as prayed for. Defendant answered, setting up fully his said asserted franchise, and praying judgment that said franchise had vested in him, that he has the right to construct and operate the railroad along said street, that plaintiff be enjoined from interfering with the construction of said railroad by defendant and from hindering him from enjoying his franchise, etc. The case was tried upon the pleadings and a stipulated statement of facts, and the court rendered judgment in favor of plaintiff, enjoining defendant as prayed for. From this judgment, defendant appeals.

The main question in this case is whether defendant had a franchise to construct and operate a street railroad along Tenth street. There is substantially no dispute about the facts, and the question here involved depends mainly on the meaning of certain legislative acts and provisions of the municipal charter of plaintiff. On March 11, 1901, an act of the Legislature was approved, entitled "An act providing for the sale of street railroad and other franchises in municipalities," etc. St. 1901, p. 265, c. 103. Section 1 of said act provides, among other things, that every franchise to construct or operate a street railroad upon any street or highway "hereafter proposed to be created by boards of supervisors, boards of trustees, or other governing or legislative bodies of any city and county, city or town within the state * * * shall be granted upon the conditions in this act provided and not otherwise." Section 2 provides that an applicant for such franchise shall "file with the governing or legislative body" an application therefor, and thereupon said governing body shall "in its discretion"—and must in case the application is accompanied with a certain petition of persons owning land along a street—advertise the fact of said application in manner as provided. The advertisement must state the character of the proposed franchise to be granted, that sealed bids will be received up to a day and hour named, and that the successful bidder must pay to the municipality 2 per cent. of the gross annual receipts of the use of the franchise. It shall further state "that the said franchise will be granted to the person, firm, or corporation who shall make the highest cash bid therefor," provided that when the bids are opened any person may raise the highest bid not less than 10 per cent., and it may again be raised by others, and "said franchise or privilege shall finally be struck off, sold, and granted by said governing body to the highest bidder therefor in gold coin." It is also provided that the successful bidder shall, within five days after the franchise shall have been sold and struck off to him, file a certain described bond. In accordance with the provisions of the said act of March 11, 1901, the defendant herein made an application to the city council of plaintiff for a franchise to construct and operate a railroad for a distance "along Vermont avenue to Tenth street, and thence along Tenth street to Western avenue." And on November 27, 1904, the council made an order that said franchise be sold for a period of 39 years. In advertising and conducting the sale all the provisions of said act were complied with, and on the 6th day of February, 1905, which was the day set for opening the bids, the bids were opened and defendant increased his bid 10 per cent. and bid $700 for the franchise; and there being no other bid the city council did on said 6th day of February accept the said sum of $700, and did thereupon strike off, sell, and award to the defendant herein the said franchise, and defendant immediately paid said sum of money, which was accepted by the council. (This money has, however, been tendered back to defendant and is at his disposal.) On the next day, February 7th, defendant duly executed and presented to the council the bond required by the statute, which was approved by the council, and thereupon, on said February 7th, an ordinance was passed by the council whereby said franchise was, in form, granted to defendant. This ordinance was presented to the mayor of the city, who returned it with his veto, putting his veto on the ground that certain amendments to the charter of the city, which limited the term of a street railroad franchise to 21 years, were approved by the Legislature of the state on said February 7, 1905. The council did not afterwards take any action on said veto.

The charter of plaintiff provides for, among other things, a city council, consisting of one councilman from each ward. It is provided in the charter that "all legislative power of the city is vested in the council, subject to the power of veto by the mayor as hereinafter given, and shall be exercised by ordinance." It is further provided that "the enacting clause of all of the ordinances shall be substantially as follows: 'The mayor and council of the city of Los Angeles ordain as follows.'" The said act of March 11, 1901, was amended by an amendatory act approved March 3, 1903 (St. 1903, p. 90, c. 82), so as to provide that after the filing of the bond of the successful bidder "the said franchise shall by said governing or legislative body be granted by ordinance to the person, firm, or corporation to whom it has been struck off, sold or awarded." The said amendatory act of March 5, 1903, also amends the act of 1901 in some other particulars: For instance, the word "granted" in section 5 of the act of 1901, is changed by the act of 1903 to "awarded." The first act does not provide for the granting of the franchise by an ordinance, but seems to assume that the franchise passes by the acts of the governing body by which it is "struck off, sold," etc., by the governing body, and provides that if the bidder fails to file the required bond "the award of said franchise shall be set aside," while the act of 1903 provides that upon the filing and approving of the bond "the said franchise shall by said governing or legislative body be granted by ordinance to the person," etc. The city charter provides that "every ordinance which shall have been passed by the council before it becomes effective," shall be submitted to the mayor, with the usual provisions that the ordinance shall not be operative unless approved by the mayor, or unless upon his veto it shall be again passed by the council by a two-thirds vote.

No doubt the legislative enactments and the charter provisions above referred to are a little confusing, and leave considerable room for the forcible argument of counsel for appellant that the franchise here in question vested in appellant by the act of the city council on February 6th striking off, selling, and awarding it to appellant. But the amendments to the act of 1901 by the act of 1903 must be construed in connection with the provisions of the city charter; and, so construing them, we think that the latest expression of the legislative will, as expressed in the act of 1903, was that the franchise here in question should finally pass from the sovereign to the individual only by an ordinance approved by the mayor. It is true that the provision in the act of 1903 is that the ordinance by which the franchise is to be granted shall be by "the governing or legislative body," without special mention of the mayor; but the provision must be construed in view of the legislative knowledge that by the charter all "legislative power" of the council must be "exercised by ordinance," that the form of an ordinance includes the mayor, and that no ordinance "becomes effective" until approved by the mayor, or passed over his veto. Otherwise the amendment of 1903, providing for the granting of the franchise "by ordinance," would have to be entirely disregarded.

We have disregarded the contention of respondent that the amendments to the charter alleged to have been approved by the Legislature on February 7th are conclusive against appellants, because there is no finding or evidence that said amendments were approved as early as February 7th. We have also disregarded the contention of respondents that, by the act of the Legislature approved March 27, 1897 (St. 1897, p. 190, c. 129), it is expressly provided that every ordinance of a municipality providing for the grant of a franchise "shall, before it takes effect, be presented to the mayor for his approval," because it is doubtful if such provision applies to a municipality having a freeholders' charter.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.

150 Cal. 96

DODGE et al. v. KINGS COUNTY.

(Sac. 1,258.)

(Supreme Court of California. Nov. 8, 1906.)

1. COUNTIES — COUNTY BOARDS — EFFECT OF MOTIVE ON OFFICIAL ORDERS.

That a board of supervisors intended to discriminate against a publisher, in fixing a lower rate for the official publication of the delinquent tax list than for other county advertising, would not vitiate the order.

2. SAME — ACTIONS — EVIDENCE — SUFFICIENCY.

Evidence, in an action against a county to recover for county printing, *held* to sustain a finding that there was good reason for fixing a lower rate for the publication of the delinquent tax list than for other public printing, and that the action of the board of supervisors in so fixing the rate was not arbitrary or unnatural.

Department One. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by F. A. Dodge and another against Kings county. Plaintiff appeals from the judgment. Affirmed.

E. T. Cosper, for appellants. H. Scott Jacobs, Dist. Atty., for respondent.

SLOSS, J. Appeal by plaintiffs from a judgment and an order denying a motion for new trial.

The action was brought by the appellants, printers and publishers of the Hanford Sentinel, a newspaper, to recover from Kings county the sum of $383.75 for printing and publishing the delinquent tax list of the defendant in June, 1901. The publication was made by direction of the tax collector. Under the provisions of subdivision 21, § 25, of the county government act (St. 1897, p. 464, c. 277), the tax collector had authority to procure such advertising at a price no greater than that fixed by the board of supervisors, who are required to annually fix the price of all county advertising. Journal Pub. Co. v. Whitney, 97 Cal. 285, 32 Pac. 237. In January, 1901, the board of supervisors had made an order reading as follows: "It is ordered that the following rates be, and they are, hereby established for county advertising during the present year, to wit: For first insertion, per square, fifty cents. For each subsequent insertion, per square, twenty-five cents. Said rate to apply to all county advertising except the publication of the delinquent tax list, the rate for which is hereby fixed as follows: For four insertions, fifteen cents per square." The court gave the plaintiffs judgment for $46.05, which was the amount due at the rate of 15 cents per square for four insertions, as fixed by the order of the board of supervisors. The claim of the plaintiffs, however, is that the order of the board, in so far as it purported to fix a less rate for publishing the delinquent tax list than for other county advertising, was void. The complaint alleges that the rates fixed for general county advertising are reasonable and just, that the work of printing the delinquent tax list is of the same general character, and that the rate fixed for publishing such delinquent list was so low as to entail a loss on any one publishing it at such rate. The distinction made between the two classes of printing is alleged to be arbitrary and without good reason, and it is charged that the board of supervisors adopted the two different rates for the purpose of discriminating against the plaintiffs.

So far as concerns the allegation of an intent to discriminate against the plaintiffs, the finding of the court was against plaintiffs; but, even if it had not been, it cannot be contended that the validity of the action of the board of supervisors should be made to depend upon the motives which actuated the members of the board. On the issues raised as to the reasonableness of the distinction between the two classes of printing, the court found that "there was good reason for excepting the publishing of the delinquent tax list from the general rates fixed for the other county advertising of a like general character; that the distinction so made by said exception was not arbitrary nor unnatural." The appellants contend that these findings are not supported by the evidence. While the bill of exceptions discloses considerable testimony tending to support the view that the cost of doing the work and the reasonable value of the service were the same in each case, there was evidence which, we think, supports the findings of the court. One of the plaintiffs' witnesses testified that the printing of the tax list is "much easier for the compositor than the general run of advertising, because it is descriptive matter, and to a certain extent it is table matter, and more or less figures." The tax collector himself testified that he had had a verbal offer to publish the tax list at the rate fixed by the supervisors. And the testimony of a member of the board was that the supervisors fixed the rate by "learning what it was printed for in other counties and what they offered to print it for here." The court accepted the statements of these witnesses, and, so accepting them, was justified in finding as it did on the facts in issue. It follows that the judgment and order must be affirmed.

We may add that we are not to be understood as holding that a different result could be reached if the evidence had shown conclusively that the rate fixed for publishing the delinquent tax list was arbitrary and unreasonable. The only authority which the law gave to the tax collector was to procure the advertising at a price no greater than that fixed by the board. It may well be argued that one who does work after a rate has been fixed accepts that rate, and is bound by it, or, in any event, that, if the order fixing the rate be void, no recovery can be had, since the fixing of a rate is the condition upon which, by the terms of the law, the liability of the county depends. To strike out of the order the rate fixed for publishing the delinquent tax list could hardly have the effect of making the general rate of 50 cents per square for the first insertion and 25 cents for subsequent insertions apply to the delinquent tax list. By such ruling the court would be making for the board a rate which it never intended to fix. In this respect, as well as in others, the case is very different from Van Harlingen v. Doyle, 134 Cal. 53, 66 Pac. 44, 54 L. R. A. 771, which dealt with a void and severable provision of an act of the Legislature of the state. In making these last suggestions, we desire to avoid any inference that might be drawn from a failure to notice the contention as to the effect of an arbitrary and unreasonable fixing of rates, rather than to decide a question which, in the view we take of the evidence, is not here involved.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

150 Cal. 99

COHEN v. COHEN. (S. F. 3,277.)

(Supreme Court of California. Nov. 20, 1906.)

1. DIVORCE—DEFAULT JUDGMENT—NONCONFORMITY TO PLEADINGS.

Code Civ. Proc. § 580, provides that the relief granted to a plaintiff where there is no answer cannot exceed the demand in the complaint. A complaint for divorce contained no averments concerning property or the husband's ability to pay alimony, and prayed for divorce and for such other relief as might be just and within the jurisdiction of the court. *Held*, that the part of a default judgment for divorce which awarded alimony was not void nor subject to collateral attack on the ground that the relief awarded was in excess of that prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 594-596.]

2. JUDGMENT—DEFAULT—RELIEF.

A judgment by default granting more relief than is prayed for may be modified in the lower court only by proceedings under Code Civ. Proc. § 473, authorizing the court to relieve a party from a judgment, or by proceedings in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 246, 324, 325, 803–806.]

3. Divorce — Alimony—Appeal — Questions Raised in Trial Court.

The court, on appeal from an order refusing to vacate the part of a default judgment for divorce which awards alimony, on the ground that justice requires its vacation because of the remarriage of the wife, cannot vacate the judgment on the ground that the relief is in excess of that prayed for.

4. Same—Modification of Judgment—Jurisdiction.

Under Civ. Code, § 139, providing that the court may, from time to time, modify its orders providing for the maintenance by a husband of his divorced wife, the court may change a judgment awarding as permanent alimony to a wife obtaining a divorce a specified sum per month so as to require the payments for a stated period only, and the court, on the wife remarrying, may vacate the decree as to alimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 691–696.]

5. Same.

Where the complaint for divorce did not contain any allegations as to the property of the husband or his ability to pay alimony, it will be presumed, in the absence of any showing to the contrary, that an allowance of alimony to the wife, on her obtaining a divorce, had no other foundation than the obligation to give her support, and that it was not based on any property rights possessed by her at the time of the divorce, so that, on her remarriage, the decree as to alimony may be vacated.

6. Same.

Under Code Civ. Proc. § 1963, declaring that it is presumed that things happen according to the ordinary course of nature and the ordinary habits of life, a husband liable to pay alimony to his divorced wife is prima facie relieved from such liability so as to entitle him to an order vacating the decree as to alimony on showing that the wife has remarried, for the presumption is that the second husband is able to support the wife, and in a proceeding by the husband to vacate the decree as to alimony, on the ground of the remarriage of the wife, the wife has the burden of proving that the support received from the second husband is not adequate to her needs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 696–699.]

7. Equity—Laches.

Delay for a time less than the period of limitation does not amount to laches, unless it occasions, or may be presumed to occasion, prejudice to the other party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 212–214.]

8. Divorce—Alimony—Modification.

In January, 1898, a wife obtained a default judgment of divorce which awarded to her as alimony a specified sum per month. After the filing of her complaint, and before the rendition of the judgment, she agreed with her husband not to ask for alimony. After obtaining the divorce, she removed to another state and remarried. The husband, three years after the rendition of the judgment, discovered that alimony had been allowed, and he commenced proceedings by motion to vacate that portion of the judgment. No part of the alimony had ever been paid nor demanded. *Held*, that the husband was not barred by laches as against the wife from having the award of alimony set aside.

9. Same—Assignments of Sums Due Under Judgment—Rights of Assignee.

Since a judgment is not a negotiable instrument, a purchaser of sums alleged to be due a divorced wife under the decree awarding to her as alimony a specified sum per month acquires rights subject to the same attack in his hands as they would have been had the wife not assigned her rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 727; vol. 30, Judgment, § 1526.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Proceedings by George Knight White to recover alimony awarded his assignor, Pauline Cohen, in a suit for divorce by her against Meyer Cohen, and proceedings by Meyer Cohen against Pauline Cohen for a vacation of the judgment awarding alimony. From a judgment refusing to vacate the judgment, and directing that execution issue for sums accruing prior to a specified date, Meyer Cohen appeals. Reversed and remanded.

Henry H. Davis (W. R. Daingerfield and Jerome H. Kahn, of counsel), for appellant. H. M. Owens, T. C. West, and L. C. Pistolesi (George Knight White and Henry G. Tardy, of counsel), for respondent.

SHAW, J. Pauline Cohen, on January 4, 1898, obtained a decree of divorce from the defendant, Meyer Cohen, judgment being taken by default for his failure to appear or answer. The decree adjudged that Meyer Cohen should pay to Pauline, as permanent alimony, the sum of $10 per month thereafter. On October 4, 1898, Pauline was married to one Hoffman. On December 4, 1901, Pauline duly assigned to George Knight White all money due her under the decree. On December 13, 1901, White obtained an order in the case requiring the defendant to show cause before said superior court on December 20, 1901, why an execution should not issue against him for the money due. The matter was continued to January 17, 1902, and, in the meantime, the defendant served notice of a motion to vacate and modify the decree for alimony, upon the ground that, since the rendition of the decree, the plaintiff had become the wife of Hoffman and that equity and justice demanded a modification thereof. Both motions were heard together. The court refused to vacate the decree as to the amounts already accrued, but modified it by directing that the payments of alimony thereon should cease after January 15, 1902, and directed that execution be issued for the sums previously accrued, amounting to $490. From this order, the defendant appeals.

The complaint alleges a good cause of action for a divorce on the ground of extreme cruelty, but contains no averments concerning property, or concerning the husband's ability to pay alimony. The prayer is for a divorce and for "such other relief as may be just and meet in the premises and within the jurisdiction of the court." It is now contended that the judgment for alimony is void on the face of the record, because of the absence of any averments in the complaint of facts showing the husband's faculties, or of any prayer for that particular relief. There are two reasons why this claim cannot be upheld.

In the first place, the defect does not go to the jurisdiction; and hence does not render the judgment void. In Gaston v. Gaston, 114 Cal. 545, 46 Pac. 609, 55 Am. St. Rep. 86, this court said: "It is argued that the portion of the judgment requiring the payment of $45 per month for the support of plaintiff is void, because no statement of the husband's ability was contained in the complaint. The provision for support in such cases is ordinarily an incident of the judgment of divorce; the jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody." The following cases are to the same effect: Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. Rep. 636; McKensey v. McKensey (N. J. Ch.) 55 Atl. 1073; Seibly v. Ingham, 105 Mich. 584, 63 N. W. 528; Darrow v. Darrow, 43 Iowa, 411; 2 Bish. on Marriage, Divorce and Separation, §§ 1008, 1009. The judgment is not avoid on the ground that it gives relief in excess of that specifically prayed for. Section 580, Code Civ. Proc., providing that, where there is no answer, the relief cannot exceed that demanded in the complaint, does not make the judgment void in a case where the relief given is within the terms of a prayer for general relief and is germane to the cause of action stated, although it may not be authorized by the facts alleged. In such cases the judgment may be erroneous as to the excess and subject to reversal or modification on appeal, but it is not void, nor subject to collateral attack on that ground, nor has the lower court power to amend or modify it as to the excess, as an act done without jurisdiction. It can be modified in the lower court only by proceedings under section 473, Code Civ. Proc., or by proceedings in equity. It has, indeed, frequently been held that a judgment for more relief than is prayed for is not void as to such excess and cannot be attacked in collateral proceedings, although there is no prayer for general relief. Bond v. Pacheco, 30 Cal. 530; Chase v. Christianson, 41 Cal. 253; Mach v. Blanchard, 15 S. D. 439, 90 N. W. 1042, 58 L. R. A. 811, 91 Am. St. Rep. 698; Harrison v. Trust Co., 144 N. Y. 326, 39 N. E. 353; Ketchum v. White, 72 Iowa, 193, 33 N. W. 627; Jones v. Jones, 78 Wis. 446, 47 N. W. 728.

Secondly. The defendant did not move the court below to vacate this part of the judgment on the ground that it was void, but upon the ground that equity and justice required that it should be vacated because of the remarriage of the plaintiff, and the court below, having refused to set it aside, this court cannot, on appeal from the order denying that motion, go beyond the matter appealed from and vacate the judgment on a ground not presented to the court below, nor involved in the appeal, namely, that the judgment is void for want of jurisdiction. It is not an appeal from the judgment, and this court cannot, on the appeal from the order in question, inquire into the jurisdiction to render the judgment.

Upon the merits of the motion it is insisted that, upon the showing made, the court should have modified the judgment by an order releasing the defendant from any obligation to pay the sums accruing after the plaintiff's marriage to Hoffman. In this we think counsel is correct. The Code expressly gives the court power to modify, from time to time, its orders respecting permanent alimony. Civ. Code, § 139. The judgment, in the first instance, might have been made for a gross sum, or for periodical payments, either for a stated period, or, as in effect was done, during the life of the plaintiff. Id. To change this judgment so as to require the payments for a stated period only would not be an annulment of the original judgment, but only a modification thereof. Therefore, such modification would be within the power of the court, even if it were conceded that the power to modify did not give authority to vacate such order in its entirety. "Where a wife has obtained an absolute divorce carrying with it the privilege of a remarriage, and permanent alimony is decreed to her, it is generally held that the husband, upon her subsequent remarriage, may secure an order vacating the decree as to alimony." 14 Cyc. 787, citing Casteel v. Casteel, 38 Ark. 477; Brown v. Brown, 38 Ark. 324; Bowman v. Worthington, 24 Ark. 522; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Southworth v. Southworth, 168 Mass. 511, 47 N. E. 93; Albee v. Wyman, 10 Gray (Mass.) 222; Bankston v. Bankston, 27 Miss. 692; Olney v. Watts, 43 Ohio St. 499, 3 N. E. 354; Brandt v. Brandt, 40 Or. 477, 67 Pac. 508. There is a qualification of this rule, generally adverted to in the cases cited, to the effect that such a remarriage does not authorize a vacation of the decree for alimony where it is given as a substitute for, or in lieu of, the wife's rights, at the time of the decree, in the property of the husband, or in the community property, or in property which he acquired from her by the marriage. This qualification does not affect this case, however, for there is no claim here that the allowance in question was based upon either of those grounds. In view of the absence of any allegations in the complaint as to his property and of any showing to the contrary on the hearing of the motion, it must be presumed that the allowance had no other foundation than the obligation to give her support and maintenance, which was a part of his marriage covenant, and that it was not based upon any property rights possessed by her at the time of the divorce.

In support of the defendant's motion, it was shown that the remarriage took place in Seattle, Wash., on October 4, 1898; that, after the filing of the complaint for divorce and prior to the decree, the plaintiff in writing promised the defendant that she would not ask alimony in the action; that the defendant had no actual knowledge of the allowance of alimony in the judgment until December 1, 1901, that he thereupon began proceedings upon the motion to vacate that portion of the judgment, and that no part of the allowance had ever been paid. No evidence was introduced by either party concerning the ability of the second husband to support the plaintiff. It was held in Southworth v. Southworth, supra, that the fact of remarriage gave the wife the right to claim support from another man, and throws upon her the burden of proving that such support is not adequate to her needs and is prima facie sufficient cause to revise the judgment for alimony. We think this rule is just and equitable. The presumption would be that the second husband was able to fulfil his marriage covenant and support his wife according to her station in life. This is the ordinary and normal condition of married persons, and such ordinary condition is to be presumed until the contrary is shown. Code Civ. Proc. § 1963. If, in fact, the second husband was unable to give his wife reasonable support, the wife would be better advised of the facts than the former husband, and justice would require that proof of such inability should be produced by her. It is to be gathered from the decisions in Re Spencer, 82 Cal. 110, 23 Pac. 37, and Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266, that this court there held that the remarriage of a wife does not, of itself, avoid a previous decree for alimony. But we believe that the cases wherein the alimony should be continued after the remarriage are extremely rare and exceptional, particular where there are no children of the former marriage. Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove. Unless such conditions are shown by her to exist, the court should, on the former husband's motion, cancel all payments accruing after the remarriage, in all cases where, as here, there are no children and the allowance is based solely upon the husband's probable earning capacity, or upon his breach of the marriage vows, and not upon existing property rights.

The delay of the defendant in proceeding for a vacation of the allowance does not, under the existing circumstances, constitute laches. Delay for a time less than the period of limitation does not amount to laches unless it occasions, or may be presumed to occasion, wrong or prejudice to the other party; an element entirely lacking here. Cahill v. Superior Court, 145 Cal. 46, 78 Pac. 467. He had no actual knowledge of the allowance. She did not, in her complaint, allege his abilities, or pray specifically for an allowance. Before the decree she made a conditional agreement with him that she would not ask alimony. Not long after the decree she removed to the state of Washington and was there remarried nine months after the divorce, and she never at any time before the assignment demanded any payment on account of the alimony allowed, or gave him any notice that she had obtained such allowance. She is certainly in no position to complain of the delay, and he was not called upon to proceed to avoid a liability which he had reason to believe did not exist and of which he was in fact unaware.

The defendant did not assign the judgment to the respondent White until December 4, 1901. The bill of exceptions recites that evidence was given that "the assignment was for a valuable consideration," but the price is not otherwise stated. It is, however, immaterial. The contention that the assignee, White, is an innocent purchaser for value, and that, therefore, the decree for alimony already accrued cannot be modified, as against him, cannot prevail. The judgment is not a negotiable instrument. No part of it had ever been paid, nor, so far as appears, had any demand ever been made for it. If an obligation could be dishonored by failure to comply with it, then certainly this obligation was so dishonored. It is eminently a case of the application of the maxim, "Caveat emptor." The purchaser got the right he bought and no more, and the decree is subject to the same attack in his hands as it would have been had it remained in the name of the original plaintiff.

The order appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.

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150 Cal. 71

In re PFAHLER. Cr. 1,328.)

(Supreme Court of California. Oct. 13, 1906.)

1. MUNICIPAL CORPORATIONS — CHARTER — "INITIATIVE" PROVISION—DIRECT LEGISLATION BY CITIZENS—CONSTITUTIONAL GUARANTY OF REPUBLICAN FORM OF GOVERNMENT.

Const. U. S. art. 4, § 4, declaring that the United States shall guaranty to every state a republican form of government, is not violated by the "initiative" provision of the charter of Los Angeles (St. 1903, p. 572), authorizing direct legislation as to strictly local affairs by the citizens, in case the council refuses to enact the same.

2. Same.
The initiative provision of the charter of Los Angeles (St. 1903, p. 572), authorizing direct legislation by the citizens, is authorized by Const. art. 11, § 11, providing that any county, city, town, or township may make and enforce within its limits certain regulations; the term "city" not meaning some board or officers of the city, but the municipality, or the people in their organized condition as a body politic.

3. Same—Conflict of Authority.
It cannot be objected to the "initiative" provision of the charter of Los Angeles that by reason thereof there are two equal, co-ordinate lawmaking bodies in the city, each absolutely independent of the other; the electors having the veto power over the council, and the council not having such power over the electors.

4. Same — Suspending Exercise of Police Power.
The "initiative" provision of the charter of Los Angeles does not interfere with or suspend the exercise of the police power granted to the city by Const. art. 11, § 11, merely because it takes longer to amend or repeal a police regulation made by the people than one made by the council.

5. Same — Conflict in "Initiative" and "Referendum" Provision.
There is no conflict in the "initiative" and "referendum" provisions of the charter of Los Angeles, because under the referendum provision certain emergency ordinances adopted by the council take effect immediately, without opportunity for a protest by electors, requiring reference to the people, as in case of an initiative ordinance and an emergency ordinance on the same subject the provisions would be construed to make one or the other ordinance paramount.

6. Same — Preventing Exercise of Police Power.
The "initiative" provision of the charter of Los Angeles is not invalid on the ground that under it the proper exercise of the police power may be prevented, by reason of the absence of sufficient funds for the expenses of an election to repeal or amend an initiative ordinance, without which funds, under Const. art. 11, § 18, the election could not be had.

7. Same—Delegation of Power to Perform Municipal Functions.
Const. art. 11, § 13, prohibiting the Legislature from delegating to any special commission or private agencies power to perform any municipal functions, is not contravened by the "initiative" provision of the charter of Los Angeles; the electors as a whole, or those signing a petition for adoption of an ordinance, not constituting a special commission or a private agency, and such signing not being the performance of a municipal function.

8. Same — Inconsistency of Charter and Political Code.
It is immaterial that the "initiative" provision of the charter of Los Angeles is inconsistent with Pol. Code, § 4354 et seq., providing a general form of city government; they not being such general laws as city charters must be consistent with.

9. Same—Legislative Authority.
The "initiative" provision of the charter of Los Angeles, giving power to the electors to adopt ordinances, is not shown to be unconstitutional because of the words "legislative authority" being used by Const. art. 11, § 8, to designate the ordinary legislative body of a city, in providing for submission by legislative authority of the city of a proposed charter amendment to the voters of the city.

10. Statutes—Titles of Resolutions Approving Amendments of City Charter.
The approval as a whole by the Legislature of 13 amendments of the charter of Los Angeles ratified by the electors thereof at an election, by a single resolution, the title to which simply states it is a resolution "approving thirteen certain amendments to the charter of Los Angeles," does not violate the requirement that every act shall embrace but one subject, which shall be expressed in its title, but is in accord with Const. art. 11, § 8, providing that a city charter adopted by the electors shall be submitted to the Legislature for its approval or rejection as a whole, without power of alteration, and, if approved by a majority vote of each house, it shall become the charter, and that the charter may be amended by proposals submitted to and ratified by the electors, and approved by the Legislature as provided for approval of the charter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 126, 171.]

McFarland, J., dissenting.

In Bank. Application by Andrew Pfahler for writ of habeas corpus, to be directed against the chief of police of the city of Los Angeles. Writ discharged and petitioner remanded.

Robert A. Todd (C. W. Pendleton, E. S. Torrance, Earl Rogers, and Luther G. Brown, amici curiæ), for petitioner. Wm. B. Mathews, Herbert J. Goudge, and Hunsaker & Britt (W. H. Davis, Wright & Wright, Allen G. Wright, Wm. J. Danforth, W. G. Burke, City and County Atty. for San Francisco, and W. D. Burchard, Asst. City and County Atty. for San Francisco, amici curiæ), for respondent.

ANGELLOTTI, J. The petitioner is held in the custody of the chief of police of the city of Los Angeles, under a warrant issued upon a complaint charging him with a violation of the provisions of a certain purported ordinance of said city, which ordinance prohibits, except within certain defined limits, the killing or slaughtering of animals, the flesh of which is to be sold or offered for sale or eaten. There is no claim that the complaint does not state facts sufficient to show a public offense under the provisions of said ordinance; nor is there, on the part of the petitioner, any claim that the ordinance, if legally enacted, was not a reasonable and valid exercise of the police power vested in such city. Petitioner's claim is that the purported ordinance has never been legally enacted. The ordinance was not adopted in the ordinary way, by vote of the city council and approval of the mayor, but by the electors of the city, at a general election, at which it was submitted for their approval or rejection; such submission having been compelled by a petition submitted to the council, signed by electors equal in number to at least 5 per cent. of the vote cast for all candidates for mayor at the last preceding election. The procedure was in strict accord with what is known as the "initiative" provision of the charter of Los Angeles, which, together with what is known as the "referendum," was made a part of such charter by amendments ratified by the people of such city at an election held December 1, 1902, and approved by the Legislature of the state on January 30, 1903 (see St. 1903, pp. 555, 572). The real question presented by this proceeding is, then, as to the validity of this provision of the charter.

The city of Los Angeles is a municipal corporation operating under a freeholders' charter, framed and adopted under the provisions of section 8, art. 11, of the Constitution, and approved by the Legislature January 31, 1889 (St. 1889, p. 455, c. 1). By that charter the legislative power of the city was vested in a council provided for by such charter, subject to the power of veto and approval by the mayor. The initiative amendment of 1902 and 1903, so far as material to the question here presented, provides substantially as follows: Any proposed ordinance may be submitted to the council by a petition signed by registered electors of the city. If such petition is signed by electors equal in number to 15 per cent. of the entire vote cast for all candidates for mayor at the last preceding general election at which a mayor was elected, and contains a request that said ordinance be submitted forthwith to a vote of the people at a special election, the council must either (1) pass such ordinance without alteration (subject to a referendary vote as elsewhere provided), and if, when passed, it is vetoed by the mayor, and on reconsideration fails of passage by the council, submit it to a vote of the people at a special election, or (2) call a special election, at which said ordinance, without alteration, shall be submitted to a vote of the people. If the petition is signed by electors equal in number to at least 5 per cent., but less than 15 per cent., of such vote, the ordinance shall be submitted to a vote of the people at the next general municipal election that shall occur at any time after 30 days from the date when the sufficiency of the petition is officially determined. "If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition or which shall be adopted by a vote of the people cannot be repealed or amended, except by a vote of the people. * * * The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general election; and should such proposition receive a majority of the votes cast thereon at such election, such ordinance shall be repealed or amended, accordingly." The accompanying referendum amendment provides: "No ordinance passed by the city council (except when otherwise required by the general laws of the state or the provisions of the charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency, and is passed by a two-thirds vote of the council, but no grant of any franchise shall be construed to be an urgency measure, but all franchises shall be subject to the referendary vote herein provided for), shall go into effect before thirty days from the time of its final passage and its approval by the mayor." It is further provided therein that a protest against such ordinance filed during said 30 days, signed by electors equal in number to at least 7 per cent. of such vote, shall have the effect of suspending the ordinance from going into operation and require the council to reconsider the same, and, if that body does not entirely repeal it, to submit it to the electors at a general or special election; the ordinance to go into effect or not as the majority of the electors voting thereon shall decide.

While no question as to the validity of the referendum amendment is directly involved here, we have briefly set forth its provisions, as the two amendments are simply part of one general plan or scheme looking to a more direct control of local legislation by the people of the city, and, so far as the principal objections here made are concerned, must stand or fall together. Those objections go to the question of the validity, under the provisions of the Constitution of the United States and our own Constitution and laws, of any provision in a municipal charter which authorizes the electors of the municipality to participate directly in the enacting of local laws. These two amendments, the initiative and the referendum, have the same effect in this respect. In each it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference, in principle, whether the proposition originates with electors or with the council. In each the electors by their vote at the ballot box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with authority, paramount to that of the council, to directly enact such local legislation as they may deem expedient, where the council declines to enact the same. The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the state, is vigorously attacked by counsel for petitioner and other attorneys appearing as amici curiæ, who claim to see in this curbing of the power of the ordinary legislative body of the city, this vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own Constitution, and a forbidden departure from the republican form of government, guarantied by the Constitution of the United States.

The latter objection may appropriately be first considered. Its sole foundation is section 4 of article 4 of the Constitution of the United States, which is as follows: "The

United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence." The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guarantied by this provision, and ineffectual for any purpose; the theory being that such provision requires a purely representative form of government, not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question, rather than a political one to be determined by the Congress of the United States (see, however, Luther v. Borden, 7 How. 1, 12 L. Ed. 581; Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 1009, 44 L. Ed. 1187), we are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the federal Constitution. That they may do so has been decided by the Supreme Court of Oregon in the case of Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, which appears to be the only case in which that question has been directly presented. See, also, Hopkins v. City of Duluth, 81 Minn. 189, 83 N. W. 536. However this may be, it is clear that the direct participation of the electors of subdivisions of a state in legislation as to local affairs was never intended to be prohibited by the framers of the federal Constitution, or the states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state Constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the federal government.

As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various states at the time of the adoption of the Constitution that was violative of the provisions under discussion. Discussing this question, and speaking of the forms of government then existing in the various states, the Supreme Court of the United States said, in Minor v. Happersett, 21 Wall. (U. S.) 162, 175, 176, 22 L. Ed. 627: "These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution." It is unnecessary to here do more than to refer to the widely known and well-recognized form of local government that prevailed in several of the states at the time of the adoption of the Constitution, known as the 'New England town government,' under which all the inhabitants in town meeting directly exercised such legislative power as was essential to the conduct of local affairs. No difference material to the objection under discussion is to be found in the fact that they did this in public meeting, rather than by secret ballot at the polls, as under the provision before us. The objection here made is that, under the republican form of government guarantied by the federal Constitution, such power cannot be directly exercised by the people, and, so far as that objection is concerned, if the people may legislate directly in town meeting, they may do so by their votes at the polls. The constitutional provision was framed and adopted with full knowledge of this system of local government that then obtained in four of the states, and that system was continued under the Constitution, without any question as to its validity. It is still to be found, not only in several of the New England states, but also in other states (see 1 Bryce, Am. Com. pp. 594, 601, 605; 1 Dillon, Mun. Corp. § 258). and we are not aware that any suggestion has ever been made that this form of local government is prohibited by the federal Constitution. Other instances practically without number of the direct exercise of legislative power by the people in local affairs authorized by the state might be noted. As suggested in the briefs, the forms of local government in this country have been most varied, running all the way from the pure democracy of the town meeting form of government up to such absolute control by the Legislature of the state as deprived communities of any voice in their local affairs. It is apparent from this condition of affairs, existing continuously from the moment of the adoption of the Constitution, that, if there is anything therein inconsistent with a republican form of government, within the meaning of these words as used in the federal Constitution, the constitutional guaranty was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions.

Whatever may be said as to the former, the latter is undoubtedly true. It is clearly a question of local policy with each state what shall be its various political subdivisions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. See Claiborne v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095. Where the authority of the electors of a municipality or other subdivision of a state to directly legislate in a matter of purely local concern is denied by a state court, it is denied solely upon the ground that the state Constitution or statutes forbid the exercise of such power, as in Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820, and many cases cited by petitioner. See Cooley's Const. Lim. (7th Ed.) pp. 165, 166; Dillon, Mun. Corp. § 44, and note. The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is, therefore, purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal Constitution. In thus speaking of the state, we mean, not the Legislature of the state, or the executive, or the judiciary, but the entire body of the people, who together form the body politic, known as the "state." Panhallow v. Doane's Adm'r, 3 Dall. (Pa.) 93, Fed. Cas. No. 10,925, 1 L. Ed. 507; Brown v. State, 5 Colo. 499.

Coming to a consideration of the contention that the initiative amendment is in violation of the Constitution and laws of this state: There is, of course, no doubt as to the possession by the municipality of Los Angeles of legislative power. By section 11 of article 11 of the Constitution, providing that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," the people of the state "have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes." Denninger v. Recorder's Court, 145 Cal. 629, 631, 79 Pac. 360; Ex parte Lacey, 108 Cal. 326, 328, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; Ex parte Roach, 104 Cal. 272, 276, 37 Pac. 1044. As to such local legislation as may not be included in this constitutional grant, if it be assumed that the legislative power of the municipality operating under a freeholders' charter finds its source in any grant from the Legislature, there is in this no forbidden delegation of the lawmaking power vested in the Legislature. As said in Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637: "While the rule is fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject, of course, to the interposition of the superior in cases of necessity." While the power so granted by a Legislature may be called a delegated power, "the right to so delegate all powers of a municipal nature is expressly given to the Legislature, when, by the Constitution, it is authorized and directed to provide for municipal corporations." Hellman v. Shoulters, 114 Cal. 136, 149, 44 Pac. 915, 45 Pac. 1057. So that, if we assume for the purposes of argument that the Legislature, in approving by concurrent resolution a charter framed by any city containing more than 3,500 inhabitants under section 8 of article 11 of the Constitution, delegates to the city any local legislative power, it is a delegation of legislative power that is expressly authorized by the Constitution.

We do not understand that there is any claim that the city of Los Angeles, and by the term "city" we mean the municipal corporation, and not any officer or officers thereof, is not vested with legislative power, both under the constitutional provision quoted above, and the freeholders' charter framed by the Constitution and approved by the Legislature, except in so far as it is urged that the word "city," in such constitutional grant to "any county, city, town," etc., must be construed as meaning some board or officers of the city. Manifestly, there is nothing in this claim. The grant to the "city" is a grant to the municipal corporation itself (Denninger v. Recorder's Court, supra), the artificial body created by the laws made up of the people of the territory comprising the same organized as a body politic, and there is no authority that would warrant a different construction. The common council or other local legislative body and other charter officers do not constitute the "city," but are merely agents or officers of the city. 1 Dill. Mun. Corp. [3d Ed.] §§ 21, 40. Legislative power has been properly granted or delegated by the state to the city. We are not here concerned, then, with the doctrine asserted by counsel for petitioner to the effect that the power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature. The question here is simply whether it is competent, under our Constitution and laws, to vest in the electors of a city, by the charter thereof, such right to directly participate in the exercise of the legislative power granted by the state to the city, as is given them by the initiative amendment of the Los Angeles charter.

It will not be questioned that the charter of the city, whether it be the special act of incorporation authorized by our old Constitution, the general municipal corporation act enacted under our existing Constitution, or the freeholders' charter, is the appropriate place in which to provide where the legislative power of the city shall be vested, and the manner of its exercise. One of the most important and essential offices of the charter is and always has been appropriate provision in this behalf. See 1 Dill. Mun. Corp. § 39. Our Constitution declares that, when a freeholders' charter is finally approved by the Legislature, it "shall become the organic law of the city" (section 8, art. 11), and such a charter has elsewhere been aptly termed the local constitution of the city. As such, provisions as to the distribution of the governmental functions, and the manner of their exercise, obtain, so far as the same are consistent with the Constitution of the state. It has already been held by this court that the manner of enacting municipal ordinances and resolutions is unquestionably a municipal affair (Morton v. Broderick, 118 Cal. 474, 487, 50 Pac. 644), and therefore, under section 6 of article 11 of the Constitution as amended in 1896, the provisions of a city charter in regard thereto are paramount to general laws of the state. When by section 8 of article 11 of the Constitution, every city containing more than 3,500 inhabitants is authorized to frame "a charter for its own government," which, when ratified by the electors and approved by the Legislature by concurrent resolution, "shall become the organic law" of the city, the city is authorized to make, subject to the approval of the Legislature, such provision as it deems best for the exercise of the legislative power confided to it by the state: the only limitation being that the provision made must not be a violation of our state Constitution. The provision so made may, of course, be changed by amendments to the charter, framed, ratified, and approved in the manner provided for the adoption of the original charter (section 8, art. 11, of the Constitution).

Wherein does the method prescribed by the initiative amendment violate any provision of our Constitution? The specific constitutional provisions pointed out by petitioner as violated by this amendment are two, namely, sections 11 and 13 of article 11. Section 11 of article 11 of the Constitution has already been quoted. It is the section granting the police power of the state to any municipal corporation of the state for local purposes. One of petitioner's points appears to be that this is a direct grant to the council or other legislative body of the city or town and that the direct exercise of legislative power by the people is inconsistent therewith. As already stated, the grant is to the municipality itself, the people in their organized condition as a body politic, and neither this nor any other provision of the Constitution intimates as to how this power is to be exercised. That is left to be provided for in the "organic law" of the city, and the power is vested just where it is placed by the charter, and is to be exercised as therein provided. It is solely by virtue of the provisions to that effect in the city charter of Los Angeles that the council of that city may exercise any of the legislative power of this city whatever (Odd Fellows' Cem. Ass'n v. City & Co. of San Francisco, 140 Cal. 226, 230, 73 Pac. 987), and it may exercise only such power in that regard as it is authorized to do by the charter.

The Odd Fellows' Cemetery Case, cited above, is cited by petitioner as authority for the proposition that the constitutional grant is to the council; this court having said therein: "All the legislative power of the city is by the charter vested in the board of supervisors. Article 11, c. 1, § 1. By virtue of this clause the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state, subject only to the control of general laws." It is here pointed out that the San Francisco charter contained provisions relative to the initiative substantially similar to those of the Los Angeles charter, and it is claimed that the decision must be taken as declaring that all of the legislative power of the city was in the board of supervisors, notwithstanding the presence of other provisions in the charter giving the electors certain powers in that regard. There was no question in that case as to the validity of the initiative provision of the charter, and what was said therein was said solely with reference to the right of a city to exercise within its limits the entire police power of the state, notwithstanding a certain provision of the charter which was claimed to limit the power. It was held that nothing contained in the charter could affect the grant made by the Constitution, and that the city, under such constitutional grant, had the right to exercise the whole police power of the state so far as local regulations were concerned, subject only to the control of general laws. What was said in the case must be read in the light afforded by a knowledge of the precise question under consideration, and, so read, the quotation above set forth is direct authority upon the proposition that the legislative power of a city operating under a freeholders' charter is just where it is placed by the charter. The effect of the provisions of the Los Angeles charter, as amended, is to give the legislative power vested in the city to the council and mayor, subject to such control by the electors as is given them by the initiative and referendum provisions. The reserved power of the electors to directly enact such ordinances as the council refuses to enact, as well as their power to effectually veto ordinances adopted by the council, is made paramount to the power of the council and mayor, the council being without power to repeal or amend an ordinance so enacted, and the objection that under the initiative we have "two equal, co-ordinate lawmaking bodies, the one absolutely independent of the other," is therefore without foundation. This feature renders the decision in Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236, a decision strongly relied on by petitioner, inapplicable; for the only thing decided therein was that there could not be, under our system of government, two equal, co-ordinate lawmaking powers, "each existing without any restrictions the one upon the other."

It is urged that the effect of the provisions of the initiative amendment is to interfere with and suspend the exercise of the police power granted by section 11 of article 11, in that as an ordinance adopted by the people is repealable or amendable only by the people, and as special elections on such questions can be held only at intervals of six months, and the council itself can submit propositions for repeal or amendment only at a general municipal election, the making of necessary changes in the local laws of a police nature may be unreasonably delayed. The amendment does not purport to restrict or suspend in the slightest degree the exercise of the police power vested in the municipality, having reference solely to the manner of its exercise. Any ordinance enacted by the people may at any time be repealed or amended in the manner provided in the charter. The rule against the suspension of the police power invoked by petitioner means no more than that the power is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law, and never has been held to mean that a law enacted in the exercise of the police power must ever be open to instantaneous alteration. There are provisions in the nature of police regulations in the state Constitution itself, and these cannot be repealed or amended, except by the slow process of amending the Constitution. The Legislature of the state at each of its biennial sessions enacts numerous laws in the exercise of the police power of the state, which laws can be repealed or amended only at a succeeding biennial session, except in the rare case of an extra session. The freeholders' charters of the various cities of the state contain many provisions which are essentially police regulations, and these can be amended or repealed only with the assent of the majority of the electors at an election, which elections can be held only at intervals of two years (Harrison v. Roberts, 145 Cal. 173, 179, 78 Pac. 537), and with the approval of the state Legislature. So far as the objection here made is applicable to provisions in city charters, it was overruled in People v. Williamson, 135 Cal. 415, 417, 418, 67 Pac. 504. So far as this objection is concerned, there can be no distinction in principle between the case of a provision in the nature of a police regulation in the city charter and one to the same effect in an ordinance. In each case it is ever amendable or repealable in the manner provided by the organic law—in the one case, the organic law of the state; in the other, the organic law of the city. This, as said in People v. Williamson, supra, must satisfy the courts. The same objection might, as is suggested, be made with the same degree of force to the numerous provisions in freeholders' charters and acts of the Legislature relative to municipal corporations which prohibit the passage of an ordinance on the day of its introduction or prevent its taking effect until after publication. The claim that the power to make police regulations upon a subject covered by an ordinance adopted by the people is taken from the city by the adoption of such ordinance finds its source in the erroneous assumption, which is the basis of many of petitioner's arguments, that the city council is the "city."

It is urged that the initiative and referendum amendments are hopelessly in conflict, in that under the referendum amendment certain emergency ordinances take effect immediately on passage, and need not be referred to the people, while there is no exception declared in the initiative amendment. There is no claim that any emergency ordinance passed by the council is in conflict with the ordinance here involved, and it is unnecessary here to determine what the situation would be in such event. Obviously, however, the law would be construed either as making the emergency ordinance paramount, and precluding the application of the initiative to the subject-matter thereof, or as making the initiative ordinance paramount. We cannot see any legal objection to either method, or any unconstitutional interference by either with the exercise of the police power.

It is suggested that the proper exercise of the police power may be prevented by reason of the absence of sufficient funds to pay the expense of an election necessary to the adoption of an ordinance which repeals or amends some prior ordinance adopted by the people; section 18, art. 11, providing that no county, city, etc., "shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors," etc. The same argument might with as much force be made as to a provision of law requiring the publication of an ordinance before its taking effect, or as to any requirement in connection therewith involving expense, however small. Surely a method adopted for the passage of ordinances cannot be declared unconstitutional upon any such ground. It is to be presumed that the municipality will provide the funds necessary for the administration of its government. If there be any offender against the rule invoked by petitioner in this connection, it is the constitutional provision cited by him.

The contention is made that the initiative amendment is in violation of section 13, art. 11, of the Constitution, which is as follows: "The Legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal functions whatever." So far, at least, as the prohibition concerning the delegation by the Legislature to any "special commission" to perform any municipal function is concerned, it is clear that the whole object of the provision was to prevent the state Legislature from interfering with local governments by the appointment of its own special commissions for the control of purely local matters. It was said in People v. Hoge, 55 Cal. 612, 618, that it was the manifest intent of this and other sections "to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature." See 2 Deb. & Pro. Con. Convention, p. 1066. Certainly there is nothing in the language used which could be held to prohibit provision, in the organic act framed for the government of a city, for such commissions, special or otherwise, to be appointed or elected by the city, as might be deemed necessary for the proper conduct of municipal affairs.

Under no circumstances, however, could the aggregate body of qualified electors of a municipality be held to be a "special commission," within the meaning of the constitutional provision. Any claim to the contrary appears so frivolous as not to merit discussion. Nor is there anything in the claim that the electors signing the petition for the submission of a proposed ordinance to the vote of the electors either constitute a "special commission" or perform any "municipal function." Certainly they perform no act of legislation. Whatever "municipal function" is performed in the matter of the adoption of an ordinance under the initiative is performed either by the council, when it enacts the ordinance without submitting it to the electors, or by the electors when it is submitted by the council. As in People v. Ontario (Cal. Sup.) 84 Pac. 205, 207, the petition of the electors is merely an initiatory step, accomplishing no more than to compel a consideration of a proposed matter by those qualified to act and perform municipal functions, and does not itself constitute the performance of a "municipal function" in any proper sense of those words. Aside from the prohibition as to "special commissions" contained in this section of the Constitution, the utmost effect of the section is to prohibit the granting to private agencies, as distinguished from public agencies, the power to control in any degree the property or improvement work of a local subdivision or municipality, or to levy local taxes or assessments, or to perform any municipal function. Assuming the applicability of this provision to a freeholders' charter, as it is claimed was held in Yarnell v. Los Angeles, 87 Cal. 603, 25 Pac. 767, it is manifest that the electors of a municipality, in their capacity as such, do not constitute any such prohibited private agency.

It is earnestly urged that the initiative provision of the charter is inconsistent with the form of municipal government prescribed by title 3 of part 4 of the Political Code (section 4354 et seq). These sections constituted part of the original Code, and provided a general form of government for cities. By section 4355 the legislative power of the city was vested in a common council. It is said that this is a general law, with which the provisions of the freeholders' charter must be consistent. As to municipal affairs, it is sufficient if the provisions of a charter are consistent with the Constitution. As we have shown, the method of exercising the legislative power of a municipality is a municipal affair. But, were it otherwise, this provision of the Political Code could not be held to constitute one of the general laws with which charter provisions must be consistent. The old Political Code sections invoked were intended merely as a plan under which cities might be organized and governed, if so desired, and this was the sole object of their enactment. Ex parte Simpson, 47 Cal. 127. Except where specially made part of a city's charter by reference (Ex parte Mauch, 134 Cal. 501, 66 Pac. 183; Buck v. Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409), they have not been held applicable. The sections of the title relative to refunding a bonded indebtedness, held applicable to Los Angeles in Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580, were part of a much more recent act of the Legislature, intended, as this court held, to have general application. The old sections of the Political Code as to the form of government of cities stand, then, in precisely the same class of laws as does the municipal corporation act of 1883, under which towns or cities may now organize at their option. The constitutional grant to a city to frame its own charter, which, when ratified and approved, shall become its organic law, necessarily assumes that the form of government to be provided therein need not be the same as that provided by the Legislature for municipalities generally, and it was for the very purpose of enabling cities to have such a local organization as their local needs demanded that the authority to frame a charter for its own government was given to every city of over 3,500 inhabitants. That such a charter was not subject to the municipal corporation act, even prior to the "municipal affairs" amendment of 1896, is too plain for discussion; but, if authority be needed, it is to be found in People v. Bagley, 85 Cal. 343, 24 Pac. 716.

Much stress is placed by petitioner upon the fact that in section 8 of article 11 of the Constitution the words "legislative authority" are used in designating the ordinary legislative body of the city. The use of these words is taken as indicating the intent of the Constitution that no legislative power could be exercised, except by some representative body, such as a council, etc., which should have supreme authority as to all matters of legislative nature. We see no force in this contention. It was doubtless recognized by the framers of the Constitution, as it must be by every one, that in the conduct of municipal affairs it would be impracticable to do without the presence of a local legislative body of some kind, which should possess such powers in that behalf as might be granted to it, and that such a body would exist in every municipality. The words "legislative authority," as here used, have no greater significance than such words as "common council or other legislative body" would have had. They were simply intended to designate the particular body, which it was recognized would exist under some name or other in every municipality, as the proper official agency to submit propositions for amendments to charters, and were not intended to define the powers of that body, or place it in a position where it would be beyond restrictions by the organic act of the city. Doubtless it is this body that is termed the "governing body" in section 1, art. 14, of the Constitution, relative to the fixing of water rates, and it may be that it is the "corporate authority" referred to in section 12, art. 9, of the Constitution, relative to the assessment and collection of local taxes. Bd. of Education v. Bd. of Trustees, 129 Cal. 599, 62 Pac. 173. But the use of these various terms in various constitutional provisions means no more than that the official body thereby referred to is to have the power or perform the duty specified.

That the electors of a duly organized local subdivision of this state may be authorized to directly participate in the exercise of the legislative power of such subdivision cannot, we think, be seriously disputed. There is certainly no provision of our Constitution which expressly or by reasonable inference prohibits it. There is no decision of this court which holds that it is forbidden. What was said in the majority opinion in Ex parte Wall, 48 Cal. 279, 321, 17 Am. Rep. 425, upon this point, was pure dictum. This was expressly pointed out by the later cases of People v. Nally, 49 Cal. 478, 480, and People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, in the latter of which cases it was stated that the real question in Ex parte Wall was "whether the Legislature could authorize the people of a given locality to suspend the operation, within such locality, of a general penal statute of the state." Page 493 of 81 Cal., page 852 of 22 Pac. In the case of People v. Ontario (Cal. Sup.) 84 Pac. 205, which is the latest case bearing on the question, it was held that the power to perform the legislative act of prescribing the boundaries of territory to be annexed to a municipality, which power, under our Constitution, could not be performed by the Legislature itself, but must by it be reposed elsewhere, could be given by the Legislature to the electors of the locality to be affected. We there said: "There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected; and, in the absence of such a provision, the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the Legislature is conclusive." This appears to be the general rule as to legislative power which a Legislature is authorized to grant for local purposes to local subdivisions, and is expressly recognized by some of the cases cited by petitioner. For instance, in Clarke v. City of Rochester, 28 N. Y. 605, 634, it is said: "But while general statutes must be enacted by the Legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction." See, also, People v. Reynolds, 5 Gilman (Ill.) 1, approvingly quoted in Upham v. Supervisors, 8 Cal. 383. In the recent case of Hindman v. Boyd, 84 Pac. 609, 612, the Supreme Court of Washington upheld the right of the people of the city of Spokane to reserve to themselves, in their charter, the power to compel the submission to the electors of every proposed ordinance granting certain kinds of franchises, such submission to be had whenever a certain percentage of the electors petitioned therefor. It was conceded that the granting of a franchise was a legislative act. The court said: "It is clear, therefore, that the powers of the mayor and council are such as are granted by the charter. If the people choose to provide in their charter that the power to grant franchises of a given character shall not be given wholly to the mayor and council, but shall be reserved to themselves, can it be said that the granting thereof is such a legislative act as cannot be exercised by the people themselves? The power to make a charter is in a sense a legislative one. It is well known that charters so made often contain much that is legislative in its nature, such as the adoption of a complete scheme for making special assessments and other similar elaborate and detailed provisions."

We know of no state in which the right of the Legislature to grant to the people of a local subdivision the power to directly discharge legislative functions in local matters is denied, except where the Constitution of such state may reasonably be construed as forbidding such a grant, as may be held to have been the case in Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107, a case relied on by petitioner. Our own Constitution certainly cannot be so construed. We entirely concur in what was said by the Chief Justice in Ex parte Anderson, 134 Cal. 69, 75, 66 Pac. 194, 86 Am. St. Rep. 236, where, speaking of the constitutional grant to every county, city, etc., embraced in section 11 of article 11, he said: "This grant to the counties of the power of local legislation is, of course, a grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state Constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation; and I cannot see how it is possible, upon any recognized principle of constitutional construction, to deny to the Legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits." This question, as already stated, was not determined by the majority of the court in that case. If the Legislature, in providing by general statute for the organization and government of municipalities, can grant such power to the people thereof, there can, of course, be no question that such power may be vested in the people of a city by the provisions of a freeholders' charter framed by the city, ratified by the electors thereof, and approved by the Legislature, under section 8 of article 11 of the Constitution.

Much that is said in the briefs of counsel assailing the initiative amendment goes rather to the question of the policy of investing the electors of a municipality with such general power of local legislation than to the question of the validity of the law accomplishing this result. There may reasonably be differences of opinion as to whether the method devised will prove beneficial or not. However, the extent to which the electors of a municipality shall be permitted to directly discharge legislative functions in local affairs is purely a question of policy, with which the courts have nothing to do. It is our duty to uphold the charter provision, if it be consistent with our federal and state Constitutions, and that it is we have no doubt.

The initiative amendment was one of thirteen amendments to the Los Angeles charter ratified by the electors of Los Angeles at a general municipal election. They were approved by the Legislature as a whole by a single concurrent resolution, the title to which simply stated that it was a resolution "approving thirteen certain amendments to the charter of Los Angeles," etc. There is nothing in the point made by amici curiæ that this was a violation of the requirement that every act shall embrace but one subject, which subject shall be expressed in its title. The method pursued was strictly in accord with the provisions of section 8, art. 11, of the Constitution, relative to the approval of charters and amendments thereto, as we read the same.

The writ is discharged, and the petitioner remanded.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

McFARLAND, J. (dissenting). I dissent; but I will not undertake to do more just now than to briefly outline the skeleton of the argument which leads me to the conclusion that the "initiative," as contained in the Los Angeles charter, is unconstitutional and void. I will not stop to discuss the forcible contention by counsel for the petitioner that the provision of the charter under consideration is violative of certain parts of our state Constitution, because, in my opinion, the provision is violative of that part of the Constitution of the United States which declares that "Congress shall guarantee to each state a republican form of government." It is, in my judgment, a narrow and incorrect view of that provision of the United States Constitution to hold that it concerns Congress alone, and that a state may violate it at its will so long as Congress does not choose to interfere. The provision declares a great constitutional principle, and must be observed by all coming within its purview. The correct construction is that given by the United States Supreme Court in Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627, where it is said: "The guaranty necessarily imposes a duty on the part of the states themselves to provide such a government." Therefore every act done by a state which is inconsistent with and violative of the theory of a republican form of government is invalid.

Now, what is a republican form of government? These words are not defined in the Constitution itself. Like other words used in that instrument, we must look for their meaning to the general and usual sources and authorities which determine the signification of English words and phrases. And an examination of those sources leaves no doubt as to the meaning of the phrase in question. It is defined in the Federalist, in legislative debates, in judicial opinions, in text-books of the law, and in the standard dictionaries of the language. I shall not quote from these authorities. The meaning of the phrase as derived from these sources is correctly and concisely stated in Webster's Dictionary as follows: "A state in which the sovereign power resides in the whole body of the people and is exercised by representatives selected by them." A republican form of government is one in which the people select those who are to make their laws, and is radically different from a pure democracy in which the people collectively and as their own original act make the laws. And whenever, under our American system of representative government, a state undertakes to destroy the representative system, and install in its place, as the lawmaking power, the people—either acting in a mass-meeting, or enacting laws by ballot—in their original capacity, it undertakes to do an unconstitutional thing, which is void. And it is to be observed that the initiative provision of the Los Angeles charter is not confined to merely reserving to the people the right to approve of measures which refer to one or two special subjects. It gives them full affirmative sway over the whole matter of municipal legislation. They may propose and pass by vote "any ordinance."

It is said that, although the state might not have power to take the lawmaking power of the state from a representative body and confer it upon the whole people, still it may do so as to part of the state organized as a municipality. But what the state cannot do itself, it cannot authorize a municipality to do. The act is one which the state cannot do at all, and therefore cannot make such act valid in any part of its territory. Moreover, the state cannot do indirectly that which it cannot do directly; and, considering the wide power of legislation which the people of the state have already given the municipalities, the latter are exercising lawmaking power almost equal to that of the state. The initiative in the Los Angeles charter embraces a large power of general legislation which usually belongs to the state. Already a municipality is independent of the state as to all legislation relating to municipal affairs; and we all know how difficult it is to determine how far legislation as to "municipal affairs" runs into general legislation. Moreover, considering the generosity with which the people of the state have given away their powers to municipalities, there is no telling how much further they may go in that direction. If this disposition continues, the time may come when California will be not much more than a shadow of a name—used to designate the territory within which exist certain almost free cities and independent municipalities. Why should the people of the state, with their present love of municipal power, restrict the legislative power of a municipality to "municipal affairs"? Why should not each municipality have its own substantive law in all ordinary matters of legislation, no matter what the law on any subject might be in other municipalities, or in other parts of the state? And the initiative would then cover substantially all the legislation in the state.

Of course, the expediency or wisdom of the law under consideration is not a judicial question; but it is well to remember that in a government republican in form representative legislators are persons who are presumed to have, at least, some special qualifications for legislative work. They are chosen some time before they are called to act. They meet and consult with each other. They are not too much hurried in their action, and take full time for consideration of proposed legislation. In a pure democracy, which is represented in part by the initiative, whenever demagogues, pseudo reformers, or promoters of discontent are able to "fool" the people for only a short "part of the time" by a mischievous proposition, they can by a hurried special election have the proposition voted into a law before there is an opportunity for a sober second thought. It admits the very evils which the representative form of government was intended to guard against. I cannot refrain from expressing regret at the apparent readiness of many of the people of this state to abandon prominent features of our American system of government, the wisest and best system ever yet devised and put into successful operation.

(150 Cal. 106)

PEOPLE'S HOME SAV. BANK v. STADTMULLER. (S. F. 3,453.)

(Supreme Court of California. Dec. 3, 1906. On Rehearing, Dec. 28, 1906.)

CORPORATIONS — STOCKHOLDERS — WHO ARE —DISTRIBUTEE OF STOCKHOLDER'S ESTATE.

A distributee of certain shares of corporate stock belonging to the estate of a decedent was not a stockholder of the corporation, as between himself and it, where section 324 of the Civil Code, requiring the transfer to be entered upon the books of the corporation, was not complied with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 479.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the People's Home Savings Bank against Anna Stadtmuller. From a judgment sustaining defendant's demurrer to the complaint, plaintiff appeals. Affirmed.

F. S. Stratton and Stratton & Kaufman, for appellant. T. C. Coogan, for respondent.

HENSHAW, J. This is an appeal from a judgment given after demurrer sustained to the fourth amended complaint of plaintiff. The complaint charged that one F. D. Stadtmuller subscribed for and received from plaintiff 100 shares of its capital stock, of the par value of $100 each, and that he continued to be the owner of this stock until the defendant in turn became the owner thereof; that Stadtmuller had paid in $33⅓ per share upon his stock, and was liable to the plaintiff for the sum of $66⅔ on each share whenever such unpaid portion should be called in and demand made therefor. The death of Stadtmuller and the proceedings in the administration of his estate are set forth, and it is averred that by these proceedings "the said 100 shares of the capital stock of the plaintiff were duly distributed unto the said defendant, * * * and that said defendant accepted said certificate, and ever since has and still and now does retain the same. Plaintiff alleges that ever since said 28th day of December, 1894, the defendant has been and still and now is the owner and holder of said 100 shares of said plaintiff's capital stock." It is then alleged that 12 days after the distribution to defendant—upon January 12, 1895—plaintiff became insolvent, and ever since that date has been insolvent, and that on the 30th day of September, 1895, "and after said defendant had accepted and received and became the owner of said certificate and said shares represented thereby as aforesaid," plaintiff duly called in all of its unpaid capital stock. Defendant has refused to pay $66⅔ on each of the shares so held by her, and judgment is prayed against her for that amount. It is admitted that no claim was ever presented against the estate of F. D. Stadtmuller upon this contingent liability, and it is also admitted that this defendant did not cause the stock to be transferred to her name upon the books of the corporation, nor do any act equivalent thereto, and that she does not appear as a stockholder upon the books of the company.

It is contended, however, by the appellant, that the acceptance as owner of the stock, under the circumstances alleged in the complaint, is sufficient to establish a privity between herself and the corporation, so that she becomes a stockholder thereof, subject to all the rights, duties, and liabilities of such stockholder. Respondent, in support of the judgment, contends that, as no claim was presented upon this contingent liability against the estate of Stadtmuller, this liability was barred forever (Code Civ. Proc. §§ 1493, 1500; Verdier v. Roach, 96 Cal. 467, 31 Pac. 554), and that the distributee thus took the stock with the right of the corporation to call in the unpaid purchase price likewise barred forever; otherwise, it must be said that by the mere decree of distribution, which does no more than to designate the persons to whom the title of the estate belongs, and to stand for all the world as a muniment of such title, a liability was created against the distributee which had been forever barred against the estate. Interesting as a consideration of this question would prove, its determination becomes unnecessary, because the second proposition which respondent urges and argues is conclusive in favor of the judgment. That proposition is that upon the face of the complaint the defendant is not a stockholder, within the meaning of the law which renders a stockholder liable for the unpaid balance of the subscription price of stock.

Section 324 of the Civil Code, with other matters, declares that shares of stock, except as thereinafter provided, are personal property, and may be transferred by indorsement by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties, by whom and to whom transferred, the number of certificate, the number or designation of the shares, and the date of transfer. In People v. Robinson, 64 Cal. 373, 1 Pac. 156, this court, in construing the statute of 1853, which was identical as to the language under consideration with that of section 324 of the Civil Code, declared that this clause meant that a transfer of stock, until entered upon the books of the company, conferred on the transferee no rights as between himself and the company, no right beyond that of having such transfer properly entered, and that, whatever right the purchaser of a certificate of stock might acquire as between himself and his vendor, "it is well settled that as between himself and the corporation he acquires only an equitable title, and until he secures a transfer on the books of the company he is not a stockholder, and has no claim to act as such." As to a corporation organized under the Code provision as it now stands, this court said in Visalia Railroad v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136: "For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books." And, indeed, the rule is universal in states whose laws contain a provision such as that of ours, embodied in section 324 of the Civil Code, that the registered owner of stock is alone liable to the corporation until the transferee causes the transfer to be entered upon the books of the corporation, or in some other way, equivalent in the eye of the law, establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as a substituted stockholder for the original holder. It is true, of course, that as between the transferror and the transferee, the transferror, who has been made to pay a call or an assessment upon the stock, has a right of recovery over against his transferee. But the corporation must proceed against the transferror, because he stands upon its books as a stockholder, and has no right of action against the transferee, because, as between him and the corporation, the contractual relation of stockholder has not been created. Thus says Cook on Corporations (4th Ed.) § 258: "Until a transfer is recorded in the transfer book of the corporation, the transferee, not being duly recognized as a stockholder, is not chargeable either with corporate debts or unpaid balances of the subscription. He is bound to protect and indemnify his transferror, but he is not liable to the corporation or corporate creditors or other stockholders." See, also, Clark & Marshall, Private Corp. § 588; Beach, Private Corp. § 130; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133.

Of course, the cases are numerous which hold that the provisions in the by-laws of a corporation as to the forms and procedure for effecting a transfer are provisions for the benefit of the corporation, so that errors or irregularities in complying with such forms and procedures will not avail a person in his attempt to deny his stockholder's liability. Likewise the cases are numerous where a party has been refused to be heard in his denial that he was a stockholder, upon the familiar grounds of equitable estoppel, as where he has accepted and receipted for dividends, has voted at stockholders' meetings and in various other ways has exercised a stockholder's privileges. None of these cases, however, go to the proposition that, where the law requires a transfer of stock before the relationship of corporation and stockholder exists, such relationship may be forced on one who has done no act to establish such privity. The mere fact that the distributee or legatee of an estate takes the paper certificate, and does nothing more, cannot be said to be a substantial compliance with the provisions of section 324 of our Civil Code. For, if so, those provisions are absolutely meaningless, and every unrecorded transfer of stock establishes against the transferee the relation of stockholder. Of course, the right of the corporation to proceed and sell the stock in case of delinquency is an entirely separate and distinct right, and one not here under consideration. This action deals entirely with the personal liability of the defendant because of her ownership of the stock under the circumstances above set forth. As to this we have seen that no such liability exists, and the judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

On Rehearing.

In Bank. Response to petition for a rehearing.

BEATTY, C. J. Counsel for appellant in their petition for rehearing urge very strongly the argument that, as the complaint contains an allegation "that ever since the 28th of December, 1894, the defendant became and now is the owner and holder of said 100 shares of said plaintiff's capital stock," the fact so alleged is confessed by the demurrer, and therefore establishes defendant's liability. But this allegation is merely a conclusion of the pleader from the facts specifically alleged, viz. that the stock was distributed to the defendant (16 days prior to the confessed insolvency of the plaintiff), and that she "accepted" it. It is like an allegation of ownership of the demanded premises in ejectment, coupled with an attempted deraignment of title which shows that the title is defective. Here the demurrer is special, on the ground of uncertainty and ambiguity, in that it cannot be determined what is meant by "accepted," which may mean no more than that the defendant received the certificate of stock from the executor and retained it in her possession. In such a case I am satisfied she did not make herself personally liable for the unpaid portion of the subscription price of stock.

4 Cal. App. 354

GREGG v. CAREY et al. (Civ. 266.)

(Court of Appeal, Second District, California. Oct. 16, 1906. Rehearing Denied Nov. 14, 1906.)

1. Brokers—Sale of Realty—Authority in Writing—Ratification of Agency.

A contract of sale of realty was made by one having no title nor authority in writing to execute such an instrument. The attorney for the purchaser was informed by the equitable owner that such person was authorized to sell, and was directed to see him in reference to the matter. *Held* that, under Civ. Code, §§ 2300, 2317, and Code Civ. Proc. § 1962, subd. 3, such statement was a ratification of the agent's authority, which estopped the equitable owner from denying it.

2. Specific Performance—Contract for Sale of Realty—Inability to Perform.

Where defendants are unable to make the deed called for in a contract of sale, plaintiff cannot have complete specific performance of the contract of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 30-32.]

3. Same—Damages Instead of Specific Performance—Amount.

Where specific performance of a contract for the sale of realty on which a payment has been made cannot be compelled because the vendor cannot make the deed contracted for, and th purchaser refuses to take such title as the vendor can give him, the purchaser should be given damages to the amount of the payment, but, payment having been tendered, no interest should be allowed on the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 415, 416.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Suit by Luisa A. Gregg against Samuel D. Carey and others to compel specific performance of a contract. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

T. R. Archer, for appellant. John W. Kemp, for respondents.

SMITH, J. Appeal from a judgment for the defendants, and from an order denying the plaintiff's motion for a new trial. The suit is brought for specific performance of a contract for the sale of real estate alleged to have been made by the defendants, or for damages, in case performance cannot be had. The contract sued on is signed by the defendant Lewis only; but it is alleged that he was authorized in writing by the other defendants to sign it on their behalf. It is in the words and figures following: "Los Angeles, Cal., Feb. 11-05. Received from Luisa A. Gregg the sum of fifty dollars, being a deposit on lot one in blk. 28 Crenshaw's Arlington Hts. tract $1,000 cash with unlimited certificate of title and all street work in front of said lot to be done and paid for by first party within one year. The first party also agrees to conduct an adequate supply of water to said lot within a year. The first party also agrees to lay a temporary pipe to said lot conducting an adequate supply of water for domestic purposes within one week from completion of sale. First party agrees to furnish above title and deed to said lot within ten days from date hereof. Floyd F. Lewis."

At the time of the making of this document the legal title to the land was vested in Crenshaw and the equitable title in Carey, under a contract of sale subject to certain building restrictions and other conditions; and it is found that Lewis was not authorized in writing, or otherwise, by the other defendants, to execute the instrument sued on. It appears from the evidence, however, that, upon application to Carey by the plaintiff's attorney on her behalf, he was informed by Carey that Lewis was authorized by him to sell the lot, and the attorney was directed "to see defendant Lewis in the matter." This, it is claimed by the appellant, under authorities cited, was a ratification of Lewis' agency by Carey of such a character as to estop him from denying it, and this contention, we think, must be sustained. Civ. Code, §§ 2300, 2317; Code Civ. Proc. § 1962, subd. 3; Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559; Scott v. Glenn, 87 Cal. 221, 25 Pac. 405; Id., 98 Cal. 170, 32 Pac. 983. Afterwards, the plaintiff applied to Lewis for a deed, and was offered a deed executed by Crenshaw, containing the building restrictions and other restrictions provided for in his contract with Carey, and without any provisions as to the street work and water piping referred to in the contract sued on. This she refused to receive, and demanded a deed without such restrictions and in accordance with her contract, which was refused by the defendants Lewis and Carey. Afterwards, at the close of the evidence, the plaintiff offered to accept a deed with the building restrictions as first offered by defendants.

The defendants Lewis and Carey, not being able to make the deed called for by their contract, it is clear that the plaintiff cannot have specific performance of the contract; or, at least, complete specific performance. Nor, in view of her previous definite refusal to accept the deed offered by the defendants and the time elapsing before her offer to accept such a deed, are we prepared to say that the court below was not justified in refusing to require the defendants to make the deed the plaintiff was ready to accept. It seems clear, however, that as to the defendants Carey and Lewis, the plaintiff has made a good case for damages, the measure of which in the present case should be the money paid on the contract (Civ. Code, § 3306). But, as it appears from the evidence that this money was once tendered without interest, therefore, the judgment should be modified by adjudging to the plaintiff the recovery of $50 from the defendants Carey and Lewis.

The order denying the plaintiff's motion for a new trial is affirmed. The judgment appealed from is reversed, and the cause remanded, with directions to the lower court to modify the same as above indicated; and the judgment, thus modified, shall stand affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 302

PETERSON v. PLUNKETT. (Civ. 262.)

(Court of Appeal, Third District, California. Sept. 25, 1906.)

1. JUDGMENT — DEFAULT — MOTION TO SET ASIDE—DISCLOSING DEFENSE.

A motion to set aside a judgment rendered in defendant's absence will be denied where defendant discloses no meritorious defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 292, 293.]

2. QUIETING TITLE — PLEADING — DEFENSE — TITLE—DENIAL OF PLAINTIFF'S TITLE.

Defendant in an action to quiet title need not allege in his answer his source of title, a denial of plaintiff's right being sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 78.]

3. JUDGMENT — DEFAULT — MOTION TO SET ASIDE.

A motion to set aside a judgment in an action to quiet title rendered in defendant's absence must set forth what he can prove in support of his title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 312.]

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by H. D. Peterson against W. J. Plunkett to quiet title. Judgment for plaintiff, and defendant appeals from the judgment, order denying motion to set aside judgment, and order denying motion for new trial. Affirmed.

Bell & Straus and Edwd. G. Knapp, for appellant. Crawford & Crawford, for respondent.

BUCKLES, J. This is an action to quiet title of H. D. Peterson to a tract of land in Lake county. The case was set for trial.

The defendant failing to appear, a trial was had, resulting in a judgment for plaintiff on December 21, 1903. On March 21, 1904, defendant moved the court to set aside said judgment on the ground that it was taken against him "through his mistake, inadvertence, surprise, and excusable neglect." Defendant at the same time moved for a new trial. Both motions were denied, and this appeal is from the judgment, from the order denying motion to set aside the judgment, and from the order denying motion for a new trial.

The usual complaint to quiet title was filed. A general demurrer thereto was filed and overruled. Defendant answered, denying plaintiff's title, and for further defense alleges his own title to said lands to be a seizure in fee and entitled to possession, and that, while so seised and possessed and entitled to possession, the plaintiff entered and ejected him, and wrongfully, unlawfully, and without defendant's consent, withholds possession from defendant. The answer was filed November 16, 1903. On November 25, 1903, plaintiff filed an answer to defendant's cross-complaint, specifically denying the allegations thereof. This answer, according to admissions of Frank V. Bell, a member of the firm of Bell & Straus, attorneys for defendant, was served on defendant's said attorneys before December 11, 1903, to wit, about November 25, 1903. On December 7, 1903, the court made an order setting the case for trial on December 21st, and directed in said order that the clerk notify Bell & Straus, attorneys for defendant. On December 7, 1903, the clerk did notify said Bell & Straus by letter, they having their office in San Francisco, that the case was set for trial for December 21st. On December 11, 1903, Attorney Frank V. Bell wrote the clerk in answer to his said notice, saying: "The plaintiff has as yet failed to serve upon me any answer to my cross-complaint, and, as the demurrer has been withdrawn, the case is not at issue nor ready for trial. Under any circumstances, it would be impossible for me to try the case on the 21st, my engagements in courts in this county will prevent it. However, as the case is not at issue and cannot be tried, as soon as the answer has been served on me I will agree on some future day to try the case. Very truly, Frank V. Bell." Bell says in his affidavit on motion to vacate the judgment that at the time of writing said letter he believed he had not been served with said answer, but that he was mistaken in this belief, and did not discover his mistake until after December 21st, when for the first time he discovered said answer where it had been misplaced. On December 12, 1903, the clerk again wrote Bell & Straus, notifying them that the case was set for trial for December 21st, and added, at the bottom of the letter, the following: "I send this notice because I think that I failed to state in the first notice that the demurrer had been overruled." This letter was received by Bell & Straus about December 13th, according to Frank V. Bell's said affidavit. At the trial on December 21st there was no appearance for the defendant, and no other showing made to account for the nonappearance of Bell & Straus than the letter of Frank V. Bell of date December 11th, heretofore set forth, which was shown to, and considered by, the court. The showing made by defendant on the hearing of the motion to set aside the judgment consisted of the affidavit of the defendant, Plunkett, and the affidavits of his attorneys. The defendant, Plunkett, sets forth in his affidavit that Helen F. Peterson, the wife of the plaintiff, on the 14th day of July, 1900, filed a homestead on the land in controversy, and that, by reason of said homestead, the said Helen F. Peterson had or claimed some interest in said land, and that she is a necessary party to the action, and that there could be no complete determination of the action until she is made a party to said action. The affidavit of said attorney, in addition to the matters already referred to as tending to excuse their nonappearance at the trial, sets forth that he was and is prepared to introduce evidence to show that plaintiff was a resident of San Joaquin county at the date of filing said homestead, and that said homestead was void.

The trial court heard all the evidence, and was well acquainted with all the facts in the case, and was called upon to exercise its discretion in passing upon the motion to set aside the judgment. The evidence produced at the trial of the case was the United States patent to plaintiff for the land and the homestead declared and filed by Helen F. Peterson. There is no allegation in the answer, nor elsewhere, of defendant's source of title, and there was no showing at all made at the hearing of the motion to set aside the judgment, of any claim, right, title, or interest the defendant had in or to said land, and no offer made to prove such claim or interest. If he had a meritorious defense to the said action, he failed to disclose the same, and the court could not do otherwise than deny his motion.

Defendant need not allege in his answer his source of title; a denial of plaintiff's right being entirely sufficient to raise an issue to be tried by the court (Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510; United Land Association v. Pacific Improvement Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988), but, upon a motion to set aside a judgment rendered in the absence of the defendant, in order that the court may know what his defense is, and whether he has a good or meritorious defense to plaintiff's cause of action, justice requires him to set forth what he can prove in support of the right of title he claims in his answer. This the defendant failed to do.

We discover no abuse of discretion on the part of the court.

Judgment, order denying motion to set aside judgment, and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

4 Cal. App. 341

MILLER v. GRIFFITH et al. (Civ. 262.)

(Court of Appeal, Second District, California. Oct. 16, 1906.)

APPEAL — RESERVATION OF GROUND — OBJECTIONS — INSTRUCTIONS.

A statement in an order granting a new trial that the verdict was against law meant that the verdict was contrary to the instructions of the court, and the instructions, not being set out in the record on appeal, the order would be presumed correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2944, 2945, 3272, 3273.]

Appeal from Superior Court, Los Angeles County; B. F. Bledsoe, Judge.

Action by L. L. Miller against Griffith J. Griffith and another. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Jones & Weller, J. W. McKinley, Earl Rogers and Luther Brown, for appellants. Hunsaker & Britt, for respondent.

GRAY, P. J. This is an appeal by defendants from an order granting plaintiff a new trial. The action is brought by the assignee of a firm of attorneys to recover the sum of $20,000, alleged to be a reasonable attorney's fee in certain litigation wherein they acted as attorneys for the defendants. The verdict was in plaintiff's favor for $500. The motion for a new trial was based on the ground, among others, that the verdict is against law, and also upon the ground that the evidence is insufficient to justify the finding or verdict of the jury to the effect that the services of plaintiff's assignors were not worth more than the sum of $500. A new trial was granted by the court on the grounds that the verdict is against law, and is not supported by the evidence. The motion was heard on the minutes of the court, and the appellants attack the order granting the new trial upon the ground that no proper specifications of insufficiency of the evidence were stated. It is replied in the respondent's first point, in effect, that this is immaterial, for the reason that one ground of the order was that the verdict was against law, and as the instructions are not set out error in that regard is not made to appear by the record, and therefore the order must be affirmed. This position of the respondent we deem to be well taken. The statement of the court in its order that the verdict was against law means that the verdict was contrary to the instructions of the court. Emerson v. County of Santa Clara, 40 Cal. 543. In the absence of the instructions, how are we to determine whether the verdict is contrary to the instructions? It appears from the transcript that the court did instruct the jury, and, for all that we know, it may have instructed the jury to bring in a verdict for the plaintiff for a much larger amount than $500. If it did, certainly the verdict would be contrary to the instructions, and against law. All presumptions are in favor of the order granting or refusing a new trial, and the burden is on the appellant to make it affirmatively appear by a proper record that the order is erroneous. In the absence of the instructions, we must presume that the verdict was contrary to the instructions. The principle here laid down is analogous to that stated in Wyckoff v. Pajaro Valley Consolidated R. R. Co., 146 Cal. 681, 81 Pac. 17, Skinner v. Horn, 144 Cal. 278, 77 Pac. 904, and Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075. On the authority of those cases, the sufficiency or insufficiency of the specifications becomes immaterial.

The order appealed from is affirmed.

We concur: SMITH, J.; ALLEN, J.

4 Cal. App. 358

CROWELL v. EWING. (Civ. 269.)

(Court of Appeal, Second District, California. Oct. 17, 1906.)

1. FRAUDS, STATUTE OF—INTERESTS IN REAL PROPERTY—CONTRACTS FOR COMMISSIONS.

Where defendant held an option for the purchase of a mine, and, though it had expired, he continued in possession and made improvements with the consent of the owner under an oral extension of the option, and, on resale of the premises by him, he was to receive a certain sum for his services in making the sale and for improvements, he had an interest in the property, so that his agreement to divide the commission was within Civ. Code, § 1624, subdivision 6, requiring contracts for the payment of commissions for the sale of real property to be in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 131.]

2. SAME—SUFFICIENCY OF WRITING.

A letter of defendant notifying plaintiff that defendant had told a third person to talk with plaintiff on commissions was not a sufficient memorandum to take an agreement between plaintiff and defendant for the division of commissions for the sale of real estate out of the statute of frauds.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by J. Irving Crowell against Thomas Ewing. From an order granting a new trial after verdict in favor of plaintiff, he appeals. Affirmed.

Munson & Barclay, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher, for respondent.

GRAY, P. J. This action is brought to recover $50,000 on an oral agreement made between plaintiff and defendant concerning the sale of certain mining property and the division between them of $100,000 commissions. The plaintiff had a verdict for $15,000, and the court granted defendant's motion for a new trial. The appeal is by the plaintiff from the order granting the new trial.

It is contended by appellant that an agreement made under the circumstances of this case for a division of commissions is not within subdivision 6 of section 1624 of the Civil Code, and the case of Gorham v. Heiman, 90 Cal. 358, 27 Pac. 289, is cited to sustain this position. The trial court, as we gather from its opinion, took the view that the defendant had an actual interest in the mining property which was sold, and that his contract with the plaintiff was that of employment as an agent or broker to sell real estate, and this view is fully sustained by the defendant's evidence. From this it appears without conflict that he had a written option on the property, which at the time of this sale had expired, but that thereafter, and up to the time of said sale, he remained in possession of the property, working upon and improving the same; that to that end he expended upon the mine about $20,000; that he did all this and remained in possession really under the written agreement, which was extended as to the time of its operation by oral agreement. This would give the defendant an actual interest in the property, and he seems to have dealt with it and finally sold it as if he was at least a part owner in it. These facts distinguish the case very clearly from Gorham v. Heiman, supra. In that case the defendant had no interest, but there was, in effect, a partnership between plaintiff and defendant for the sale of mining property generally as brokers and the division of the commissions for such sales. In the case at bar, however, while the defendant referred, in his conversations with plaintiff, to the $100,000 which he was to receive out of the property as commissions, and orally agreed to divide the same with plaintiff, it is still quite clear that this large sum of money which defendant was to receive for the mine was to compensate him, not merely as commissions on a sale, but for the work and labor performed in improving the mine, and for the interest acquired thereby, and by reason of the agreements with the owners thereof and the expenditure of money in the mines. In other words, this $100,000 was intended to pay defendant for his interest in the mine. The $50,000 that the plaintiff was to receive under the oral agreement was for commissions as such on the sale which he was to assist in making, and, as this was to be paid to him by a party interested in the property and for whose benefit the property was to be sold, the case comes clearly within the provisions of subdivision 6 of section 1624 of the Civil Code, and the oral contract is therefore invalid. The trial court on the evidence was warranted in so holding.

The appellant further contends that; conceding the case to come within said section of the statute of frauds, still there was a sufficient agreement or memorandum in writing, signed by the party to be charged, to take the case out of the statute. To substantiate this he quotes the following letter, written by the defendant to the plaintiff: "Needles, Cal., Feb. 22, 1902. Crowell: I enclose you Mr. Davidson's letter which makes me sick. I will be home Wednesday or Thursday. These gentlemen seem to be very much pleased and will talk to you on commissions so arrange with them. I simply told them they could adjust the matter with you as I should surely allow you a commission if I did them. Hope to see you soon. Ewing." This letter was written concerning parties who were negotiating for the purchase of the mine. We do not think that it contains a memorandum of any agreement to pay anything. It certainly does not constitute an agreement to pay commissions. It is no more than a notice to the defendant to enter into negotiations with some third parties concerning his commissions, and it cannot be construed into any kind of a promise from defendant, Ewing, to the plaintiff. We are of opinion that the case is not taken out of the statute of frauds, and that, for that reason, the court below properly granted a new trial.

The order appealed from is affirmed.

We concur: ALLEN, J.; SMITH, J.

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4 Cal. App. 357

HESPERIA LAND & WATER CO. v. GARDNER et al. (Civ. 160.)

(Court of Appeal, Second District, California. Oct. 16, 1906. Rehearing Denied by Supreme Court Dec. 13, 1906.)

APPEAL—DECISIONS REVIEWABLE—SUBJECT-MATTER OF ACTION—TITLE TO REAL PROPERTY.

The right of the owner of a water system to recover for water supplied therefrom does not involve the title to real property so as to give the right to appeal from a judgment of the superior court for $32.50 on appeal from a justice's court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 118.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the Hesperia Land & Water Company against George F. Gardner and another. From a judgment in favor of plaintiff, defendants appeal. Dismissed.

J. W. Stephenson, for appellants. Mack & Light, Henry M. Willis, for respondent.

GRAY, P. J. This action was originally commenced in the justice's court by the plaintiff corporation to recover from the defendants the sum of $36.37 for water furnished and delivered to the defendants from the water system of the plaintiff. The case was tried in the justice's court, and plaintiff obtained judgment in the sum of $32.50. Thereafter the case was appealed to the superior court on questions of law and fact and tried anew, the superior court rendering judgment for $32.50 and costs in favor of the plaintiff. This appeal is brought here from the judgment of the superior court by defendants on the theory that the title of real property is involved in the action.

It has several times been held that water diverted from a natural stream into ditches and reservoirs is, when so contained in said ditches and reservoirs, the personal property, and not the real estate, of the owners thereof. Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384. The only matter presented in the justice's court and in the superior court related to the water furnished after it had been diverted by the water system of the plaintiff. This in no way involved any title or right in real estate, the water itself being personal property. The judgment appealed from involves nothing except the question whether the water was actually furnished to the defendants, and its value. The sum involved being less than $300, and there being no question of the title of real estate in any way connected with the case, the superior court had final jurisdiction of the case on appeal, and neither this court nor the Supreme Court has any jurisdiction whatever in the matter.

The appeal is therefore dismissed.

We concur: SMITH, J.; ALLEN, J.

(4 Cal. App. 361)

REDPATH v. EVENING EXPRESS CO.

(Civ. 256.)

(Court of Appeal, Second District, California. Oct. 18, 1906. Rehearing Denied by Supreme Court Dec. 13, 1906.)

1. Appeal—Harmless Error—Exclusion of Evidence.

On trial by the court, any error in the exclusion of a stipulation between the parties offered in evidence is immaterial, since the stipulation may be considered as of equal value to a finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4197.]

2. Contracts—Action for Breach—Pleading.

In an action against a newspaper company for breach of a contract for carrier service, which provided that the carrier might sell his route subject to the right of the company to approve the purchaser, allegations that the carrier found purchasers who were willing to take the route, but whom the company dissuaded from taking it, but not alleging that assignments were actually made and that the company refused to approve them, did not state a cause of action.

3. Tender—Sufficiency—Effect.

Under Civ. Code, § 1500, providng that an obligation for the payment of money is extinguished by an offer of payment accompanied by a deposit in a bank and notice thereof to the creditor, an obligation is not extinguished by a tender unaccompanied by the deposit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 55.]

4. Contracts—Breach—Effect.

Where a newspaper company, on the termination of the contract of employment of a carrier, by notice to him, became obligated under the contract to pay him $843, it was not relieved from the obligation by the carrier's refusal to deliver a list of names of subscribers which the company, within a short time, secured through other sources at an expense of not over $60.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by K. V. Redpath against the Evening Express Company. From a judgment in favor of defendant and an order denying a new trial, plaintiff appeals. Reversed and remanded.

Stephens & Stephens, for appellant. Anderson & Anderson, for respondent.

SMITH, J. Appeal from a judgment for the defendant, and an order denying the plaintiff's motion for a new trial. The suit was brought for breach of a written contract of date September 12, 1898, between defendant as party of the first part and the plaintiff as party of the second part, of which the following are the material parts:

"The Evening Express Company, in consideration, etc., * * * does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, the carrier service of the Evening Express in the limits of the city of Los Angeles described as follows: [Here follows description and provisions as to copies of the Express to be sold to the party of the second part and as to services to be performed by him.] * * * It is further agreed by said second party that he will not sell, lease or otherwise dispose of said carrier service, or any part thereof, to any person or persons, without the previous consent and full approval in writing of the Evening Express Company, which reserves the right, in case the service of the papers to subscribers shall be unsatisfactory, or the work of canvassing and building up the list by said second party shall be inefficient, to repurchase back and resume control of all said carrier service by paying to said second party the sum of $1.50 per name for all names of bona fide subscribers on his books on the date of such notice of their intention to repurchase. It is further expressly agreed that the Evening Express Company shall be the sole judge of the satisfactory service of its papers, or of the efficiency of the work of said second party, and it agrees to give him thirty (30) days' notice of such intention to repurchase its carrier service in said territory hereinbefore described. But the said second party shall first have the privilege of selling said carrier service, or any part thereof, to a third party or parties at a higher rate per name, provided the third party be first accepted and approved by the Evening Express Company. * * * [Here follows a provision empowering the party of the first part to require the second party to subdivide the carrier district whenever in its judgment the territory is too large for him to serve and canvass efficiently, the second party agreeing within thirty days of such notice to sell such portion of the district as may be required by the first party to some person or persons satisfactory to it; and on failure of the second party to sell, reserves to the first party the right to repurchase such portion of the carrier district at the rate of $1.50 per name for each bona fide subscriber, etc.; and provisions as to the number of copies to be purchased by the second party and the terms of purchase, with some other provisions immaterial to the present controversy.] * * * The Evening Express Company reserves the right to solicit new subscribers within the carrier district limits defined herein, and said second party agrees to pay said Evening Express Company the sum of twenty-five cents for each bona fide new subscriber" thus secured for him, etc.

The complaint contains three counts, in all of which the contract is set out or made part by reference, and the sale of part of the district, the termination of the contract by the defendant, and the performance of its conditions by the plaintiff alleged. In the first count it is further alleged, in effect, that within a period of 30 days from the notice terminating the contract it was agreed by the plaintiff and one McIntyre that the latter should purchase the carrier service at the price of $3,000, provided McIntyre should be accepted and approved by the defendant; that McIntyre applied to the defendant to learn whether he would be accepted and approved; that by certain statements and representations made to him by the defendant with intent of preventing him from making the purchase, McIntyre was prevented from purchasing, to plaintiff's damage in the sum of $3,000, etc. In the second count, similar allegations are made as to one Barton, who had agreed with plaintiff to purchase the route for the sum of $2,500. In the third count, besides the general allegations common to the three counts, the material allegation is as follows: "At the time of said notice hereinbefore referred to, so given by the defendant to the plaintiff, there were on the books of plaintiff 562 names of bona fide subscribers, and, by reason of said notice and the termination of plaintiff's interest under said contract by said notice, there became due to the plaintiff on the 5th day of November, 1901, the sum of $843, no part of which has ever been paid to the plaintiff and the whole thereof is now due, owing, and unpaid from the defendant to the plaintiff."

A general demurrer was interposed to each count of the complaint and sustained as to the first two. The answer to the third count consists of a denial of performance of the contract by the plaintiff without assignment of any particular breach, and of a counterclaim for the sum of $147.15, due to the defendant under the terms of the contract for papers sold to the second party.

Upon the issues thus made the court finds, in effect: (1) That the plaintiff has not performed all the obligations of the contract, but has failed and refused to perform "certain obligations and conditions of said agreement by him to be kept and performed"; (2) that it is not true "that there became due to plaintiff on the 5th day of November, 1901, or any other time, or at all, the sum of $843, or any other sum"; (3) that on November 5th the defendant tendered to plaintiff $1.50 per name for all bona fide subscribers to the Evening Express, and then and there demanded of plaintiff to turn over to the defendant the names of such subscribers, but the plaintiff refused to accept the tender or to turn over the names; and (4) that the allegations of the defendant's counterclaim are true. Upon a fair construction of these findings, it must be assumed that the only breach of the contract on the part of the plaintiff was the refusal to turn over the names of the subscribers referred to in the third of the findings enumerated, and in this connection, it appears from the statement on motion for new trial that "it was stipulated that the defendant paid out and incurred a sum not exceeding $60 to obtain through its own agency the list of subscribers on the books of the plaintiff." This stipulation was offered in evidence, but excluded by the court, the plaintiff excepting, and this is assigned as error by him. But the error, if any, is immaterial, as the stipulation itself may be considered as of equal value as a finding. The judgment is that the plaintiff take nothing by his action, and that the defendant recover the amount of its counterclaim.

The points urged by the appellant are that the demurrers to the first two counts of the complaint were improperly sustained, and that on the findings there should have been a judgment for the plaintiff.

As to the first point, it may be assumed, for the purposes of the decision, that the right of assignment given to the plaintiff by the terms of the contract was not a mere privilege thereafter to be conferred or not at the option of the defendant, but a substantial right regarded by the parties as valuable and as constituting part of the consideration of the contract; that the condition imposed by the contract of acceptance and approval by the defendant was inserted merely for the purpose of protecting the defendant against an assignment to an inefficient or otherwise objectionable purchaser; that this power could be exercised for that purpose only, and not arbitrarily for the purpose of evading the provisions of the contract; and hence, that in the present case, under the circumstances alleged, the defendant was under obligation upon demand to accept and approve the purchasers referred to in the complaint. But the fault of the complaint is that it is not alleged that assignments to the purchasers as distinguished from agreements looking to that end were in fact made, or that the acceptance and approval of the assignments were either demanded of, or refused by, the defendant. The most that can be gathered from the complaint is that the defendant, by certain representations or statements—which were not in themselves actionable—prevented or persuaded the intended purchasers from making the purchases, from which it must be inferred, either that there were no actual contracts between them and the plaintiff, or that the latter voluntarily released them. Had the assignments been consummated and presented to the defendant for acceptance and approval, and such acceptance and approval been refused by the defendant, a different case would be presented. We are of the opinion, therefore, that the demurrers to the first two counts of the complaint were rightly sustained.

As to the second point, it would seem clear on the express allegations of the complaint showing an indebtedness at the time of the termination of the contract from the defendant to the plaintiff in the sum of $843 for the "562 names of bona fide subscribers" then on the books of the plaintiff—which are not denied by the answer—that the plaintiff was entitled to judgment for that amount, less the sum of $147.15, counterclaimed by the defendant, with damages, not exceeding $60, for expenses incurred by the defendant in getting the names of the subscribers, and we are at a loss to understand upon what principle this relief was denied to him. It is clear, however, that the judgment must rest on one of two propositions: The one, that the admitted obligation of the defendant to pay the amount alleged was extinguished by the tender found to have been made by it; the other, that the obligation was extinguished by the refusal of the plaintiff to turn over to the defendant the names of the subscribers. But we are of the opinion that neither of these propositions can be maintained. As to the first, an obligation for the payment of money is not extinguished by a tender, unless the money is deposited with some bank as prescribed in section 1500 of the Civil Code. As to the second, it may be assumed that the plaintiff was under obligation to turn over to the defendant the names of subscribers, and that in refusing to do so he was guilty of a breach of the contract, and further, that, until this information was given to the defendant or otherwise obtained by it, it would be justified in refusing to perform. But here it appears by stipulation that the information was in fact obtained by the defendant at an expense of not more than $60 within a short period after the plaintiff's refusal and before the commencement of the suit—which did not occur until about nine months afterwards. The case presented is, therefore, that the defendant had received from the plaintiff under the contract the sum of $843, which it was under admitted obligation to pay, and the contention is that, by reason of the plaintiff's breach of the contract—by which it was not damaged in excess of $60 and which could be fully compensated by that amount or less—the obligation was extinguished and the right of the plaintiff forfeited.

This contention can be maintained only upon the broad ground that any breach of the terms of a contract by a party deprives him of the right to maintain an action against the other party to enforce the obligation of the latter. But this is not the law, nor has it ever been, either at law or in equity. At law it was only where the obligation broken by the plaintiff was a condition precedent to defendant's obligation that the breach was a defense. Nor was any obligation of the contract regarded as a condition precedent unless made so by the express terms of the contract, or by necessary implication. 1 Chitty's Pl. 321, 322; Civ. Code, §§ 1439, 1498; Code Civ. Proc. § 457; Anson on Contracts, 376 et seq., 287, 303 et seq., 308 et seq. But here the obligation broken is not expressed in the contract, and was probably not thought of by the parties, but is a merely implied obligation added to the contract by construction of law. Civ. Code, §§ 1656, 1655, 1643. It could not, therefore, have been regarded by the parties as a condition precedent to the defendant's obligation. But, under our system, the distinction between legal and equitable suits has been abolished, and in any suit the plaintiff is entitled to either legal or equitable relief, or both, as may be required by the case made (Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423), and, where equitable principles will apply, they will be determinative of the case. Hence, in our system the rules formerly prevailing at law have been essentially modified by the principles of equity, and, to the extent the latter will apply, superseded. But in equity the failure to perform an obligation of the contract, whether a condition precedent or otherwise, where "it is only partial and either entirely immaterial or capable of being fully compensated" has always been regarded as insufficient to constitute a defense. Civ. Code, §§ 3392, 3386. And this, under our system, has become a general principle of the law. Nor, in view of the settled principles of equity, could it be otherwise, for in case of a partial breach of the contract, as in this case, the defendant has received and voluntarily retains so much of the consideration, and has become subject to a corresponding obligation;

and hence, in cases to which the strict legal rule would apply, if any, a forfeiture of the plaintiff's corresponding right would occur, against which equity on other principles would relieve. Civ. Code, §§ 3275, 1477.

We are of the opinion, therefore, that judgment should be entered in favor of the plaintiff for the sum of $843, less the sum of $147.15, and less, also, the sum of $60—if the plaintiff be willing to admit that to be the amount of the expenses incurred by the defendant in obtaining the names of subscribers—and otherwise, the amount of such expenditures as may be found by the court, together with interest on the balance from the date of the commencement of the suit, or from the date of such expenditures, as the case may be.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 369

LUDINGTON EXPLORATION CO. et al. v. LA FORTUNA GOLD & SILVER MINING CO. et al. (Civ. 263.)

(Court of Appeal, Second District, California. Oct. 18, 1906.)

1. VENUE—RESIDENCE OF PARTIES—FOREIGN CORPORATIONS.

The right to sue nonresident corporations in any county of the state does not exist where there are other resident defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 40.]

2. SAME—CHANGE OF VENUE—PARTIES ENTITLED.

Where all the defendants in an action are nonresidents of the county in which the action is brought, defendants residing in another county in the state are entitled to a change of venue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 61-63.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Ludington Exploration Company and others against the La Fortuna Gold & Silver Mining Company, an Arizona corporation, and others. From an order denying the motion of certain of the defendants to change the place of trial, they appeal. Reversed.

E. J. Baumberger, for appellants. A. D. Warner, for respondents.

PER CURIAM. Appeal from an order denying the motion of corporation defendants and Neumann to change the place of trial from the county of Los Angeles to the city and county of San Francisco. It appears from the defendants' affidavits that the two corporations have their principal place of business in the city of San Francisco, and that that is the place where the contract was made and is to be performed; that defendants Neumann and Oliver are both residents of San Francisco, and were so at the time of the beginning of this suit; and that the fictitious defendants are not, nor is any one of them, a necessary party to this action, nor have they any interest therein. The briefs of the counsel are largely devoted to the proposition of the respondents, that the corporation defendants are nonresidents of the state and may therefore be sued in any county which the plaintiffs may designate. But assuming that this is the case, the right of the plaintiffs to sue them in any county could exist only in a case where they were the only defendants (Code Civ. Proc. § 395), and here it appears that there are two other defendants, Neumann and Oliver, both of whom are residents of the state. We may disregard, also, as a point that need not be decided, the claim of the appellants that, under the provisions of article 12, § 16, of the Constitution, these corporations have a right to a trial of the case in the city and county of San Francisco; and, on the other hand, the fictitious defendants named in the complaint may be disregarded as not being parties to the action, or, at least, as not being necessary or proper parties, or interested in the action. Of the remaining defendants, Oliver does not join in the motion; but it appears that he, as well as Neumann, the moving defendant, is a resident of the city and county of San Francisco. The case, therefore, comes directly within the decision in Wood, Curtis & Co. v. Herman Mining Co., 139 Cal. 713, 73 Pac. 588, where it is held that where all the defendants in an action are nonresidents of the county in which the action is brought, any of the defendants residing in another county are entitled to a change of the place of trial, notwithstanding the opposition of the other defendants; and upon the authority of this decision, the order appealed from must be reversed. It is so ordered.

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4 Cal. App. 219

CHURCHILL v. MORE. (Civ. 228.)

(Court of Appeal, Second District, California. Aug. 14, 1906. Rehearing Denied by Supreme Court Oct. 11, 1906.)

1. FIXTURES—BETWEEN LANDLORD AND TENANT—LEASE—RIGHT TO REMOVE.

A lease provided that the lessee should have the right to remove fixtures placed on the premises at any time. A contractor was engaged to bore an oil well for the lessee, the lessee to furnish the casing, and the contractor to pull it from the well, if abandoned. The lessee abandoned the well, and the contractor sued for a balance due him, obtained judgment, and sold the casing on execution to plaintiff. Nearly a year after such sale, the lessor terminated the lease, and sold the property to defendant, who knew of plaintiff's purchase, but refused to let him remove the property, and plaintiff brought replevin. *Held*, that the casing was not a fixture which passed to defendant.

2. PROPERTY—OWNERSHIP—POSSESSION.

Where casing is placed in a well by direction of a lessee under a lease authorizing him to remove it, possession of the casing by a corporation entering into possession of the leasehold is prima facie proof of ownership.

3. REPLEVIN—EVIDENCE—OWNERSHIP.

A lease permitting the removal of fixtures placed on the land by the lessee, the assignment of the lease, the execution on a judgment against the last assignee, and the sheriff's certificate of sale of the fixtures under the execution, are admissible in evidence in replevin by the execution purchaser against the grantee of the land, as showing right of removal of the fixtures, ownership, and right of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 285, 289.]

4. SAME—DEMAND.

Formal demand for property in possession of defendant is not necessary before bringing replevin, where defendant notifies plaintiff that the property cannot be removed without defendant's consent, and defendant's agent notifies plaintiff that he cannot go upon the land where the property is.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 88.]

5. TRIAL—RECEPTION OF EVIDENCE—FAILURE TO OBJECT—STRIKING OUT.

It is not error to refuse to strike out evidence received without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

6. REPLEVIN—EVIDENCE—OWNERSHIP.

A corporation as lessee placed property on the leasehold which subsequently passed into the possession of another corporation, and the property was sold on execution against the latter corporation. The purchaser brought replevin against the grantee of the land to recover possession of the property. *Held*, that evidence as to the identity of the two corporations was admissible as bearing on the question of ownership.

7. APPEAL — PRESUMPTIONS — INSTRUCTIONS —FAILURE TO INCLUDE IN RECORD.

Where instructions given and refused do not appear in the record, it will be assumed that an instruction objected to, taken with those given and refused, properly presented the law of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3750.]

Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Frank Churchill against John F. More. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. G. Griffith, for appellant. C. F. Carrier and Richards & Carrier, for respondent.

ALLEN, J. Appeal by defendant from a judgment for plaintiff and an order denying a new trial in an action of replevin.

The record discloses that one Mrs. Rowe, in March, 1901, then the owner of certain real estate, executed thereon what is popularly known as an "oil lease" to one Ayers, who assigned the same to a corporation known as the "Mescalitan Island Oil & Development Company." This lease provided, among other things: "The party of the second part shall have * * * the right to remove all machinery and fixtures placed on the premises by him at any time." Further: "That if oil or other metals or minerals are not found in paying quantities within one year * * * this lease shall become void." Further: "That the parties of the first part shall maintain the party of the second part or his assigns in the full and free possession of said premises during the life and term of this lease." Further: "That a cessation of work for more than sixty days consecutively shall invalidate this lease, unless by written consent of the parties of the first part." Acting under this lease, the corporation before mentioned entered into a contract with J. W. Churchill, the father of plaintiff, to bore an oil well on said leased premises, it being stipulated that the corporation should furnish all casing and, if the well was abandoned, Churchill should pull the same, or as much as could be taken from the well with reasonable effort. Churchill proceeded to bore a well to a depth of 1,360 feet, using therein four strings of casing of various diameters, furnished by the corporation until the well had attained a depth of about 900 feet, when another corporation, designated as the "Seaboard Consolidated Oil Company," entered into possession of the leasehold and continued sinking the well to an additional depth of 400 feet, furnishing casing therefor, Churchill during all of this time performing the work of sinking the well. About February, 1902, this last-named corporation abandoned the well, and there remained unpaid to Churchill on account of his work thereon $1,118.75, who brought his action against the Seaboard Company, and obtained a judgment therefor. An execution was issued out of such judgment, and the casing, which is the subject of the controversy in this action, was sold in October, 1902, to the plaintiff, and a sheriff's certificate duly issued. Afterwards, in September, 1903, Mrs. Rowe caused to be recorded a notice that she elected under said lease to terminate the same, and in October following conveyed the premises to defendant More. After More acquired the real property, plaintiff undertook the removal of certain personal property thereon, at which time More said: "I will not allow you nor even the President of the United States to take anything away from that well without my permission." Subsequently, however, he said to his foreman: "You can let him have those two large bitts. They are too large to use in the well. We will not need them." There is evidence in the record to the effect that it was practicable to remove this casing from the well; and further, that Churchill made preparation to remove the casing, and was notified by Mr. More's man that he would not allow him to go on the premises. There is no evidence of Mr. More having any other man in his employ other than a certain foreman, to whom Mr. More gave instructions as to what property on the leasehold Churchill should be permitted to take. Without further demand, plaintiff instituted this action, and judgment was rendered for the return of the casing or the value thereof. Upon the trial, there was evidence tending to show that More, before he purchased the premises, knew of the execution sale and of the plaintiff's claim to the property; and at one time the proposition for More to purchase the casing from plaintiff was under consideration. There is no evidence in the record tending to show an assignment of the leasehold to the Seaboard Company, nor of its ownership, other than the presumption to be drawn from the possession of the leased property by such corporation, and the circumstances attending the operation of the work.

The chief contention of the appellant is that the casing in controversy is shown to have been so affixed to the soil that, by the conveyance to More, the same passed to him by the deed under the recognized rule that chattels attached to the freehold by the owner and contributing to its value and enjoyment pass by the grant. This rule, however, is that applying between vendor and vendee in the absence of a contract to the contrary. But it has long ago been modified as applying to the rights of landlord and tenant (Fratt v. Whittier, 58 Cal. 130, 41 Am. Rep. 251), and was never a proper rule between any class when its enforcement would be to impair the obligation of a contract with reference to the right of removal. In the case under consideration, were ambiguity in the contract conceded, its construction should be in favor of the lessee. Civ. Code, § 1069. But, we think, giving effect to the words "at any time" as employed in the lease, they were intended to and did give the right of removal to the lessee of the property placed thereon, even were such right not exercised during the life of the lease. More is shown to have accepted the conveyance with notice of the plaintiff's claim, and in fact is shown to have recognized the same at one time after acquiring title to the land.

Appellant contends further that, there being no proof of an assignment of the lease to the Seaboard Company, no ownership in the casing is shown in said company; hence no title thereto passed to plaintiff by the sheriff's sale on execution. There is evidence, however, that the possession of all this casing was in the Seaboard Company long before the suspension of work, and at the date of the levy of the execution. This is prima facie proof of ownership. Goodwin v. Garr, 8 Cal. 616; Kelly v. Mack, 49 Cal. 524; Hewitt v. San Jacinto, etc., Irr. Dist., 124 Cal. 191, 56 Pac. 893.

We find no error in the admission in evidence of the lease to Ayres and its assignments; nor the admission of the execution and certificate of sheriff's sale. These instruments were competent as tending to show that the casing was agreed to be and remain personal property with right of removal, and as evidence in support of the issue of ownership and right of possession. There was some evidence which supports the verdict of the jury in finding in favor of the plaintiff upon the issue of demand before suit; yet, even in the absence of such testimony, it is clear that More personally, and through his agent, notified Churchill that none of the property could be removed without More's express consent; and the agent of More notified him that he would not be allowed "to go on there," evidently referring to the leasehold. This conduct on the part of More obviated the necessity of formal demand. Mrs. Rowe, without objection, testified: "I know in a general way, but I don't know when the Mescalitan Company was absorbed or merged into the other." There was no error in refusing to strike out this evidence, received without objection. Evans v. Johnston, 115 Cal. 183, 46 Pac. 906. The question of identity of the corporations was not immaterial as affecting ownership of the property, and nothing appears in the record justifying the statement that her knowledge was hearsay only.

Instructions given and refused not appearing in the record, it will be assumed that the single instruction objected to, taken with those given and refused, properly presented the law of the case to the jury. Harris v. Barnhart, 97 Cal. 548, 32 Pac. 589.

We have examined the other points raised by appellant, and perceive no prejudicial error therein; and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

4 Cal. App. 379

COLLINS HOTEL CO. v. COLLINS.

(Civ. 248.)

(Court of Appeal, Second District, California. Oct. 19, 1906.)

Municipal Corporations — Governmental Powers—Judicial Supervision.

A city ordinance will not be judicially reviewed on the ground that it is void as unreasonable, in the absence of a showing that it is unreasonable as applying to petitioner's property as distinguished from other property within the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1380.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Collins Hotel Company against W. S. Collins. From a judgment for defendant, plaintiff appeals. Affirmed.

John D. Pope, for appellant. Scarborough & Bowen, for respondent.

SMITH, J. Appeal from a judgment for the defendant, an order denying the plaintiff's motion for a new trial, and an order denying the plaintiff's motion to vacate the judgment and to enter a judgment in its favor. The suit was brought for breach of an agreement of the defendant with plaintiff's assignor, of date October 1, 1903, for the lease of a lot of land in the city of Los Angeles near the northeast corner of Third and Olive streets with a hotel building thereon to be constructed, according to the plans and specifications specified, under the following provision of the contract: "Said first party agrees to complete said building and have it ready for occupancy by the 1st day of February, 1904, unless he shall be prevented by strikes, accidents, or other causes beyond his control, and if, for any reason, said first party shall not have completed said hotel by the first day of February, 1904, he agrees to complete it and deliver possession thereof as soon thereafter as possible."

The agreement sued on is in the form of a lease, delivered in escrow to the Title Insurance & Trust Company, for delivery to the plaintiff within 30 days after the completion of the hotel, upon the execution of a mortgage specified in the escrow agreement. The hotel building provided for, according to the specifications, would be about 65 feet in height on Olive street and 119 feet at the rear end of the lot, with an addition thereto of a café 10 feet in height on the top of the house and a tower 28 feet square by 73 feet in height above the roof of the café. The construction of the building by the defendant was prevented by an ordinance of the city of Los Angeles passed by the city council October 8, 1903, to the effect following: "Section 1. That it shall be unlawful for any person to erect or to cause to be erected, any frame building in the city of Los Angeles, the height of which, at any point, exclusive of the flag pole, shall be more than 65 feet above the natural surface of the ground." This ordinance was subsequently modified by another ordinance of date October 26, 1903; but this, also, in its effect, prohibited the erection of the building contemplated. Assuming these ordinances to be valid, the defendant was excused for nonperformance of the contract, not only "by the operation of law" (Civ. Code, § 1511), but by the express provisions of the contract, and the only question involved is as to the validity of the former ordinance, which, it is contended by the appellant, is void for three reasons: "(1) It applied to all kinds of frame buildings, whether churches, icehouses, elevators, water towers, oil derricks, or windmills, as well as to private residences, rooming houses, and hotels. (2) It applied to any building of any kind erected a mile from any other structure, with the same force and effect as if it were in the thickly settled portions of the city. (3) It applied to a building erected on the side of a hill, as the hotel mentioned in the lease was to be, and did not permit the front of the hotel to extend even one story above the sidewalk on Olive street."

These objections, it may be observed, may be summed up in the one general objection, that the ordinance, under certain special circumstances, would be unreasonable. But "there is nothing pleaded de hors the ordinance by virtue of which petitioner claims that the same is unreasonable, oppressive, or void as applying to his property distinguished from other property within" the city, and, in the absence of such a showing, we are not in a position to review the action of the council. In re Newell (Cal. App.) 84 Pac. 226. It was so, in effect, held in the case cited, and we see no reason for departing from the principle announced in that decision. We have no general jurisdiction to review the action of the legislative body of a city any more than to review that of the state Legislature. Nor have we any jurisdiction at all, except in so far as may be incidentally necessary to protect the constitutional rights of litigants from violation by unreasonable legislation. Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920. It follows that our jurisdiction will extend only to determine whether the constitutional rights of the individual litigant before us have been violated, and in no case can our decision go further than to hold the affirmative of this proposition.

We are of the opinion, therefore, that the judgment and orders appealed from must be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 376

PERRINE et al. v. SAN JACINTO VALLEY WATER CO. (Civ. 165.)

(Court of Appeal, Second District, California. Oct. 19, 1906.)

MANDAMUS—SUBJECT OF RELIEF—CONTRACTS.

Where a contract with an irrigation company specified that plaintiffs should receive a continuous flow of 10 inches of water during a given period, and that they might accumulate the flow at any one month or more of the period, mandamus would not lie to require the company to deliver water in accumulated quantities twice a month, since mandamus will lie only to compel performance of acts specially enjoined by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 268, 272.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by M. E. Perrine and others against the San Jacinto Valley Water Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Frank W. Burnett, for appellant. Gill & Densmore, for respondents.

SMITH, J. This is an appeal from a judgment in a mandamus suit, adjudging that the plaintiffs, under the water certificate set out in paragraph 3 of the complaint, are "entitled to receive thereunder a continuous flow of ten (10) inches of water * * * for and during the seven summer months, as therein mentioned, * * * and of the further right to cumulate the use of said water in the way and manner set forth in the findings filed herein, and to receive from such corporation such cumulated flow of water to which they were and are so entitled twice a month in a head of flow not exceeding sixty (60) inches of water, constant flow, for such period, each time, as will be necessary to approximate the water then accumulated by them," and "commanding said corporation, its officers, attorneys, and agents, and each and all of them, to so deliver to said petitioners, in way and manner as aforesaid, the cumulated water to which they are so entitled." The certificate of stock mentioned, so far as material, is as follows: "These fifty certificates, issued by the San Jacinto Valley Water Company, a corporation, to M. E. Perrine, for fifty acres, are guaranteed by said company to entitle the holder thereof to receive a continuous flow of one-fifth of an inch of water to each acre of land to which the same shall be devoted, or multiple thereof, as designated on the face thereof, for the seven summer months commencing on March 15th and ending on October 15th of each year, upon payment to said company, in advance, of the sum of three dollars ($3.00) per acre for the use of water during each irrigating season. * * * The holder of this certificate may elect to cumulate the use of water thereunder at any one month or more of said seven months, the aggregate in any one month not to exceed one-fourth of the whole for that season. * * * The holders of these certificates are subject to the usual rules and regulations of said company for the distribution of water."

Under these provisions no question can be made as to the plaintiffs' right to a continuous flow of 10 inches of water during the period named in the judgment. But we can find nothing in the provisions of the contract entitling them to cumulate the water otherwise than as therein provided, which, according to the construction we place upon the contract, is at periods of "one month or more." The writ of mandamus will lie only "to compel the performance of an act which the law specially enjoins." Code Civ. Proc. § 1085. And here the only duties enjoined upon the defendant are the obligations incurred by its contract, which, according to its terms—except as modified by the rules and regulations of the company—are: To deliver to the plaintiffs a continuous flow of 10 inches of water during the period specified in the judgment, or to deliver the same in cumulated quantities at periods of not less than one month. It may be that in a proper proceeding the court, as a court of equity, would have the power, under appropriate circumstances, to direct the delivery of the water in such cumulated quantities as justice and equity might require. But, in the present proceeding, the court has no such power. Alhambra Water Co. v. Richardson, 95 Cal. 490, 30 Pac. 577. In this regard the case differs from that of Hewitt v. San Jacinto, etc., Irr. District, 124 Cal. 186, 190, 191, 56 Pac. 893. There the agreement was to deliver "an amount of water equal to one irrigating inch of water to each seven acres," and it was held that this provision should be construed "in the light of usage and the practice of the parties." But here there is no proof or averment of usage, or, rather, it appears that the usage has been different; and the special provision as to cumulation, and the provision that the holders of certificates are subject to the usual rules and regulations of the company for the distribution of water, seem to exclude any right in them to cumulate the water otherwise than as thus provided.

The judgment appealed from is reversed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 371

ALLEN v. BRYANT et ux. (Civ. 259.)

(Court of Appeal, Second District, California. Oct. 18, 1906. Rehearing Denied Nov. 14, 1906.)

1. APPEAL—REVIEW.

The effect of failure to find on an allegation in an answer, the truth of which is established by the evidence, will be regarded, on appeal, as equivalent to an affirmative finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3675.]

2. CROPS—SEVERANCE—CONVEYANCE OF HAY TO BE CUT.

Where the owner of the soil conveys "all the hay now cut, or that shall be cut this year on the ranch," such hay became personalty in the hands of the purchaser.

3. DEEDS—VALIDITY—EVIDENCE.

Evidence considered, and *held* to show deed to have been obtained through mistake or misrepresentations and undue influence.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Nellie L. Allen against W. S. Bryant and another. From a judgment for plaintiff, defendants appeal. Reversed.

Walpole Wood and Jesse F. Waterman, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, on the judgment roll, with bill of exceptions. The suit was brought to quiet the plaintiff's title to an undivided one-half of the tract of land described in the complaint, and referred to in the answer, as the "Cherrioto Ranch." The plaintiff derived her title to an undivided one-half of the land in question under a deed of gift from her husband, Charles Allen, to whom it had been conveyed by the defendants by deed of date July 22, 1904. The defense is that this deed was fraudulently obtained under the circumstances set up in the answer.

The case as presented by the pleadings, findings, and stipulations of the parties, is as follows:

1. The tract described in the complaint was purchased by Bryant from one Cher-

rioto, who conveyed the same to him by deed of date January 9, 1904, subject to a mortgage executed by him and his wife to secure the purchase money thereon, amounting to the sum of $22,500, with interest. There were some other instruments subsequently executed to correct mistakes or supposed mistakes in the deed and mortgage, but these need not be regarded.

2. At this time Bryant and Allen were associated together in the business of subdividing and selling a tract of land known as the "Pardee Tract" under an agreement entered into by them of date December 14, 1903. This tract belonged to Bryant, and, by the terms of the contract, Allen was to have charge of the subdivision and sale of the tract, and the proceeds of the sales of lots, after payment of the expenses and amounts due thereon to Bryant, were to be equally divided between the two parties.

3. This being the relation of the parties, Bryant and Allen, it is alleged in the answer, entered into another contract that Bryant should convey to Allen an undivided one-half of the ranch, subject to the mortgage, to be operated, and ultimately subdivided and sold, on joint account, and for the joint benefit and profit. There is no finding on this allegation, but its truth is established, without contradiction, by the evidence, and the effect of the failure to find upon it is, for the purposes of this appeal, to be regarded as equivalent to an affirmative finding.

4. Accordingly, by deed of date January 16, 1904, the Bryants conveyed to Allen an undivided one-half of the ranch, subject to the mortgage.

5. Thereafter, by deed of July 22, 1904, which is the deed in controversy, Bryant conveyed to Allen the remaining undivided one-half of the property. The consideration stated in this deed does not appear, but it is alleged in the answer, and it appears from the evidence of Bryant, which is uncontradicted, that the consideration was Allen's note for $1,500 and the sum of $989.97, claimed to be due to him from Bryant on account of the ranch. On this allegation there is no explicit finding, but it is found that the consideration of the deed, and of a transfer of "certain personalty" to Allen was "a release of all indebtedness to him, being a balance due said Allen on account of moneys laid out and expended on and in connection with said real property, under an agreement between said Allen and the said * * * Bryant," and a promissory note given by Allen to Bryant for the sum of $1,500, payable with interest at 6 per cent. per annum four years after its date. And it is further found that Allen afterwards satisfied the note "by paying and delivering to the said * * * Bryant one hundred tons of hay at fifteen dollars per ton." In explanation of this finding, it is to be observed that at the time of the conveyance Allen rendered to Bryant a statement of the account of their affairs, including the operation of the Cherrioto Ranch and the Pardee Tract and some personal matters, to which there was attached the following on a slip pinned to the statement:

"The item of $989.97 is this day settled as part of the consideration for the purchase of Mr. Bryant's interest in said ranch. Charles W. Allen." This account, omitting the items, is as follows:

Paid Out Act. Cherrioto Ranch.

	By Charles W. Allen.	By W. S. Bryant.
* * * * * *		
Total	$1,353.57	$363.60
Pardee Tract.		
* * * * * *		
Totals	$3,188.00	$3,488.95
Balance due Allen, $300.95.		
Advancements Made W. S. Bryant.		
* * * * * *		
Total		$211.88
Due Allen.		Sum Totals.
From Ranch		$989.97
" Pardee Tr.		300.95
" W. S. Bryant		211.88
Total		$1,502.80

From this account it is apparent that the amount due from Bryant to Allen was one-half only of the $989.97 due "from ranch." But Bryant testifies that, prior to the delivery of this statement, Allen went over the books with him and told him (Bryant) that the amount of $989.97 was due from him to Allen, and then proposed to him "to deed him [Allen] another quarter interest in the Cherrioto Ranch for it." From Bryant's evidence it also appears that Allen then offered to buy Bryant's one-half interest in the ranch and give him a receipt for the account, "nine hundred eighty-seven dollars and some cents, and two thousand dollars besides." Bryant, he says, was then proposing to sell his store, for which he had an offer pending, to pay this indebtedness, but being disappointed in the sale, he notified Allen that he would accept his offer. But Allen then refused to give more than $1,500, in addition to the amount due him, to which Bryant acceded. It appears, therefore, if Bryant's statement was true, that the actual consideration was the $1,500 note and the sum of $989.97, claimed by Allen to be due to him from Bryant, but of which he was entitled to only one-half. On the other hand, if Bryant's testimony was false and the account was understood by him as it should have been, the consideration was the note and one-half of the $989.97. There was thus raised a very sharply defined and material issue, and upon this issue the finding of the court leaves us in doubt whether it was intended to negative the testimony of Bryant. If so, we are of the opinion, for reasons to be stated presently, that the finding would be in conflict with the evidence.

In some other particulars, also, the finding is clearly in conflict with the evidence. The court finds the transfer of "certain personalty" to Allen by Bryant, and that the note was satisfied by the payment and delivery to Bryant of 100 tons of hay at $15 per ton. But, on looking at the evidence, we find that the only transaction of the kind was a bill of sale of July 15, 1904 (seven days before the execution of the deed), transferring to Allen Bryant's interest "in all hay now cut or that shall be cut this year on the ranch, * * * authorizing him to dispose of same to the best advantage he may be able; the intention being that he may repay himself for money expended in care of said ranch out of said hay, if possible." The hay referred to as used in the payment of the note was the hay on the ranch covered by the bill of sale. Prior to the time of the supposed payment, it had been baled by Allen, and, from the ordinary course of the seasons, and agriculture in the country, it may, perhaps, be assumed that it had been cut, if not baled, prior to the date of the deed and the date of the bill of sale. But, however this may be, it had been transferred by Bryant to Allen prior to the date of the deed, and thus became personalty in the hands of Allen upon the trusts specified. Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; Bank of Woodland v. Heron, 120 Cal. 614, 616, 52 Pac. 1006. The hay, therefore, did not pass to Allen by the deed subsequently made to him. It appears, therefore, that one-half of the hay with which the note was satisfied was the property of Bryant, and that he in fact received only one-half of the amount due on the note. But the significance of this transaction is much broader. It shows the helplessness of Bryant at that time in business matters, and the willingness and disposition of Allen to take advantage of his infirmity, and from this may be inferred a similar weakness on the part of Bryant and a similar disposition on the part of Allen at the time of the conveyance of the land; thus strongly confirming the testimony of Bryant as to his understanding of the matter. Nor, independently of this confirmation, do we see any reason to doubt Bryant's testimony in this regard. On the contrary, it is strongly confirmed by its consistent circumstantiality, and also by the slip attached to the account, which, though susceptible of a different construction, was more calculated to be understood by Bryant as asserting an indebtedness of the amount stated to Allen; thus confirming the impression previously received from Allen's representations.

6. It is also found that on or about the 5th day of August Allen sold and conveyed to one Funk an undivided one-half of the Cherrioto Ranch, subject to the mortgage, for the sum of $5,000, Funk agreeing to assume and pay one-half of the amount then due under the mortgage. But it appears from the record that the sale was made on the 3d day of August, just 12 days after the execution of the deed of Bryant to Allen. One of the facts set up in the answer as constituting the fraud complained of is that at the time of the execution of the deed from Bryant to Allen, Allen was in negotiation for the sale of the ranch at a large profit, and from the evidence it fairly appears that this was the fact, and that the pendency of the negotiation was concealed from the defendant. But there is no direct finding on this point.

7. It is, however, found that Allen, in none of his transactions with the defendants in relation to the said real property or personalty, made any false or fraudulent representations or concealments whatsoever, or designed or intended to, or did, cheat said defendants, or either of them. But, in view of the admitted facts, and of the uncontradicted evidence, and of the relations existing between the parties, we are of the opinion that this finding cannot be sustained, and, on the whole, we are of the opinion that the consent of the defendants in the deed from them to Allen was the result of a mistake as to the amount due to Allen; that this mistake was known to Allen, if not produced by his misrepresentations made with the view of obtaining the deed; and that the deed was obtained by undue influence. Civ. Code, §§ 1565, 1567, subds. 3, 4, 5, 1575, 1577.

For these reasons, we are of the opinion that the judgment should be reversed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 382

WINCHESTER v. BECKER. (Civ. 163.)

(Court of Appeal, Second District, California. Oct. 27, 1906. Rehearing Denied by Supreme Court Dec. 13, 1906.)

FORCIBLE ENTRY AND DETAINER—STATUTORY PROVISIONS—ELEMENTS OF FORCIBLE ENTRY—BREAKING OPEN.

A person who fraudulently and without right entered into a dwelling house by means of a false key was liable for forcible entry, under Code Civ. Proc. § 1159, subd. 1, making every person guilty of forcible entry who, "by breaking open doors, windows, or other parts of a house, enters upon or into any real property."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forcible Entry and Detainer, §§ 15–19.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by Jennie M. Winchester against A. E. Becker. From a judgment for plaintiff and order denying new trial, defendant appeals. Modified, and remanded to the lower court, with directions to grant new trial unless plaintiff, within 10 days, consents to the modification, and, upon filing of such consent, judgment and order denying a new trial affirmed.

G. P. Adams, for appellant. J. L. Murphey, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff and from an order denying the defendant's motion for a new trial.

This is a suit for forcible entry on the plaintiff's land. The premises in controversy consist of a lot of land situate in the city of Los Angeles, with a six-room dwelling house thereon. On the record before us there can be no question as to the defendant's hostile entries upon the land in question on two several occasions, and that the entries were without justification, or that the land was owned and in the actual possession of the plaintiff at the time of the defendant's entries; at which time, also, it appears that the house was securely locked and the keys in the possession of the plaintiff, except the key of one back door, which was secreted over the door. The first entry was in the absence of the plaintiff through the back door with this key and on the 10th day of June. On the 12th the plaintiff found an agent of the defendant on the premises and, taking from him the key, ordered him off. The defendant then, through his agent, applied to plaintiff for the key, proposing to enter under a pretended agreement for a sale of the land on which a deposit of $100 had been paid. But the plaintiff repudiated the agreement and forbade the defendant's entry. This agreement contained no authority for the defendant to enter. The defendant thereupon again entered upon the premises through the front door, which he unlocked by means of a false key, and the finding of the court, which is fully sustained by the evidence, is that the defendant on the occasion mentioned "fraudulently and without right * * * went upon said premises and with force unlocked the doors of said house," etc., which is to be construed as, in effect, that he entered in the manner shown by the evidence as above stated. Other facts are alleged and found, but, leaving these out of view, the question is presented whether the defendant's entry made in the manner stated comes within the provisions of the first subdivision of section 1159 of the Code of Civil Procedure, by which every person is to be held to be guilty of a forcible entry, who "by breaking open doors, windows, or other parts of a house * * * enters upon or into any real property." This question we think must be answered in the affirmative. The meaning of the provision is that any opening of a closed door or window involving the use of force is to be regarded as "breaking open" the door or window or house. This was the construction given to the term "break" as entering into the common-law definition of burglary, and we see no reason why a different construction should be given to it in the provision now under consideration. Abbott's Law Dict., word "Break"; see, also, Webster's Dict., in the expression: "Open the door or I will break it open;" and also the definition of "House Breaking" in Pen. Code, § 461, as originally enacted, and in Act Feb. 27, 1864, St. 1863–64, p. 104, c. 114.

We do not find, however, any evidence in the record to sustain the finding of the court that the plaintiff suffered damage by reason of the taking and retaining of the possession of the premises in the sum of $150, or in any amount in excess of the sum of $45, which the court, in effect, finds was the value of the use and occupation during the month the premises were occupied by the defendant. The judgment should, therefore, be modified by striking therefrom "the sum of four hundred and fifty (450) dollars," as the amount adjudged, and inserting in lieu thereof "the sum of one hundred and thirty-five (135) dollars."

The case is remanded to the lower court, with directions to the court to grant a new trial, unless the plaintiff shall, within 10 days after the filing of the remittitur, file a written consent to the modification of the judgment, as above indicated, and, upon the filing of such consent, the judgment and order denying a new trial shall stand affirmed.

I concur: ALLEN, J.

GRAY, P. J. (concurring). I concur in the judgment of the court and in the suggested modification of the judgment of the court below. I place my concurrence, however, upon the ground that it seems to me that the evidence discloses that the defendant did not take forcible possession of the house in question, but that he entered the same without any lawful right so to do, and that there is evidence contained in the testimony of Miss Winchester to uphold the findings and decision of the court to the effect that, after this entry, without right he held possession of the house by force. The plaintiff testifies: "I did not see Mrs. Becker at the time I was talking to Mr. Becker at the house. He showed me the receipt and stepped out and kept forcing me out of the door onto the porch, and I was standing on the porch and the door was closed when he showed me the check with my signature." In my opinion, this is sufficient evidence of force to uphold the finding of forcible detainer.

150 Cal. 111

HATCH et ux. v. McCLOUD RIVER LUMBER CO. (S. F. 3,641.)

(Supreme Court of California. Dec. 14, 1906.)

1. LANDLORD AND TENANT—DEFECTS IN PREMISES—INJURIES TO OCCUPANT—ASSUMPTION OF RISK.

Occupants of premises under a lease assumed the risk of injury from a wire extending from an electric light pole without the premises to an anchor about two feet within the premises which was so located at the time of the lease and was known to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 630.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a tenant and his wife had been in possession of premises for 16 months and knew of a wire extending from an electric light pole without the premises to an anchor about two feet within the premises and there was nothing to require the wife to go near the wire, she was guilty of contributory negligence in running against it in an evening, precluding any right to recovery for injuries therefrom.

Department 1. Appeal from Superior Court, City and County of San Francisco.

Action by Kimball I. Hatch and wife against the McCloud River Lumber Company. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Edward C. Harrison, for appellants. F. D. Madison, for respondents.

SHAW, J. This is an action to recover damages to the plaintiff Emma F. Hatch, wife of the plaintiff Kimball I. Hatch, arising from an injury alleged to have been caused by the negligence of the defendant. A demurrer to the complaint was sustained in the court below, and judgment rendered accordingly. The sole question presented by this appeal is the sufficiency of the complaint.

On May 29, 1900, the defendant let to the plaintiff Kimball I. Hatch a dwelling house and the lot on which it stood. The plaintiffs immediately took possession and remained in the occupancy of the premises until the injury occurred, which was on October 7, 1901. At the time the house was leased, an electric light pole was standing in the street, on the sidewalk, in front of the lot. From the top of this pole a stay wire or rope extended to the ground, within the lot so leased, at a point 2½ feet inside of the front line thereof, where it was fastened to an anchor fixed in the earth. This wire inclined at an angle of 45 degrees from the top of the pole to the ground, and crossed the front line of the lot about 2½ feet above the surface of the ground. The plaintiffs knew of the existence and position of this wire at the time of the lease. It was, of course, plainly visible in the daytime. The pole and wire belonged to the defendant, constituted no part of the leased premises, and was under the control of the defendant as a part of an electric lighting system maintained by it in the town where the premises were situated. At the point where the wire was fastened to the anchor, and a few inches above the ground, several sharp points or ends of wire protruded, which were dangerous to any person who might come in contact with them. They were so small and so near the ground that they were not easily discernible. On the 7th of October, 1901, between 7 and 8 o'clock in the evening, the plaintiff Emma F. Hatch, while leaving the premises, came in contact with the wire rope, was thereby tripped and caused to stumble and fall over the same, and in so doing, struck the protruding points aforesaid and was thereby injured severely. She was not aware of the existence of said points, until she came in contact with them, but she knew of the wire, and it is alleged that at the time she was "using all due care to avoid the same."

Under these circumstances, we are of the opinion that no actionable negligence on the part of the defendant is shown. So far as the wire rope is concerned, as distinguished from the small ends near the ground, the defendant was under no duty whatever to advise the plaintiffs regarding the danger therefrom, or to guard them from coming in contact therewith. The rope was on the premises at the time the lease was made, and the plaintiffs lived in the house for 16 months thereafter before the injury occurred, and they must have become extremely familiar with its location and appearance. The premises were let to the plaintiffs without guaranty or warranty in regard to this rope. Under such circumstances, the tenant in taking the premises assumes all risk arising from dangers which are obvious to ordinary observation. Gately v. Campbell, 124 Cal. 520, 57 Pac. 567; Brewster v. De Fremery, 33 Cal. 341. With regard to the sharp points or ends near the ground, it is apparent, from the facts stated in the complaint, that whatever injury the plaintiff, Emma, received therefrom was caused in part by her own negligence contributing thereto. Whatever injury was received from these sharp points was caused primarily by the fall, which occurred because of her walking against the wire rope. This fall was manifestly occasioned by her own negligence. The allegation that she was using all due care to avoid the wire is incompatible with the fact shown by the complaint that she had been for a long time familiar with the position of the wire. Being so familiar, it is apparent that, unless some extraordinary circumstances intervened, which made it necessary for her to walk close to the wire, it was entirely unnecessary for her to come in contact with it. No such extraordinary circumstances are alleged. The fact that, knowing the position of the wire, she nevertheless walked against it, when there was no necessity for going near it, proves that she could not have used due care to avoid it. The allegation of due care is, therefore, unavailing, and must be disregarded. It was her own neglect that caused her to fall, and that neglect contributed to the injury which she received from the sharp points at the bottom of the wire.

Conceding, though not deciding, that defendant was also guilty of neglect in allowing the points near the ground at the end of the wire to remain, without protection or guard, the case merely becomes one where the contributory negligence of the plaintiff in part caused her injury. In such cases the plaintiff cannot recover for the portion of the injury caused by the defendant's negligence.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(150 Cal. 289)

TITLE & DOCUMENT RESTORATION CO. v. KERRIGAN, Judge.

(S. F. 4,646.)

(Supreme Court of California. Dec. 7, 1906. Rehearing Denied Jan. 5, 1907.)

1. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—SERVICE OF PROCESS.

Act June 30, 1906 (St. Extra Sess. 1906, p. 78, c. 59), providing for the establishment and quieting of title to real estate in case of the loss or destruction of public records by fire, flood, or earthquake, provides that one claiming an estate in real estate may bring an action in rem against all the world, describing the defendants as all persons claiming any interest in or lien upon the land described, provides for the issuing of a summons directed to all persons claiming an interest in or lien upon the real property described, and requiring them to appear. Plaintiff is required to file an affidavit setting forth the character of his interest, and that he does not know and has never been informed of any other person claiming any interest, or, if he does know and has been so informed, then the name and address of such person. The summons is required to be published in a newspaper of general circulation in the county, and there must be appended to the summons a memorandum giving the names of any persons who are known to the plaintiff to claim an interest adversely to him. If the affidavit discloses the name of any person claiming an interest adversely, the summons must be personally served on him, if he can be found in the state, and, if he resides out of the state, a copy of the summons must be sent to him by mail. If he resides within the state and cannot be with due diligence found therein before the expiration of the period of publication, notice must be mailed to him, and in addition to the service by publication and personal service and mailing a copy of the summons must be posted in a conspicuous place on each parcel of the property. On the completion of the publication, etc., the court is given complete jurisdiction to determine the title. *Held*, that the statute is not unconstitutional as not affording due process of law either because of the service provided for, or on the ground that the proceedings are not judicial.

2. SAME — DISTRIBUTION OF GOVERNMENTAL FUNCTIONS—JUDICIAL POWERS.

The statute is not invalid as violative of Const. art. 3, § 1, dividing the powers of government into three departments, legislative, executive, and judicial, and prohibiting the exercise by one department of the functions appertaining to either of the others, on the theory that the action provided for is not judicial.

3. STATUTES—SPECIAL LAWS—JUDICIAL PROCEEDINGS.

Neither because the procedure provided for is distinctive, nor because the statute applies only where the records have been destroyed by earthquake, fire, or flood, is the statute violative of Const. art. 4, § 25, subds. 3, 33, prohibiting the Legislature from passing any local or special laws regulating the practice of courts, and in cases where a general law can be made applicable.

In bank. Petition by the Title & Document Restoration Company for mandamus to the superior court of the city and county of San Francisco, and the Honorable Frank H. Kerrigan, as judge thereof, to compel the making of an order for publication, under the act of June, 1906, in relation to the establishment and quieting of title to real estate in case of the loss or destruction of public records. Peremptory writ issued.

Garret W. McEnerney, Walter Rothchild, Joseph H. Mayer, Joseph Hutchinson, and James S. Hutchinson, for petitioner. Charles S. Wheeler, J. F. Bowie, Van Fleet & Mastick, William H. H. Hart, and Bishop & Hoefler, amici curiæ. John Garber, Gaillard Stoney, and John J. Lermen, for respondent. Page, McCutchen & Knight, A. E. Bolton, C. S. Farquar, and William B. Beaizley, amici curiæ.

SLOSS, J. In June, 1906, the Legislature of this state, having been convened in extraordinary session to legislate concerning certain needs developed by the disaster of April 18, 1906, enacted, among other statutes, one entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."

The present proceeding is an application for a writ of mandate. The petitioner herein filed a complaint, as provided by the act above referred to, and applied to the respondent, judge of the superior court in which its complaint had been filed, for an order for publication of summons. The respondent declined to make the order upon the ground that the act in question violated certain provisions of both the federal and state Constitutions. The purpose of this proceeding being to compel the judge of the lower court to make the order for publication, as requested, the real, and substantially the only, question here involved is whether or not the above-mentioned act is a valid exercise of legislative power. The facts alleged in the petition are not denied, and the matter now comes before the court upon a demurrer to the petition. In order to properly state and discuss the constitutional points made in support of the demurrer, it will be well to give a somewhat full statement of the provisions of the act in question.

The act provides that whenever the public records in the office of a county recorder are lost or destroyed, in whole or in any material part, by flood, fire, or earthquake, any person who claims an estate of inheritance or for life in, and who is by himself or his tenant, or other person, in the actual and peaceable possession of any real property in such county, may bring and maintain "an action in rem against all the world" in the superior court of the county where the land is situate "to establish his title to such property and to determine all adverse claims thereto." Section 1. The action is commenced by the filing of a verified complaint in which the party commencing the same is named as plaintiff, and the defendants are described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The complaint is to contain a statement of the facts enumerated in section 1 of the act, together with a particular description of the real property, and a specification of the estate or interest of the plaintiff therein. Section 2. The act provides for the issuing of a summons upon the filing of the complaint. The summons is directed to "all persons claiming an interest in or lien upon the real property herein described, or any part thereof," and requires them to appear within three months after the first publication of the summons, and to set forth what interest or lien, if any, they have upon the real property in question, a description of which is to be contained in the summons. At the time of the filing of the complaint the plaintiff must file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his interest, the duration of its existence, and from whom it was obtained; (2) whether or not he has ever made any conveyance affecting the property, and, if so, when and to whom, and a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or may claim any interest in or lien upon the property adversely to him, or, if he does know and has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state one or more of the matters required, he shall set forth and show fully and explicitly the reasons for such inability. This affidavit is made to constitute a part of the judgment roll. Section 5. The summons is required to be published in a newspaper of general circulation published in the county in which the action is brought, the particular newspaper to be designated by an order of the court or a judge thereof. The summons is to be published at least once a week for a period of two months, and to each publication there must be appended a memorandum giving the date of the first publication of the summons. There must also be appended to the summons a memorandum giving the names of any persons who are known to the plaintiff to claim any interest in the property adversely to the plaintiff, if the names of such persons appear in the affidavit filed with the complaint. Section 4. If the affidavit discloses the name of any person claiming any interest adversely to the plaintiffs, the summons must be personally served upon such person, if he can be found within the state, together with a copy of the complaint and a copy of the affidavit and memoranda provided for in section 4, and, if the person disclosed by the affidavit resides out of the state, a copy of the summons, memoranda, complaint, and affidavit must be sent to him by mail within 15 days after the first publication of the summons. If he resides within the state and cannot with due diligence be found therein before the expiration of the period of the publication of summons, then the copies shall be mailed to him forthwith upon the expiration of the period of publication. Section 6. In addition to the service by publication and the personal service and mailing above spoken of, the act provides that a copy of the summons and of the memoranda referred to shall be posted in a conspicuous place on each separate parcel of the property described in the complaint within 15 days after the first publication of the summons. Section 4. Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon whom it is directed to be personally served, "the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of every one having or claiming any estate, right, title or interest in or to, or lien upon, said property or any part thereof, and shall be deemed to have obtained the possession and control of such property for the purposes of the action and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act." Section 7. Any person having, or claiming, any estate, right, title, or interest in, or lien upon, the property, may, at any time within three months from the first publication of the summons, appear and make himself a party to the action by pleading to the complaint by a verified answer setting forth the estate or interest claimed. Section 8. The plaintiff and every defendant claiming any affirmative relief must at the time of filing his pleading record in the office of the recorder a notice of the pendency of the action containing a particular description of the property affected, and this notice is to be recorded in a book devoted exclusively to the recordation of said notices, and is to be entered upon a map of the land, to be kept by the recorder for that purpose, with a reference to the date, book, and page of the record of such notice. Section 9. No judgment is to be given by default, but the court must require proof of the facts alleged in the pleadings. Section 10. The judgment, when given, "shall ascertain and determine all of the estate, rights, title, interests and claims in and to said property, and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description, and shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." A certified copy of the judgment is to be recorded in the office of the recorder. Section 11. All provisions and rules of law relating to evidence, pleading, practice, new trial, and appeal applicable to other civil actions are, except as otherwise provided in the act, made applicable to this action. Section 12. The act provides that, where one judgment under it has been entered as to any real property, no other action relative to the same property shall be tried until proof is first made to the court that all persons who appeared in the first action have been served with the papers in the new action, at least a month before the expiration of the time to plead. Section 14. Executors, administrators, guardians, or other persons holding the possession of property in the right of another may maintain the action as plaintiff, or appear and defend. Section 15. The remedies provided for by the act are to be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing the title to real property. Section 17. All actions authorized by the act must be commenced before July 1, 1909. Section 18.

The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles, which has grown up in all of the states of this Union, it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice, whether or not the record remains in actual existence, the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. It is, of course, true that for many centuries lands have been transferred in England, whence we have, in the main, derived our system of real property law, without any considerable resort to a public recording scheme. But in this country the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain. In many instances, indeed, these instruments are not preserved for any great length of time.

It is also matter of common knowledge that in the city and county of San Francisco, at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness of certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them, not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear. These considerations are suggested, not with a view to arguing that the necessity for some act of this kind affords any ground for disregarding constitutional provisions, if the statute be found to conflict with such provisions, but rather as a guide to determine the real scope and purpose of the act, and to emphasize the rule so often laid down by all the courts that in passing upon the constitutionality of an act of the Legislature every presumption and intendment in favor of the validity of the enactment are to be given effect.

1. One of the principal objections made to the act is that by the decree persons who may have an interest in the land are deprived of their property without due process of law. This contention is based upon the proposition that the proceeding created by this statute is a proceeding in personam, and not in rem, and that in personal actions a binding judgment cannot be rendered against the persons to be affected without giving them personal notice of the proceeding and an opportunity to be heard. It is conceded by the learned counsel for respondent, as it needs must be, that, if this is strictly a proceeding in rem, such personal notice is not required. Undoubtedly the act, so far as the language of the Legislature can have this effect, attempted and intended to create a proceeding which should have the force and effect of a proceeding in rem. Section 1 describes the proceeding as "an action in rem against all the world." Section 11 provides that the judgment shall be binding and conclusive upon every person who at the time of the commencement of the action had or

claimed any estate, right, title, or interest in or to the property.

It is, however, argued that, if the proceeding is in its essential features one in personam, the Legislature cannot, by merely designating it "in rem," cut off the rights of persons interested, without providing as to them such notice and opportunity to be heard as are requisite to constitute due process in personal actions. That the mere title or designation which is given by the Legislature to a proceeding cannot change its substantial character, or alter the rights of parties to it, is, of course, plain enough. What, then, in its essential characteristics, is a proceeding in rem? If, as contended by respondent, it is one "to enforce a liability for which the res is liable, irrespective of who owns it, such a liability that the res can properly be impleaded as the respondent who is liable" (quoting the language of Loring, J., dissenting, in Tyler v. Judges of Court of Registration [Mass.] 55 N. E. 812, 51 L. R. A. 433), the action provided for by the present statute does not come within the definition. But neither do some other proceedings conceded to be strictly in rem, such as the probate of wills, the distribution of estates, and the special proceeding created by section 1664 of the Code of Civil Procedure, to "ascertain and declare the rights of all persons" to an estate. Even though, viewed as a matter of historical analogy, there may have been at common law no proceeding in rem which was at all similar to the one here provided, it may be asked why the state, in exercising its control over the ascertainment and settlement of titles to real estate within its borders, may not create a suit in rem, in which the court assumes control of the land, and which has as its primary purpose the settlement of such titles as to all the world. In substance—and the constitutional requirement of due process deals with substance rather than form—the action does not differ in character from the action to determine heirship (Code Civ. Proc. § 1664), which has always been regarded as a proceeding in rem (see In re Blythe's Estate, 110 Cal. 231, 234, 42 Pac. 643), and sufficient to bar the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons. It may be conceded, however, that apart from an expression of Chief Justice Holmes in Tyler v. Judges, supra, there is no authority directly supporting the proposition that a proceeding of the kind created by this act is strictly in rem. And we need not enter into a further discussion of the point, since we do not consider it necessary in this case to determine whether or not the action is one strictly in rem.

In any view the proceeding contemplated by the act is quasi in rem—that is to say, the purpose of the proceeding is not to establish an "infinite personal liability" against any defendant—but is merely to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. It is thoroughly well established that the constitutional requirement of due process is as to such actions satisfied by a substituted service of summons, at least as to known and designated defendants who cannot be found within the state. The most frequently cited authority upon the question of the power of a state to affect the interests of nonresidents by judgments rendered upon a substituted service of summons is Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. In that case the court, speaking through Mr. Justice Field, said regarding the question of jurisdiction in cases of service by publication: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. * * * It is true that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants, but, in a larger and more general sense, the term is applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broad sense which we have mentioned." Following the rules declared in Pennoyer v. Neff, it has universally been held that even in a purely personal action, where property within the state has been attached at the outset of a proceeding, the court may by publication of summons obtain jurisdiction to the extent of subjecting the attached property to the payment of the claim in suit.

The present proceeding has some of the characteristics of a suit to quiet title, a form of action well established as a branch of equity jurisdiction. While in the exercise of its inherent equity jurisdiction a court of chancery acts only in personam, it is no doubt competent for the Legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon courts of equity a jurisdiction which shall, as to property situate within that state, operate upon it in some way other than by merely directing the defendants to do or refrain from doing some act concerning the property. The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property alone is concerned, and the action to quiet title, although originally under the old chancery practice merely a personal action against the defendant, may by statute be so extended as to permit the court to bind the interest of the defendant in the property, even though such defendant may not have been personally served with process within the state. Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, was a case involving the validity of a judgment obtained against a nonresident on publication of summons under statutes of Nebraska similar to our own (Code Civ. Proc. § 738 et seq.), authorizing persons claiming title to real estate to bring actions against any person or persons claiming an adverse estate or interest therein for the purpose of determining such estate or interest and quieting the title to said real estate. The court said: "But it is earnestly contended that no decree in such a case rendered on service by publication only is valid or can be recognized in the federal courts. * * * The propositions are that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication alone. While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by a statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate. If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to protect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident would remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." And in Perkins v. Wakeham, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67, this court, in applying the same rule to a similar case, said: "Unless the method of giving notice above prescribed [i. e., by publication under section 412, Code Civ. Proc.] is unreasonable or in conflict with some provision of the Constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment in rem." There may be some expressions in the opinion in Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101, which, on their face, conflict with the rule as declared in the two cases just cited. In Arndt v. Griggs, however, the court carefully explained the Sansom Case, and pointed out that that case had to do with the effect of a judgment obtained on publication of summons in a purely personal action. Similarly, in Lynch v. Murphy, 161 U. S. 247, 251, 16 Sup. Ct. 523, 40 L. Ed. 688, it was said: "The Hart Case was explained in Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, in which last case it was held that the duty of determining unsettled questions respecting the title to real estate was local in its nature, to be discharged in such mode as might be provided by the state in which the land was situated, where such mode did not conflict with some special inhibition of the Constitution and was not against natural justice; and we held that nothing inconsistent with this doctrine was decided in Hart v. Sansom." See, also, Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; Bennett v. Fenton (C. C.) 41 Fed. 283, 10 L. R. A. 500; Venable v. Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; McLaughlin v. McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56; Harris v. Palmore, 74 Ga. 273; Lane v. Innes, 43 Minn. 137, 45 N. W. 4; Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Sloane v. Martin, 145 N. Y. 524, 40 N. E. 217, 28 L. R. A. 347, 45 Am. St. Rep. 630; Roller v. Holley, 13 Tex. Civ. App. 636, 35 S. W. 1074.

So far, then, as the procedure authorized by the act under discussion affects the rights of persons known and designated in the proceedings who could not, on account of nonresidence or for other sufficient reason, be personally served with summons within the state, it cannot, in view of these adjudications, be said that the service by posting, publication, and mailing fell short of that due process of law which is applicable to this sort of proceeding. The objection that under the act no persons need be named as defendants in the title of the action does not appear to us to have any bearing upon the question of due process of law, so far as known claimants are concerned. The constitutional guaranty of due process requires that in actions of this character persons whose interest in the land may be affected must be given such notice of the pendency of the proceeding and of the fact that their interests may be affected as is reasonable and appropriate to the nature of the case. If it be once conceded, as it must be, that such notice may, as to known claimants who cannot me personally served, be given by publication, we think it unimportant that the person to whom such notice is given is not named in the caption of the complaint or the summons. The law requires him to be named in the affidavits and in the memoranda attached to the summons. If any notice whatever reaches such person, it will be, whether through the posting upon the premises, or the publication, or the service by mail, a notice which contains his name and advises him that his interest in the described property is involved in the proceeding, and that, in order to defend such interest, he must appear and plead within a given time. We see no reason why, so far as such designated claimants are concerned, the notice prescribed by the act does not satisfy every requisite of due process of law.

The principal contention upon this question of due process is that the act is unconstitutional, in that it seeks to bar by the decree the rights of unknown owners; that is, those who are not alleged in the complaint or the affidavit to claim any interest in the property, and who cannot have any notice of the fact that their rights are involved other than the general notice given by the posting and the publication. If by a substituted service of any sort a court may be given power to adjudicate the rights of unknown claimants in a proceeding of this character, it seems plain that the notice to such claimants here provided is sufficient. All substituted service must rest upon the ground of necessity, and, where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff, and the relief sought is posted upon the property, and is published in a newspaper for two months, and a "lis pendens" containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected.

Indeed, the learned counsel for respondent, while they make some criticism upon details of the act regarding the notice, take their stand upon a broader proposition, and contend that in a proceeding which is not strictly in rem it is not within the power of the Legislature to authorize on any form of process a decree which shall by its own force cut off the rights of persons not named or made parties to the proceeding. It is claimed that under the Constitutions in force in American jurisdictions, the rights of unnamed persons who may claim an interest in real estate cannot be cut off by any judicial proceeding, except by one which makes the adjudication against them final only upon their failure to come in and assert their rights within a specified time after the judgment or decree. In such proceeding, the decree does not operate ex proprio vigore, but becomes the starting point of a statutory period of limitation, and the right is extinguished by failure to assert it within this period. In a way, the procedure thus outlined is analogous to the common-law fine, but because such method of accomplishing the result may have been the only one known to the common law it does not follow that other methods may not be devised by the Legislature without exceeding the limits of due process of law. No doubt the forms of procedure in common use at the time the Constitutions were adopted must be taken to have been understood by the framers as embraced within the terms "due process of law." But in prohibiting the taking of life, liberty or property without due process of law those who adopted these Constitutions did not intend to provide that the details of practice and procedure then existing should forever remain unchanged. The Legislature may provide entirely novel and unprecedented methods of procedure, provided that they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. "It follows," say the Supreme Court of the United States in Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232, "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be in due process of law." It is not, therefore, a sufficient objection to the action created by this statute to say that no precisely similar proceeding was known to the common law.

Applying the principles which have led the courts in cases like Arndt v. Griggs and

Perkins v. Wakeham to sustain judgments quieting titles against nonresidents upon substituted service, why should not the Legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such judgments against known residents is based upon the grounds that the state has power to provide for the determination of titles to real estate within its borders, and that, as against nonresident defendants or others who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, C. J., in Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, in speaking of a statute which in the particular under discussion was similar to ours: "If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant."

Proceedings not strictly in rem, but intended to have the effect of barring unknown claimants who are brought in only by publication or other substituted service, are not entirely new in our Legislation. Leaving out of consideration proceedings for the probate of wills, for distribution of estates, escheat and tax cases, and the special proceeding to determine heirship provided by section 1664 of the Code of Civil Procedure, all of which are claimed by respondent to be distinguishable from the case at bar, in that, as claimed, they are proceedings strictly in rem, we find in our statutes, in sections 749 to 751 of the Code of Civil Procedure, enacted in 1901, a statutory action to determine adverse claims to and clouds upon title to real property as against known defendants, and "also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto." It is true that the constitutionality of these sections has not yet been passed upon by this court. But that the state may confer upon its courts jurisdiction to declare title to real property within the state to be vested in the plaintiff as against other claimants, known or unknown, upon substituted service, has been held by the courts of several states in well-considered cases. In Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212, the court upheld a statute authorizing an action to quiet title and determine adverse claims, and providing for including as defendants, in addition to persons appearing of record or known to have a claim to the lands in controversy, "also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein." Service was authorized to be made upon such unknown defendants by publication. A judgment obtained pursuant to the statute was held to bind persons not named in the complaint or personally served, the court saying: "The Legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court, and with a reasonable exercise of such legislative discretion the courts will not assume to interfere." This case was followed in McClymond v. Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354. In State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571, the court said: "It is now the settled doctrine of this court that the district courts of this state are clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest or claim thereto. The proceeding provided for by the act in question is such an one. It is substantially one in rem, the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceedings are full and complete, and satisfy both the state and federal Constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet title to real estate by a decree binding all interests and all persons or parties, known or unknown." Tyler v. Judges of the Court of Registration, supra, was a proceeding brought to test the constitutionality of an act of the Legislature of Massachusetts providing a method of land registration based upon the "Torrens System," so-called. It was provided in the act that the decree for registration "shall bind the land and quiet title thereto," and "shall be conclusive upon and against all persons," whether named in the proceedings or not. The court held that the act did not violate the constitutional provisions as to due process of law. Chief Justice Holmes, who delivered the opinion of the court, expressed the view that the proceeding was one in rem in the most limited sense of the term. The majority of the court did not concur in this view, but did agree that whether or not the proceeding was strictly in rem the requirement of due process was satisfied by giving to parties known, or who by reasonable effort could be known, notice by personal service or its equivalent, and to parties unknown notice by publication. People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175, involved the validity of the act of 1897, establishing the "Torrens System" in Illinois. The law was upheld, and while the language of the opinion is not, perhaps, entirely clear, a careful reading of what was said on the point under discussion leads us to the conclusion that the court intended to hold, and did hold, that there was no violation of the Constitution in the provisions of the act, coupled with those of the general law of Illinois, authorizing service by publication as against unknown owners and nonresidents.

It is not to be denied that authority, and that of a high character, is cited in opposition to the views just expressed. The opinion of Justice Loring, dissenting in Tyler v. Judges, supra, and that of Vice-Chancellor Stevens in Hill v. Henry (N. J. Ch.) 57 Atl. 554, both relied on by respondent, are careful and elaborate expositions of the law. They rest their conclusion, however, upon the proposition that the proceeding in question is not strictly in rem. For the reasons heretofore stated, we do not regard this ground, if it be well taken, as determinative of the question involved. In State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, the court declared the Ohio "Torrens Law" to be unconstitutional. While there is in the opinion some language which lends apparent support to the contentions of respondent, the fact is that the law there involved did not require personal service of summons or notice even upon resident claimants, whose existence, names, and places of abode were all known to the plaintiff or petitioner. The same defect attached to the statutes which were declared null in Brown v. Board, 50 Miss. 471, and Webster v. Reid, 11 How. (U. S.) 437, 13 L. Ed. 761. That, as to such defendants, a service by publication is not sufficient to constitute due process of law, in a proceeding not strictly in rem, must be admitted. And in this connection it may be well to notice the contention of respondents, that, by the terms of the act now under consideration, the plaintiff in the proposed action may include among "unknown claimants" those who, with reasonable diligence on his part, might have become known to him. It is no doubt true that so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind "unknown owners" by substituted service in actions of the character now under consideration. Tyler v. Judges, supra; Shepherd v. Ware, supra. But we think that, on a proper construction, the act under examination does require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants. It is not clear, as claimed by petitioner, that section 5 of the act requires, in the affidavit, a statement of the examination and inquiry made by plaintiff to enable him to aver that "he does not know and has never been informed of" any person claiming adversely. But, apart from the affidavit, the evident purpose of the act is to secure, so far as possible, actual notice of the proceeding to all known claimants—by personal service if they reside and can be found within the state, by mailing, if they cannot be so found or are nonresidents. We have no doubt that, where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants whom plaintiff "knows or of whom he has been informed" include all as to whom he would by reasonable inquiry have had knowledge or information. It is unnecessary to multiply authorities in support of the well-settled rule that "the means of knowledge is equivalent to knowledge." Civ. Code, § 19; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Shain v. Sresovich, 104 Cal. 402, 38 Pac. 51. The rule applies wherever the circumstances impose upon the party the duty of inquiry (Bank of Mendocia v. Baker, 82 Cal. 114, 22 Pac. 1037, 6 L. R. A. 833; Prouty v. Devin, 118 Cal. 258, 50 Pac. 380), and we are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property. Leigh v. Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592; Mulvey v. Gibbons, 87 Ill. 367; citing, further, Farnham v. Thomas, 56 Vt. 33. So construed, the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.

2. It is strongly urged for the respondent that the "action" contemplated by the statute is not a judicial, but an administrative, proceeding. The disposition of such proceeding being, by the act, conferred upon the supe-

rior court, it is claimed that there is a violation of the provision of the state Constitution (article 3, § 1) dividing the powers of government into three departments—the legislative, executive and judicial—and prohibiting the exercise by any one of these departments of functions appertaining to either of the others. It is also claimed as another result from the same premise that to divest property rights by a proceeding which is not judicial is not "due process of law." To maintain the position that the proceeding is not judicial, the argument is advanced that the jurisdiction of the court is (at least in cases where there is no "known" adverse claimant) invoked upon a mere allegation of the petitioner's right or title, without any assertion that such right is assailed or disputed by any one, and that in such cases the decree rendered is a mere declaration of right, made, substantially, upon an ex parte application. It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties, and that the courts will not concern themselves with settling abstract questions of law which may never be involved in an actual dispute regarding property or other rights. Quotations to this effect may be found in a multitude of cases, many of which are cited in the briefs. But it is not to be understood that it is never the exercise of a judicial function for a court to act upon the application of a party who seeks some form of relief, even though, at the outset of the proceeding, no person is named or designated as opposing the granting of such relief. "It is certainly clear as a general rule," says Selden, J., in Cooper's Case, 22 N. Y. 86, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." In the present case there is a provision for notice to all persons interested in opposing the plaintiff's application, and an opportunity to them to come in and oppose it. There are, in our law, many instances of proceedings which are analogous to the one under discussion, and they have uniformly been regarded as judicial. Thus, we do not question that the superior court exercises judicial functions in granting letters of administration, or admitting a will to probate, or ordering the sale of property of decedents, or distributing estates of decedents, or determining and declaring heirship, notwithstanding the suggestion made in one of the briefs that probate proceedings are "administrative." At any rate, it cannot be denied that such proceedings are judicial, where, in response to the published or posted notice, some person interested appears to contest the application, although, at the outset, the petition does not, in any of the instances cited, disclose a "controversy," or an "invasion of the petitioner's right" in any sense in which such elements are not present in the action brought under the statute now being considered. A petition for change of name (Code Civ. Proc. §§ 1275–1279) discloses neither controversy nor an actual or threatened denial by any one of petitioner's right, yet such proceeding is judicial. In re Societe Francaise, 123 Cal. 525, 56 Pac. 458.

Indeed, so far as this court is concerned, the question would seem to be foreclosed by the repeated decisions holding the proceeding for the confirmation of the organization of irrigation districts (St. 1889, p. 212, c. 178) to be judicial, and properly committed to the superior court for determination. Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; People v. Linda Vista Irrigation District, 128 Cal. 477, 61 Pac. 86; People v. Perris Irrigation District, 132 Cal. 289, 64 Pac. 399, 773; People v. Perris Irrigation District, 142 Cal. 601, 76 Pac. 381. In People v. Linda Vista Irrigation District, supra, this court adhered to its earlier views regarding the construction and effect of the confirmatory statute of 1889, notwithstanding the suggestion of Brewer, J., in Tregea v. Modesto Irrigation District, 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395, to the effect that the proceeding for confirmation presented a mere moot case, not calling for judicial consideration. But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved is not judicial. The action or special proceeding now in question is devised, as has been stated, for the purpose of establishing a title which is in fact good, but which is not deducible of record. That a court of equity may remedy such defect by a decree, although there is no actual controversy as to the title, was held in Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532, the court saying: "The title of the complainants is not controverted by the defendants, nor is it assailed by any action for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record—that is, by a judicial determination of its validity—and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim." See, also, Blight's Heirs v. Banks' Heirs, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136. And this court has held that in an action to quiet title under sections 738 and 739 of the Code of Civil Procedure the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial. Bulwer Cons. Min. Co. v. Standard Cons. Min. Co., 83 Cal. 589, 23 Pac. 1102. "Even though the defendant makes no adverse claim," says the court, "third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court." The action here involved may well, as claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the Legislature having power to declare what shall form such cloud (Clark v. Smith, 13 Pet. [U. S.] 195, 10 L. Ed. 123), and having in effect declared by this statute that the destruction of public records constitutes a cloud upon titles.

Again, it will be observed that in other states statutes providing for the determination of titles, under the Torrens system, by administrative officers, have been assailed and declared void upon the ground that the power of determining such titles was essentially judicial and to be exercised only by the courts. People v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; State v. Guilbert, supra. The same view as to the nature of such functions was taken in Tyler v. Judges, supra; People v. Simon, supra; State v. Westfall, supra.

The argument, advanced with much force and ability, that even a judicial proceeding cannot divest property rights, in the absence of an allegation of a controversy between parties to the record, may be viewed as a restatement, in another form, of the objections to statutes authorizing judgments against "unknown owners." This contention, if adopted, would require us to hold that, except in proceedings strictly in rem, no statute can constitutionally authorize valid judgments as against persons not ascertained or made parties defendant by name or other specific description. For the reasons before given we cannot accept this conclusion.

3. Finally, it is said that the statute violates the provision of the state Constitution prohibiting the Legislature from passing local or special laws in certain cases. Among the subjects included in the constitutional prohibition are laws "regulating the practice of courts of justice" (Const. art. 4, § 25, subd. 3), and "cases where a general law can be made applicable" (Const. art. 4, § 25, subd. 33), and these are the provisions principally relied on. The questions thus raised are sufficiently serious and important to merit a full discussion, but by reason of the length which this opinion has already attained we are compelled to be brief in disposing of them. Unquestionably this statute does make a number of provisions regarding the practice in the actions or proceedings here provided for which are not to be found in other judicial proceedings in this state. For example, the complaint does not name any defendants, even though there may be known adverse claimants. The names of known defendants do not appear in the caption of the complaint or the summons, nor in the body of the summons. In other respects, too, the summons is different in form from that used in ordinary civil actions. The proceedings for publication of summons differ in various particulars from the general statutory methods provided for publication of summons by sections 412 and 413 of the Code of Civil Procedure. Thus no affidavit of diligence is required. The court is not authorized to designate a paper "as most likely to give notice" to the defendants. The order for publication is not required to direct the summons to be mailed forthwith to nonresident defendants. The period of publication is fixed by the statute at two months, and is not in the discretion of the court. The foregoing enumeration, while not complete, represents in a general way the nature of the differences to be found between the procedure here authorized and that prescribed by the Code of Civil Procedure for ordinary civil actions. Do these differences render the act obnoxious to the constitutional provisions regarding special laws? This court has had occasion many times to consider what are special laws. "It is not necessary that a law shall affect all the people of a state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." McDonald v. Conniff, 99 Cal. 386, 391, 34 Pac. 71. The question of what is a special law as applied to the practice of courts of justice was carefully considered by this court in Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, and it is sufficient here to restate what was said in that case. "But the mere fact that it [i. e., a statute] operates only on one class of cases does not make it repugnant to the constitutional provision. Our statutes contain many provisions regulating the practice of courts of justice applicable only to certain classes of actions or special proceedings, made necessary by the nature of the objects and purposes of the various classes. The Legislature has the right to enact laws applicable only to one class of its citizens where the classification is authorized by the Constitution, or is based upon intrinsic differences requiring different legislation. The law in this regard was well stated by this court, through Mr. Justice Harrison, in People v. Central Pacific R. R. Co., 105 Cal. 576, 584, 38 Pac. 905, 906, where it was said: 'A law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law.' The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be 'founded

on some natural or intrinsic or constitutional distinction' (Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604), but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class." See, also, Rode v. Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342. The classification must not be arbitrary, for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction which will suggest a reason which might rationally be held to justify the diversity in the legisation. Pasadena v. Stimson, 91 Cal. 238, 251, 27 Pac. 604; Darcy v. Mayor, etc., 104 Cal. 642, 38 Pac. 500. "If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation."

Under these rules we think the proceeding created by the act in question is sufficiently distinct and different from ordinary civil actions covered by the general rules of the Code to justify the creation of a class which shall be characterized by the special rules of procedure here provided. As we have said, this act is intended to remedy an evil arising from an unusual circumstance, to wit, the destruction of the public records and the consequent inability to deduce a safe or merchantable title to real estate. Such inability furnishes a good reason for the creation of a procedure which shall enable owners of real estate to establish their titles, not only as against known adverse claimants, but as against even unknown and undetermined persons who may claim adversely. Many of the differences above referred to are rendered necessary by the fact that this proceeding seeks to bind such unknown claimants. Thus, since claimants can be brought in only by publication of summons, it would be useless to require the plaintiff to furnish to the court an affidavit upon which the court may determine whether or not summons shall be published. If it is to be published in every case, why should there be proof of special facts authorizing a publication? Again, the fact that the court or judge cannot know who may be affected by the proceeding seems to furnish a reason for not requiring the designation of any particular newspaper as "most likely to give notice to the person to be served." The provision that the summons should be mailed to nonresident defendants within 15 days, instead of forthwith, as required in ordinary actions, finds a reasonable justification in the fact that the summons so mailed must have attached to it a memorandum showing the date of the first publication. As the first publication may be some days after the order for publication, it might be impossible to attach this memorandum to the copy of the summons to be mailed, if such mailing were to take place forthwith.

The objections which are urged to the provisions of the statute authorizing a special form of complaint and summons may, we think, all be answered by saying that the proceeding in question differs so materially from most actions as to justify such peculiarities in procedure. The primary purpose of the proceeding is to determine the status of the title to specific property. While the rights of individuals are necessarily involved and adjudicated, this primary purpose is sufficient to justify a form of pleading and process which shall direct attention to the land to be affected rather than to the persons who may be interested in it. Our Codes are full of provisions making special rules applicable to different classes of cases, and it has never been supposed that such provisions are invalid merely because the procedure in each case is not in every particular exactly the same as for every other case. Thus, in actions for unlawful detainer, the summons is returnable not less than 3 nor more than 12 days from its date (Code Civ. Proc. § 1166), thereby reducing the defendant's time to appear or answer below the 10 days allowed in ordinary actions. The chapter providing for actions against steamers, vessels, and boats contains special provisions for the contents of the complaint (Code Civ. Proc. § 815), and for the service of summons (Code Civ. Proc. § 816). The summons in proceedings in eminent domain differs in various particulars from the form of summons in civil actions (Code Civ. Proc. § 1245). In proceedings relative to escheated estates the order requiring persons interested to appear and show cause why the estate should not vest in the state is published for one month, and parties interested have 40 days from the date of the order to appear instead of having 30 days after a publication for at least two months, as in other cases of publication of summons. All of these differences may be upheld upon the ground that the proceeding in question is of such a peculiar nature as to justify its classification for purposes of procedure. Without considering in detail every point in which this act is said to differ from the Code defining the general procedure in civil actions, we are satisfied that here, as in the Deyoe Case, the nature of the proceeding is such as to justify the Legislature in creating for it the special procedure prescribed by the statute. After all, the question of classification is primarily for the Legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made. We are not prepared to say that the needs which called this legislation into being, and the purposes sought to be accomplished, were not so peculiar in their character as to permit the Legislature to devise this remedy and these methods of seeking it.

It is not necessary to decide at this time whether parties not personally served may come in and defend within one year after judgment, as provided in section 473 of the Code of Civil Procedure. Whether that section applies to proceedings under this act is a question of construction, which can best be considered when it arises in a case directly involving the point. We doubt that the interpretation excluding the right to come in would invalidate the act. If it should be considered to have such effect, that would be sufficient ground for construing the act so as to allow the application of section 473 of the Code of Civil Procedure—a construction that is certainly possible under section 12 of the statute.

The objection is made that the act is special because it applies only where the records have been destroyed by earthquake, fire, or flood. Possibly public records might be destroyed by other causes, but certainly the three agencies of destruction named are those which are most likely to occur in this state, and are the only ones which, so far as we know, have in our past history caused any considerable destruction of public records. These facts furnish ample ground for limiting the operation of the act to the cases to which it has been made applicable.

The title of the act is sufficient to comply with article 4, § 24, of the Constitution. Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Deyoe v. Superior Court, supra.

A peremptory writ of mandate will issue as prayed.

We concur: ANGELLOTTI, J., HENSHAW, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; BEATTY, C. J.

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4 Cal. App. 385

MULBERRY et al. v. O'DEA et al. (Civ. 260.)

(Court of Appeal, Second District, California. Oct. 27, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—AUTHORITY OF COUNCIL—PREMATURE ACTION.

The Vrooman act (St. 1885, p. 147, c. 153) requires that, after a resolution of intention for certain improvements has been passed by the city council, the street superintendent shall cause a notice to be published for six days in daily newspapers of the city, and that, after 20 days from the expiration of time of such publication, the city council shall have jurisdiction to order any of the improvements to be made. *Held*, that an ordinance ordering such work to be done, adopted by the city council on the nineteenth day after the last day of publication required by the act was premature and void, although not signed by the mayor until two days thereafter, and then published for two days.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 779.]

2. SAME—CONTRACTS—VALIDITY—PROVISIONS TENDING TO INCREASE COST—RESPONSIBILITY FOR LOSSES.

A contract for street improvements providing that all damage arising from the nature of the work, unforeseen difficulties, the action of the elements or acts or omissions on the part of the contractor or his employés shall be sustained by the contractor, is void, since such clause would naturally tend to increase the cost of the work and the burden on the taxpayers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 871.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by John Mulberry and others against M. F. O'Dea and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Leslie R. Hewitt, for appellants. Lucius M. Fall, for respondents.

JAMES, Special Judge. Plaintiffs are severally the owners of parcels of real property in the city of Los Angeles against which liens are claimed under certain proceedings taken by the city for the improvement of Temple street. Defendant Tryon-Brain Company, a corporation, was the contractor, and performed work of laying cement sidewalks and building cement curbs along certain portions of said street. Upon completion of the work the rights of defendant company under their contract were assigned to defendant O'Dea. Certain irregularities in the proceedings taken by the city and alleged defects in the form of contract made with the Tryon-Brain Company formed the basis for this suit by which it was sought to have it adjudged that the assessments made against the several pieces of property owned by plaintiffs to secure payment of the contract price for the doing of said work were void, and that no liens attached for the benefit of defendant contractor. A statement of facts was agreed upon in the lower court, and, upon submission of the cause, judgment was entered for plaintiffs, and defendants have appealed.

The proceedings for the improvement of Temple street were taken under authority of the act of the Legislature known commonly as the "Vrooman Act" (St. 1885, p. 147, c. 153), and acts amendatory thereof. Respondents contend that at the time the city council attempted to order the work to be done it had not acquired jurisdiction, because 20 days had not expired after the publication by the street superintendent of a notice of the intention to have the work performed when the council adopted an ordinance directing the work to be done. The Vrooman act provides that, after the resolution of intention has been passed and adopted by the city council, the street superintendent shall "cause a notice similar in substance, to be published for six days in one or more daily newspapers published and circulated in said city, * * *" and that "at the expiration of twenty days after the expiration of the time of said publication by said street superintendent * * * the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act." From the agreed statement of facts it appears that the street superintendent published the notice required of him to be published, in a daily newspaper for six days, commencing on April 9, 1903, and ending on April 15, 1903, one of the intervening days being Sunday. On May 4, 1903, the nineteenth day after the last day of publication of the notice by the street superintendent, the city council adopted an ordinance ordering the work to be done. This ordinance was signed by the mayor of the city on May 11, 1903, and published for two days thereafter, to wit, on May 13 and 14, 1903.

It is conceded by appellants that, if the order made by ordinance providing for the doing of the work was complete on the 4th day of May, when the ordinance was adopted, this order was a nullity and made without jurisdiction, but it is argued that the ordinance did not become final until after approval by the mayor and publication for two days, and that, therefore, the order so made should be deemed to have been made as of the date when the ordinance was signed by the mayor or published. There is probably no doubt that the city council in directing street work to be done under authority of the act here under discussion, might do so by simple resolution; in fact, it has been so held in the cases of Los Angeles v. Waldron, 65 Cal. 285, 3 Pac. 890, and Hellman v. Shoulters, 114 Cal. 157, 44 Pac. 921, 45 Pac. 1057. In the case last cited the Supreme Court said: "An ordinance is also a resolution, or at least, so far as this statute is concerned, they are equivalent. The street law provides a complete scheme or procedure for street work, and, so far as it goes, governs. The charter cannot make a different procedure by requiring more or less. Otherwise there would not be a uniform operation of the law for all cities of a class. As to publication, the street law expressly provides that no other shall be necessary for the validity of the procedure. The ordinance in this regard is in the form suited to the charter of Los Angeles, and provides that the clerk shall cause the same to be published for two days, and that thereupon it shall take effect. Counsel says this publication was before it took effect, and the publication required by the street law is after it has become a valid resolution. * * * Under either view, the resolution is finally passed before publication. Whether we say it is a subsisting ordinance, though it can have no effect as an ordinance, or that it takes effect only after publication, when for the first time it be operative as an ordinance, is a matter of taste."

The city council here adopted the ordinance ordering the work to be done on the nineteenth day after the expiration of the last date of publication of the street superintendent's notice. The order of the council was complete upon the adoption of the ordinance; there was nothing left to be done by that body respecting its order after adoption of the ordinance by vote taken and recorded. But the council had acquired no jurisdiction to take any step essential to the validity of an order directing the work to be done until the full term of 20 days had run. If its order made on the nineteenth day was valid, as well might it then have adopted the ordinance on the first, third, or any other day after the termination of the period of publication of the street superintendent's notice. It appears clearly that the ordinance of May 4, 1903, directing the work of improvement to be done was prematurely adopted, without jurisdiction, and was ineffective and void for any purpose. The subsequent proceedings taken, therefore, failed to give any support to defendant's claim to rights of lien against the property of plaintiffs.

The further contention of respondents, that the provision in the specifications obligating appellants to assume responsibility for loss by reason of damages which might accrue rendered the contract invalid, should also be sustained. The contract executed between the city and appellants contained a provision that the work should be done according to "specifications on file in the office of the city clerk of said city which are known as 'Specifications No. 54 and 55,' and made part of this contract." Incorporated in these specifications was the following condition: "All loss or damage arising from the nature of the work to be done under this agreement or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any encumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by this agreement, shall be sustained by the contractor." This condition became a part of the contract. A provision similar to this was held in the case of Blochman v. Spreckels, 135 Cal. 664, 67 Pac. 1061, 57 L. R. A. 213, to render the contract void, because it added a term not authorized by statute, and also because it changed and might increase the burden of the taxpayer.

In the Blochman Case it was said by the court: "No one can say that a contractor would agree to stand behind the city and hold it harmless from damage arising out of the work he had undertaken to do without some compensation additional to the necessary cost of the material and labor to him, plus a reasonable profit. * * * The law does not authorize a municipality to escape its liability by shifting it to the shoulders of the contractor, and, in attempting to do so, it imposed conditions that would naturally tend to increase the cost of the work." See, also, the cases of Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep. 124.

Other minor points are argued in the briefs of counsel, but, as those discussed are determinative of this appeal, it will be unnecessary to consider them.

The judgment appealed from is affirmed.

I concur: GRAY, P. J.

ALLEN, J. I concur in the judgment upon the ground first stated in the opinion.

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7 Cal. Unrep. 318

MONETA CANNING & PRESERVING CO. v. MARTIN et al. (Civ. 276.)

(Court of Appeal, Second District, California. Nov. 9, 1906.)

TRIAL—FINDINGS.

Findings are not necessary in relation to separate defenses in support of which no evidence was offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 908, 914.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Moneta Canning & Preserving Company against Samuel Martin and another. Judgment for plaintiff. Defendants appeal. Affirmed.

F. B. Woodruff, for appellants. E. J. Fleming and Paul E. Ussher, for respondent.

ALLEN, J. Action to recover the agreed price of certain pea vines delivered to appellants by plaintiff under a written agreement. Judgment in favor of plaintiff, from which, and an order denying their motion for a new trial, defendants appeal.

The defendants answered separately, each denying the execution of the agreement or the receipt of the vines. The court found in favor of plaintiff upon these issues, and the evidence is uncontradicted in support of its findings. An attempt was made by defendants to plead a rescission of the contract upon the grounds of fraud in its procurement and a total failure of consideration. The answers were each insufficient to constitute a defense or to entitle the defendants to any relief. No facts were pleaded showing fraud upon plaintiff's part; neither was any fraudulent intent claimed, nor is it averred that defendants were ignorant as to the representations upon which they claimed to have relied.

It is argued by appellants that the vines not being existent when the contract was made, a warranty of their merchantable character and soundness failed under the provisions of section 1768, Civ. Code. Were all this conceded, there is no evidence tending to show that the goods were either unsound or unmerchantable when delivered; but the contrary appears. There was no finding of the court in relation to the separate defenses, but, there being no evidence offered in support thereof, findings were unnecessary. A brief synopsis of the evidence is set out in the transcript, from which it appears that the judgment of the court could not have been otherwise than as rendered.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 390

MERRITT v. McFARLAND et al. (Civ. 254.)

(Court of Appeal, Second District, California. Nov. 8, 1906.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURY TO TRAVELER—LIABILITY OF SUPERINTENDENT OF STREETS.

The Vrooman Act (St. 1885, pp. 160, 161, c. 153, §§ 22, 23) provides that it shall be the duty of the superintendent of streets to see that all laws, ordinances, and regulations as to the streets be fully carried into effect; that he shall give bond to the city; that if he fails to see that the laws, ordinances, and regulations as to the streets are executed his sureties shall be liable to any person injured in consequence of said official neglect; that if, in consequence of a street or highway, improved under the act, being out of repair, any person, while carefully using such street, suffer damage, no recourse therefor shall be had against the city, but if the defect shall have existed for 24 hours after notice thereof to the superintendent, then the person on whom the law imposed the obligation to repair, and the officer through whose official negligence such defect remains unrepaired, shall be liable to the party injured; provided that said superintendent has the authority to make said repairs, under the direction of the city council. The evidence showed that, under his supervision as superintendent, Seventh street, a street of the city dedicated to public travel, was cut down so as to leave an embankment two feet high on one side of the street, but within its boundaries as actually improved by the board of trustees and by his act; that, while plaintiff was traveling L street, a street of the city dedicated to public travel and traveled as a public street, and while on the place where the sidewalk should be, but where no sidewalk was laid, and when at the intersection of Seventh and L streets, at night, he fell over said embankment into Seventh; that the work done on Seventh street by the superintendent was authorized by the city trustees; and that no protection against the danger was made by the superintendent, though he had actual notice of the dangerous condition. *Held*, that the superintendent was liable on his bond.

2. SAME—LIABILITY OF CITY TRUSTEES.

The city trustees who appoint the superintendent of streets, being only the agents of the city, and not standing in the relation of principal to him, are not liable under the Vrooman Act (St. 1885, pp. 160, 161, c. 153, §§ 22, 23) for injury to a person from a defect in the city, due to negligent performance by the superintendent of a duty resting on him.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Frederick B. Merritt against C. L. McFarland and others. Judgment for plaintiff. Defendants, except Geo. F. Ward, appeal. Reversed in part.

W. A. Purington, Purington & Adair, and C. L. McFarland, for appellants. H. C. Hibbard and Lafayette Gill, for respondent.

GRAY, P. J. This action is brought against the city of Riverside, a city of the sixth class, to recover damages for personal injuries sustained while the plaintiff was walking along Locust street, by falling over an embankment at the intersection of Locust and Seventh streets in said city. The action is brought against the superintendent of streets of said city, the sureties on his official bond, and the city trustees of said city. Plaintiff had a verdict and judgment. The defendants appeal from the said judgment.

It is contended on behalf of the defendant, the superintendent of streets, T. K. Seburn, that his motion for a nonsuit should have been granted, because it was not shown that any duty rested upon him which he had failed to perform, or which he had performed in a negligent manner. With this we cannot agree. It was shown without conflict, that under his supervision Seventh street at its intersection with Locust street had been cut down so as to leave an embankment two feet in height on one side of said Seventh street. It was also shown, or rather admitted in the pleadings, that Locust street and Seventh street were streets of said city dedicated to public travel, and while there is nothing to show that Locust street had ever been worked as such, the evidence, without conflict, shows that it was traveled as a public street, and further, that plaintiff while traversing said Locust street within the boundaries thereof and in the place where the sidewalk should be, but where no sidewalk was laid, in the darkness of the night, fell over said embankment into said Seventh street. It was further shown that the work so done on Seventh street by the superintendent was regularly and duly authorized by said city trustees. This embankment constituted an obstruction, and, as the result shows, it constituted a danger to public travel. No protection in the way of lights, or in any other manner, was made by the superintendent of streets against such danger. The superintendent of streets had actual notice of the dangerous condition of this street. It was his duty to see that any such danger was remedied, and that the public streets of his city were kept in a reasonably safe condition. The Vrooman Act (St. 1885, p. 160, c. 153), section 22, provides as follows: "It shall be the duty of the superintendent of streets to see that the laws, ordinances, orders, and regulations relating to the public streets and highways be fully carried into execution, and that the penalties thereof are rigidly enforced. He shall keep himself informed of the condition of all the public streets and highways, and also of all public buildings, parks, lots, and grounds of said city, as may be prescribed by the city council. He shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties and for such sums as may be required by the city council; and should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution, after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect." The following section, 23 (page 161), reads as follows: "If, in consequence of any graded street or public highway improved under the provisions of this act, being out of repair and in condition to endanger persons or property passing thereon, any person while carefully using said street or public highway, and exercising ordinary care to avoid the danger, suffer damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against such city; but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice thereof to the said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city."

That the superintendent had the authority, under the direction of the city council, to do the work on Seventh street, which was the direct cause of the injury to plaintiff, is conceded. It must also be conceded that in doing said work he was proceeding in the line of his official duty and authority. The work was done by him as superintendent of streets. He had actual notice of the existence of the embankment, and both he and the sureties on his bond were equally liable for the results of his negligence in leaving the street in such a dangerous condition.

As to the liability of the city trustees: They are only the agents of the city and as such they appoint the superintendent of streets. They do not, however, stand in the relation of principal to the superintendent, and are not responsible for the faithful performance of the duties of his office. Therefore the verdict and judgment as against them is without support in the evidence.

We see nothing in the point that a public street must be confined to the part of the same which is traveled and worn down by passing vehicles. We understand that all that territory which is platted and dedicated as a public street is within the street, and that the public is entitled to the use of all that territory. But be that as it may, it appears here that the injury occurred at the intersection of two streets and within the boundaries of Seventh street as the same was actually worked and improved by authority of the board of trustees and by the act of the superintendent of streets. This being the case, there can be no question as to the liability of the superintendent.

We have examined the instructions given and refused in the case. We think the instructions given were as full and complete as the nature of the case required; that the instructions refused were properly refused because they did not come within the rules of law hereinbefore referred to; and we find nothing in the appellants' contention with reference to the instructions of sufficient importance to require special consideration.

The judgment is affirmed as against Seburn and his sureties, Davis and House, and reversed as to the other defendants.

We concur: ALLEN, J.; SMITH, J.

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4 Cal. App. 394

PEOPLE v. ERWIN. (Cr. 41.)

(Court of Appeal, Second District, California. Nov. 9, 1906.)

1. SODOMY — STATUTES — ATTEMPTS — INFORMATION.

Pen. Code, § 286, provides: "Every person who is guilty of the infamous crime against nature, committed with mankind * * * is punishable by imprisonment in the state prison not less than five years." Section 664 provides: "Every person who attempts to commit any crime but fails * * * is punishable" by imprisonment, for a term not exceeding one-half the longest term prescribed as a punishment for the offense attempted, if such offense is punishable by imprisonment in the state prison for five years or more. An information designated the offense as an attempt to commit the infamous crime against nature with and upon a male human being named therein by then and there attempting to have carnal knowledge of the body of the person named. *Held*, that the information was sufficient, the crime being described in the words of the statute, and attempts being made a crime by section 664.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Sodomy, §§ 3, 6.]

2. CRIMINAL LAW — HARMLESS ERROR — SETTING FOR TRIAL—TIME FOR PREPARATION—ABSENCE OF DEFENDANT.

The action of a court on March 3d in setting a criminal case for trial on April 12th following, in the absence of defendant but in the presence of his counsel, is not prejudicial error, defendant having interposed no objection when the case was called for trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1470.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

John Erwin was convicted of a felony, and appeals. Affirmed.

Wills & Reymert, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

ALLEN, J. The defendant was convicted of a felony designated in the information as an attempt to commit the infamous crime against nature with and upon a male human, being named in the information, by then and there attempting to have carnal knowledge of the body of the person so named. He appeals from the judgment and order denying his motion for a new trial.

Section 286 of the Penal Code provides: "Every person who is guilty of the infamous crime against nature, committed with mankind, * * * is punishable by imprisonment in the state prison not less than five years." Section 664 of the Penal Code provides: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: 1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more * * * the person guilty of such attempt is punishable by imprisonment in the state prison * * * for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." The crime charged is substantially alleged in the words of the statute. While section 286, Penal Code, does not define the crime, every person of ordinary intelligence understands what the crime against nature with a human being is. People v. Williams, 59 Cal. 397. The attempt to commit is a crime under section 664. People v. Burns, 138 Cal. 160, 69 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270. The information is sufficient and the record discloses evidence from which the jury were warranted in their verdict of guilty.

We perceive no prejudicial error in the action of the court, on the 3d day of March, 1906, setting the case for trial on the 12th of April following, although such action was taken in the absence of the defendant, yet in the presence of his counsel. There was ample time for defendant to prepare for trial, and, when the case was called for trial, if he had any objections to the time or manner of the setting of the cause, the same should have been offered. No objections were interposed.

There was no error in the admission of the evidence complained of.

The judgment and order should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; SMITH, J.

4 Cal. App. 396

PEOPLE v. MELANDREZ. (Cr. 40.)

(Court of Appeal, Second District, California. Nov. 9, 1906.)

1. INFORMATION—VARIANCE—GRAND LARCENY.

Notwithstanding Pen. Code, § 487, providing that the larceny of a horse, mare, gelding, etc., is grand larceny, proof of the theft of a mare does not constitute a variance from an information charging the theft of a horse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 113.]

2. LARCENY—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of grand larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 160.]

3. CRIMINAL LAW—APPEAL—EXCEPTION—ARGUMENT OF COUNSEL.

Questions as to the ruling of the court in connection with the argument of the district attorney cannot be reviewed on appeal where no exception was taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2666.]

4. SAME—EVIDENCE—PRELIMINARY EXAMINATION.

Where, on the trial in the superior court, there was evidence that a considerable search for a witness had been made in and about places he had formerly frequented, and he had not been found, it was sufficient to warrant the admission of the transcript of his testimony, taken at the preliminary examination in the police court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1236.]

5. SAME—ADMISSIONS.

In a prosecution for larceny of a horse, testimony that accused, in reply to accusatory statements made in his presence by the witness, stated that witness had "thrown him down" and had "given him away," was admissible, though the accused had previously stated that he knew nothing about the horse and had never seen it, until the witness brought it there for sale in the stable.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Jose Melandrez was convicted of grand larceny, and appeals. Affirmed.

Wills & Reymert, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

GRAY, P. J. The defendant was convicted of the crime of grand larceny, and appeals from the judgment and from an order denying his motion for a new trial.

1. The information in appropriate language charged the defendant with the stealing of a horse in the county of Riverside, and thereafter feloniously bringing the said horse into the county of Los Angeles. The proof taken at the trial shows that the horse stolen was a mare. The first point urged for reversal is the variance, as to the sex of the animal, between the proof and the information. This question is settled adversely to appellant's contention in the case of People v. Pico, 62 Cal. 52, wherein it was held that the word "horse," in section 487, subd. 3, of the Penal Code, is used in its generic sense, and includes all animals of the horse species whether male or female, and that the Legislature of this state in using the word "mare," also in the same section, did not intend to modify or change the common-law rule, "but inserted the word possibly for more definiteness."

2. Nor can we agree with appellant's contention that the evidence was insufficient to support the verdict. In addition to the evidence showing without conflict that the defendant exercised actual control and ownership over the mare in question in the county of Los Angeles, and that the same had been prior to its being impounded actually in the possession of the defendant in said Los Angeles county, the declarations, conversations, and conduct of the defendant in connection with the disposition of the mare all indicate guilty knowledge and tend to show a consciousness that he had obtained possession of the animal by criminal means. The fact of his guilt does not rest alone upon the possession of a stolen animal, but the fact that the animal was originally stolen and did not stray away, and that defendant was directly connected with the original larceny of the animal in another county, is substantiated by the facts that he sold the animal for almost nothing, that he made a false statement as to the period of time during which he had owned her, and that he admitted that the witness Miranda had betrayed him. In admitting this betrayal he did not deny that he had placed himself in a situation to be betrayed, but all his language and conduct seems to admit his guilt. If we were to concede that the witness Miranda was an accomplice, still his testimony showing defendant's guilt was amply corroborated by the declarations of the defendant himself made in the presence of the officers.

3. No exception was taken to the ruling of the court on any matter in connection with the argument of the district attorney. Consequently we find no error or alleged error in that direction which this court can review.

4. As to the admission of the transcript of the testimony of Canuto Miranda taken at the preliminary examination in the police court, the question of the sufficiency of the preliminary evidence as to the whereabouts of that witness and the efforts that had been

made to secure his attendance was in the first instance for the trial court. The record discloses evidence showing that a considerable search had been made for the witness in and about the places that he had formerly frequented, and that the officers had been unable to find him. We cannot say as a matter of law that this evidence was insufficient to reasonably satisfy the trial court that the witness could not be found in the state; and for this reason we cannot agree with appellant's contention that the deposition should have been excluded.

5. The accusatory statements testified to by the police officers as having been made by witness Miranda in the presence of the defendant, taken with the response thereto made by the defendant, were properly received in evidence. In reply to statements of Miranda showing defendant's claims concerning the mare in question, the defendant said, as the witness testifies: "Miranda has thrown me down. Miranda has given me away; and there is two witnesses, so I have no more to say that I brought the horse here." The witness then testifies that he said to the defendant, "Will you go and show me where you brought that horse from?" And the defendant replied, "No; let whoever claims that horse come here—whoever claims the horse come here." To be sure, previous to this the defendant had said to the officer that he knew nothing about the horse, never had seen the horse until Miranda had brought it there for sale in the stable, but his subsequent statements made after he had listened to the declarations of Miranda were in effect a contradiction of his previous declaration, and we are clearly of the opinion that the whole conversation between police officer, Miranda, and the defendant constituted a proper matter of evidence to be submitted to the jury. This is not the case of a mere charge of facts made in the presence of the defendant without any reply thereto, the defendant denying all connection with the alleged crime, but we have here the charge accompanied with a reply in the nature of an admission.

We have examined the record carefully and find no prejudicial error.

The judgment and order are therefore affirmed.

We concur: SMITH, J.; ALLEN, J.

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4 Cal. App. 400

GRAHAM v. LIGHT et al. (Civ. 298.)

(Court of Appeal, Second District, California. Nov. 14, 1906.)

1. Bills and Notes—Action—Pleading.

In an action on a note, it is not necessary to allege in the complaint that the plaintiff was the owner or holder of the note at the commencement of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1480.]

2. Same—Issues.

Where the complaint does not allege that the plaintiff was the owner of the note sued on at the commencement of the suit, a general denial puts in issue only the allegation as to nonpayment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1587, 1480.]

3. Parties — Who May Sue — Statutory Provisions.

Under Code Civ. Proc. § 367, requiring actions to be prosecuted in the name of the real party in interest, the pledgor of a note is entitled to maintain a suit thereon against the maker, though Civ. Code, § 3006, authorizes a pledgee of an evidence of debt to collect it at maturity, but the pledgee would be a necessary party to the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 6-8; vol. 7, Bills and Notes, §§ 1387, 1388.]

4. Pledges—Enforcement of Pledged Note—Bringing in New Parties—Necessity.

Though under Code Civ. Proc. § 389, authorizing the court to bring in necessary parties, the pledgee of a note should be brought in as a party to an action by the pledgor thereon, where the pledgee still retained an interest at the time of the trial, this was not necessary where the note had been transferred back to the pledgor before the time of trial.

5. Costs—Attorney's Fees.

In an action on a note by the pledgor thereof, where the pledgee was not made a party and there was no apparent necessity for the bringing of the suit by the pledgor, it was improper to allow an attorney's fee to the plaintiff.

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Edward S. Graham against John E. Light and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

Henry M. Willis, for appellants. Walter M. Campbell, for respondent.

SMITH, J. This is a suit on a promissory note for the sum of $500, with interest, etc., of date October 24, 1904, payable November 24, 1904, and secured by assignment of five shares of the capital stock of the Redlands Hospital Association of the par value of $500. The complaint, which was filed January 3, 1906, alleges the execution of the note, which is set out at length, and that the same has not been paid, nor any part thereof. There is no allegation that the plaintiff at the time of the commencement of the suit was the owner or holder of the note, but such an allegation was unnecessary. Bank of Shasta v. Boyd, 99 Cal. 606, 34 Pac. 337, and cases cited. The answer consists of a general denial, which puts in issue only the allegation as to the nonpayment of the note. The court found this allegation of the complaint to be true, and judgment was accordingly entered for the plaintiff, March 5, 1906, for the principal of the note, with interest and costs, including an attorney's fee of $50. The defendants appeal from the judgment.

On the pleadings and findings as they stand, it is clear that no other judgment could have been entered. But it appears from the bill of exceptions in the case that evidence was introduced, without objection, showing that, prior to the beginning of the suit, the note had been assigned by the plaintiff to the First National Bank of Redlands as collateral security for $500 loaned him by the bank, and was not reassigned until the day of the trial, and the point is urged by the defendants that the plaintiff had no cause of action when the suit was brought. The position of the appellants is, in effect, that the court should have found the facts disclosed by the evidence, though not pleaded, and, for the purposes of the decision, it may be assumed that it should have done so, provided the facts were material. But we do not conceive this to be the case. The plaintiff, at the time of the commencement of the suit, was still the owner of the note and had a substantial interest therein. The bank, indeed, held it in pledge, and might, therefore, have maintained an action to collect the same. Civ. Code, § 3006. Nor, under the express provision of the Code cited, would it have been necessary to make the plaintiff party. But it does not follow that there was not also a right of action in the plaintiff to protect his rights or interest in the note. Such an action, indeed, could not have been maintained at common law, but, under our practice, "in the matter of procedure and form all distinctions between law and equity" have been abolished (Grain v. Aldrich, 38 Cal. 519, 99 Am. Dec. 423), and it cannot be doubted that, under the principles of equity, the plaintiff was entitled to maintain an action to enforce his rights or protect his interests. Indeed, the right to maintain an action is given him by the provisions of section 367, Code Civ. Proc. His action, however, could not have been maintained without making the bank, as a party interested, a party, nor, in the absence of the bank—its interest still subsisting—would a court of equity have granted the plaintiff relief. But in such case relief would have been denied, "not upon the ground that the facts [did not entitle him to it], but because all the parties interested in the subject-matter [were] not before the court." Grain v. Aldrich, 38 Cal. 521, 99 Am. Dec. 423. Under our system of practice, therefore, the real objection of the defendants to the judgment is "not a want of facts, but a want of parties" (Id.), and had the note still been held by the bank under its assignment at the time of the trial, it would have been the duty of the court, under the provisions of section 389 of the Code of Civil Procedure, to have ordered the bank to be brought in. But in this case, as it appeared that the bank had reassigned the note to the plaintiff, this was unnecessary. The facts proved, therefore, were immaterial, and it was unnecessary for the court to find them.

We are of the opinion, however, that the allowance of an attorney's fee to the plaintiff was improper. An attorney's fee can be allowed only for services rendered and for the value of such services. Here the suit was improperly brought in omitting the necessary parties. Nor, indeed, was there any apparent necessity for the bringing of the suit by the plaintiff. Under such circumstances, we think that the court erred in allowing any attorney's fee.

The judgment must therefore be modified by striking therefrom the words: "And in addition thereto the sum of $50, which is fixed by the court as a reasonable attorney's fee herein;" and as thus modified will be affirmed.

It is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 422

VATUONE v. CANNOBIO et al. (Civ. 226.)

(Court of Appeal, First District, California. Nov. 21, 1906. Rehearing Denied by Supreme Court Jan. 14, 1907.)

1. LANDLORD AND TENANT—DENYING LANDLORD'S TITLE.

Lessees or sublessees cannot, in proceedings by the landlord, at expiration of their term, to recover possession, defend on the ground that he had leased the premises to another, they not connecting themselves with the title of such lessee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 176, 189, 1276.]

2. SAME—CREATION OF TENANCY FROM MONTH TO MONTH.

Where tenants were in possession under a lease for three years, terminating November 1st, a new tenancy from month to month, at the rate of $300 per month was not created under Civ. Code, § 827, providing that in all leases from month to month, the landlord may, on giving notice at least 15 days before expiration of the month, change the terms of the lease, to take effect at the end of the month, by the landlord on August 24th serving on the tenants three separate but attached notices, the first notifying them that after expiration of the lease under which they were holding the monthly rent would be $300 payable monthly in advance while they continued to hold possession after expiration of their present lease, instead of the sum then paid under said lease; the second stating that their lease would terminate November 1st, and that they would be required to deliver possession on that day; and the third being like the second with the additional clause: "This is intended as a monthly notice to quit for the purpose of terminating your tenancy as aforesaid"—the prior lease not having been a lease from month to month, the notices not being such as to mislead defendants, they having known that the premises were leased from the termination of their lease, and two days before termination of their lease having given notice that at such time they would deliver possession, and when possession was demanded of them on such day having said that they were going to keep the place another month for meanness.

3. APPEAL—HARMLESS ERROR.

Admission of irrelevant evidence, in unlawful detainer proceedings for holding over, that defendants knew the premises had been leased to another is harmless, defendants' lease having expired, they having no new lease, and not having connected themselves with the new lessee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4154.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Unlawful detainer proceedings by Antonio Vatuone against G. Cannobio and another, copartners. Judgment for plaintiff. Defendants appeal. Affirmed.

William P. Veuve, for appellants. Partridge & Jacobs, for respondent.

COOPER, J. This is a proceeding in unlawful detainer to recover possession of the premises described in the complaint, together with damages for the withholding thereof. Plaintiff recovered judgment, and defendants prosecute this appeal from the judgment and from the order denying their motion for a new trial.

The facts are, in substance, as follows: Plaintiff, by written lease, dated November 1, 1901, let the premises to De Carley and Scarsi for three years, the lease to end November 1, 1904, for the rent of $100 per month for the first six months, and $120 per month for the remainder of the term. After the execution of the lease, and more than six months before the expiration thereof, De Carley and Scarsi sold and assigned the same to defendants, who thereupon entered into the possession and occupation of the premises, and so continued in the possession thereof up to the time of the trial. On August 2, 1904, the plaintiff, by lease in writing, let the premises to one Hirsch for the term of seven years from the 1st day of November, 1904, the latter being the date of the expiration of the former lease under which defendants were holding. On August 24, 1904, the plaintiff served upon the defendants three separate notices, each signed by plaintiff and all attached together. The first one notified defendants that, after the expiration of the written lease under which they were holding, "the monthly rent thereof will be $300 in United States gold coin per month payable monthly in advance on the first day of each and every month you continue to hold possession thereof after the expiration of your present lease, instead of the sum now paid by you under said lease." The second notice stated to defendants that their lease would terminate on November 1, 1904, and that they would be required to deliver possession to plaintiff on said day. The third notice was similar to the second, but contained the additional clause: "This is intended as a monthly notice to quit for the purpose of terminating your tenancy as aforesaid." At the time these notices were served on defendants, they knew that the plaintiff had leased the premises to Hirsch, the lease to commence after the expiration of the lease under which they held. On November 1, 1904, the defendants tendered to plaintiff the sum of $300 as rent for the premises for the month of November, which tender was declined. November 3d plaintiff served upon defendants a notice to the effect that their tenancy of said premises had ended, and requiring them to surrender possession within three days. Defendants refused to surrender possession, and this action was commenced November 9, 1904.

The first point contended for by appellants is that plaintiff cannot maintain this action because he had parted with the right to the possession of the premises by his lease to Hirsch. The position is not tenable. It is a well-settled rule, with few exceptions, that a tenant cannot be permitted to deny his landlord's title. Section 1161 of the Code of Civil Procedure provides: "A tenant of real property for a term less than life is guilty of an unlawful detainer, when he continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be. * * *" The defendants as subtenants were in no better position than the original tenants. They, through their assignors, received the possession of the premises from the plaintiff, and having done so they will not be permitted, while still in possession, without connecting themselves with the title of Hirsch, to deny the plaintiff's title. It does not concern the defendants as to whether the right of possession is in plaintiff or in Hirsch. Their contract as lessees places upon them the obligation to surrender possession at the expiration of the term and to surrender it to the original lessor. Brandt v. Phillippi, 82 Cal. 640, 23 Pac. 122; Commissioners v. Barnard, 98 Cal. 199, 32 Pac. 982.

There is no merit in the contention that a new tenancy from month to month at the rate of $300 per month was created by the notices of August 24, 1904. Section 827 of the Civil Code provides: "In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month." The section by its terms is confined to leases from month to month. This was not such lease. And furthermore, the three notices must be read together as one, and when so read they stated to defendants that their lease would terminate November 1, 1904, that they would be required to deliver up possession on said last-named date, and that if they continued to hold possession after the lease should terminate the monthly rental would be $300 per month. Defendants could not have been misled by the notice. They knew that Hirsch had leased the premises. They gave no notice in any way of their intention to claim a monthly lease prior to November 1, 1904, but on the contrary they notified plaintiff on October 29, 1904, that they would deliver to him the furniture in the hotel on said premises on November 1st. When Hirsch demanded possession of the premises on said last-named date, the agent of the defendants in their presence tendered the $300, and said: "We are going to keep this place another month for meanness." To hold that a new tenancy was created under the circumstances of this case would be to attach little importance to contracts. Defendants knew when the lease would expire, and the lease itself was sufficient notice to them that they would be required to surrender possession at the expiration of the time therein named. Craig v. Gray (Cal. App.) 82 Pac. 699, and cases cited. If the defendants had permission from Hirsch to remain in possession, it was incumbent on them to prove it as a matter of defense. The court, under defendants' objection as to its relevancy and competency, admitted evidence showing that defendants knew of the existence of the lease by plaintiff to Hirsch. If it be conceded that the evidence was irrelevant and incompetent, it was harmless. As we have before attempted to show, there was no new tenancy created between the plaintiff and the defendants. Their lease had expired. They did not attempt in any way to connect themselves with Hirsch, or with the lease given by plaintiff to him. In such case we cannot see that it made any difference whether they knew of the lease to Hirsch or not.

Finally the claim is urged that the court erred in finding that the damage caused by the unlawful holding over was the sum of $160, and giving judgment for three times the amount—$480. It is said that the evidence does not support the finding of the court in this regard. The lease to Hirsch included and described the whole building, while the lease to defendants was not of the whole building. The statement shows the following: "It is admitted that that part of building which defendants have is valued at $160." This was at the close of plaintiff's evidence after he had been speaking of the rental in the Hirsch lease being $260 per month. The defendants held over one month, and the evidence supports the finding of the court that the rental value was $160, and the law supports the action of the court in allowing and giving treble damages.

This disposes of all the errors urged in appellants' brief.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 409

POGUE v. BALL et al. (Civ. 279.)

(Court of Appeal, Second District, California. Nov. 16, 1906.)

1. Assignments—Assignment of Right of Action—Reassignment—Rights Acquired by Assignor.

A lessor in a lease requiring the lessee, at the end of the term, to leave the premises set with 1,000 orange trees, and to deliver in lieu of missing trees nursery stock, contracted to sell the land and rights under the lease to a third person, who, before the termination of the lease, reassigned to the lessor with accrued damages for breach of the lease. *Held*, that the lessor could sue the lessee for accrued damages and for damages arising from the breach of the lease in the future.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 162–165.]

2. Contracts — Breach of Contract — Actions—Issues—Variance.

The variance between a complaint demanding damages for breach of contract contained in a lease from plaintiff to defendant and the proof that plaintiff's right of action was that of an assignee of the contract by virtue of his contract to sell the premises and the rights under the lease to a third person who reassigned to plaintiff was not material, within Code Civ. Proc. § 469, declaring that no variance between the allegation in the pleading and the proof is material unless it misleads the adverse party.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Thomas A. Pogue against B. J. Ball and another. From an order denying a motion for a new trial, defendants appeal. Affirmed.

Roth & McFadzean, for appellants. Bradley & Farnsworth, for respondent.

SMITH, J. This is an appeal from an order denying the defendants' motion for a new trial. There is also an appeal from the judgment, but this was not taken in time, and will not be considered.

The suit was brought for damages for breach of the contract contained in a lease from the plaintiff to the defendants of date February 10, 1899. The lease was for a tract of six acres of land forming a part of a larger tract, for the term ending August 1, 1902, which, it was contemplated by the parties, was to be used for nursery purposes. The terms of the contract alleged to have been violated (changing the order for the sake of convenience) are as follows: (1) "That at the time of the termination of this lease" the defendants were to leave the land "set in orchard form with navel orange trees at the usual distance apart"—which it appears would require 1,000 trees; that in case of the necessity arising to supply any missing or defective trees this "shall be done by said parties of the second part at the earliest date practicable after the execution of these presents;" and "in case one thousand trees may not be left in orchard form upon said land, that said party of the first part shall be entitled to have of said nursery stock the difference between the number of trees so left in orchard form upon said land and said one thousand trees, to be dug and delivered without expense to parties of the second part any time after May 1st, 1901, on request of party of the first part." (2) That the nursery trees within a radius of six feet from the trees to be left in orchard form shall be removed during the summer of 1900, and after May 1st. On the latter point, the finding and judgment of the court was for the plaintiff and are not attacked by the appellants; which leaves us to consider only the first of the breaches assigned. On this the finding of the court is "that it became necessary to supply about 156 missing or defective trees on the parcel of land described in said contract, and that said defendants have failed and neglected to supply the same, or any part thereof, to plaintiff's damage in the sum of $468." Judgment was accordingly entered for the sum of $500, with costs.

This finding is not attacked on the ground of insufficiency of the evidence to sustain it, but apparently on the ground that the decision is against law. This position is based upon the fact that on January 21, 1901, the plaintiff by his contract of that date sold, or agreed to sell, the land in question, with other land surrounding it, to one Goodale, "together with all of the first party's right, title, and interest in and to that certain agreement dated the 10th day of February, 1899," between the plaintiff and defendants, and the argument is that, under the terms of the contract, there was no breach of the provisions of the contract cited until the termination of the lease, or after the assignment. But this position cannot be sustained. It appears that on April 5, 1901, the contract was reassigned by Goodale to the plaintiff, together with all accrued damages, and the plaintiff thus became entitled to maintain his action for such damages, and also for any damages arising from the breach of the contract other than future damages affecting the land, which would include damages for breach of the contract of the defendants to deliver, in lieu of the missing trees, 156 trees of the nursery stock. This was a purely personal obligation in no way affecting the land, and, as we understand the contract, was the only right accruing to the plaintiff for deficiency in the number of trees. The plaintiff was, therefore, entitled to recover the amount of damages accruing from this breach, which is found by the court to be $468.

It is, indeed, urged by the appellants that this right of action is that of an assignee of the contract, and that there is, therefore, a material variance between the cause of action set up and the cause of action found. But assuming that there was a variance, we deem it to be altogether immaterial. Code Civ. Proc. § 469.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 409

PEOPLE v. BEATTY. (Cr. 56.)

(Court of Appeal, First District, California. Nov. 21, 1906.)

1. CRIMINAL LAW—APPEAL—CONTRADICTIONS IN BILL OF EXCEPTIONS—PRESUMPTION.

Where the bill of exceptions states in one place that "the evidence as herein given is all the testimony in the case to support the allegation in the indictment that the girl was not, at the time of the alleged offense, the wife of defendant," and in another place states that "on the trial * * * evidence was introduced * * * in support of the facts, averments, and allegations of the indictment," it will be presumed that there was evidence to support such allegation, even if that in the bill of exceptions does not do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3031.]

2. SAME—HARMLESS ERROR.

There being no evidence in the record on a prosecution for rape that defendant was married to the girl, an instruction as to her being incapable of marrying if under a certain age was harmless.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Thomas Beatty was convicted of rape, and appeals. Affirmed.

C. D. Cavellaro, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant prosecutes this appeal from a judgment convicting him of the crime of rape, and from an order denying his motion for a new trial.

It is contended that the evidence is not sufficient to show that the girl, upon whom the crime is alleged to have been committed, was not the wife of the defendant at the time of the alleged offense. The girl was called as a witness, and testified that she was not married, and that she was not the wife of the defendant. The evidence in the record had relation to the time the witness was testifying; and hence it is said that there is no evidence that the complaining witness was not the wife of defendant at the time of the alleged offense. The bill of exceptions states in one place that the evidence as herein given is all the testimony in the case to support the allegation in the indictment that the girl was not, at the time of the alleged offense, the wife of defendant. The indictment alleges that the prosecuting witness, at the time of the alleged offense, was an unmarried girl "under the age of 16 years." The bill of exceptions in another place states, "that, upon the trial of the said cause, evidence was introduced for the people in support of the facts, averments, and allegations of the indictment." If the evidence of the prosecuting witness quoted in the bill of exceptions does not support the allegation in the indictment that she was, at the time of the alleged offense, an unmarried woman, then the bill of exceptions is contradictory. In case of alleged error, the appellant must make such error clearly appear. In this case the bill of exceptions states in unequivocal language that there was evidence introduced in support of all the allegations of the indictment. If this statement is true, the evidence shows that the prosecuting witness was not the wife of the defendant at the time of the alleged offense. Where the statement or bill of exceptions is contradictory as to the facts relied upon to show error, we must presume in favor of the regularity of the proceedings in the court below. With this rule in view, we hold that the bill of exceptions fails to show that the evidence is insufficient to prove that the prosecuting witness was not the wife of defendant at the time of the alleged offense.

The defendant complains of the following instructions: "The court further instructs you that, under the laws of the state of California, a girl under the age of 15 years is incapable of consenting to marriage, and, if you find that Eliza Davis was under the age of 15 years on the 1st day of September, or upon the 2d day of October, or at any time involved in this case, then I instruct you, as a matter of law, that the prosecutrix was not capable of marrying or being married to the defendant." The instruction could not have injured the defendant unless there was evidence tending to show that the prosecuting witness was married to the defendant at the time of the alleged offense. There is no such evidence in the record.

There are no other alleged errors.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 403

FREYBERG v. LOS ANGELES BREWING CO. (Civ. 312.)

(Court of Appeal, Second District, California. Nov. 16, 1906.)

1. Corporations — Officers — Authority—Contracts.

The president and general manager of a corporation, whose business in part is the buying and selling of saloons, has authority to sell the furniture and fixtures of a saloon together with the good will of the business and the license under which it is conducted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1629–1632.]

2. Same—Provisions of By-Law.

A corporation by-law, requiring the president to execute with the secretary, except when otherwise directed by the board of directors, all contracts executed or issued by the corporation, does not restrict the power of the president as manager of the corporation to enter into oral contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1326.]

3. Frauds, Statute of—Sales—Delivery of Goods.

Where, on the sale of the furniture, good will, and license of a saloon, the license was actually transferred to the buyer, and, though the seller at first refused to deliver possession till the purchase money was paid, the buyer took possession in his absence and he afterwards acquiesced in the entry, there was, in effect, an actual delivery, taking the case out of Civ. Code, § 1624, subd. 4, requiring agreement for the sale of goods to be in writing unless the buyer accept or receive part of the goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 175.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Louis Freyberg against the Los Angeles Brewing Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. S. Wright and M. L. Graff, for appellant. Goldberg & Burke and Earle & Creede, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff and an order denying the defendant's motion for a new trial. In the original complaint two causes of action were set out. The one for the sale by the plaintiff to the defendant of the furniture and fixtures of a saloon, together with the good will of the business and the license under which the same was conducted, for the sum of $1,300; the other for trespass in the unlawful taking and conversion of goods sold by the defendant and other defendants named. But as to the latter, the suit was dismissed before the trial and the second count stricken out.

The court found the sale of the goods in question as alleged. This finding is fully sustained by the evidence, and, indeed, the sufficiency of the evidence is not disputed, except in one particular, which is that the president of the corporation and his subagents through whom the contract was made had no authority to enter into the contract, or at least, to do so otherwise than in writing. But it appears, without contradiction, that the president was the general manager of the corporation, and that the buying and selling of saloons was part of its ordinary business. There can, therefore, be no doubt of his authority to make the contract. Nor was it essential that the contract should be in writing. The section of the by-laws cited by the appellant—that "it shall be the duty of the president * * * to execute with the secretary * * * and except when otherwise directed by the board of directors, all contracts and certificates of stock that may be executed or issued by this corporation"—does not restrict his powers to the making of contracts in writing. This simply provides for the execution of written contracts, "executed or issued by [the] corporation" and has no reference to oral contracts made by the president as manager of the corporation. Nor was the validity of the contract affected by the provisions of section 1624, subdivision 4, of the Civil Code. The license was actually transferred to Tagal at the instance of the defendant and in accordance with the terms of the contract of sale—which was, in effect, an acceptance by the buyer of part of the goods sold, and there was afterwards, also, a delivery to Tagal as agreed upon. It, indeed, appears that the plaintiff refused to deliver the saloon until the purchase money was paid, but Tagal took possession in the absence of the plaintiff, who afterwards acquiesced in the entry and holding of the saloon by Tagal, and this was, in effect, an actual delivery. The agency of Tagal in taking possession of the saloon appears from the contract as proven.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 427

ANDERSON v. BANK OF SANTA CRUZ COUNTY. (Civ. 235.)

(Court of Appeal, First District, California. Nov. 21, 1906. Rehearing Denied Dec. 20, 1906.)

1. BANKS AND BANKING—DEPOSITS — ACTION TO RECOVER—PLEADING.

Where, in an action to recover an alleged bank deposit, defendant's answer denied that it had ever received any sum from plaintiff, except that it sold plaintiff a bill of exchange for $1,000, payable to the order of a third person, and received therefor $1,001, the answer stated a defense, and was not subject to general demurrer.

2. SAME—PROMISE TO REPAY.

A deposit of money with a bank raises an implied promise to repay the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 339.]

3. SAME—PRIMA FACIE CASE—NONSUIT.

Where, in an action to recover a bank deposit, plaintiff's evidence, at the time a motion for nonsuit was made, showed that plaintiff deposited with defendant bank $1,000, which had not been repaid, but which defendant at a subsequent time promised to repay when a certain draft was returned, a nonsuit was improperly granted.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by L. H. Anderson against the Bank of Santa Cruz County. From a judgment for defendant, plaintiff appeals. Reversed.

Charles B. Younger, Jr., for appellant. Joseph H. Skirm, for respondent.

HALL, J. This is an appeal from a judgment against plaintiff, taken within 60 days from the entry of judgment. The only errors relied on for a reversal of the judgment are that the court erred in overruling plaintiff's demurrer to defendant's answer and in granting defendant's motion for a nonsuit.

The action was brought to recover of defendant the sum of $1,000. It is alleged in the complaint: "That on said last-named date [August 8, 1903] said plaintiff delivered to and left with said defendant, the Bank of Santa Cruz, said sum of $1,000, in gold coin of the United States of America. That said last-named defendant then and there received said last-named sum of money, and agreed to repay the same to said plaintiff on his order or demand." Then followed an allegation of a demand and refusal to pay. Defendant's answer denies that it ever received $1,000, or any other sum of money, from plaintiff, except that it sold to plaintiff a bill of exchange for $1,000, payable to the order of a third party, one J. R. Helbron, and received therefor $1,001. The answer further denied that defendant ever agreed to pay the sum of $1,000, or any other sum, to plaintiff or to his order. This we think was a sufficient denial of the allegations of the complaint in the face of a general demurrer. (The demurrer to the answer is a general one.) The complaint, it will be observed, does not count upon a dishonored bill of exchange, but seems to attempt to plead a simple deposit with a bank, and a refusal to pay on demand. The demurrer to the answer was properly overruled.

At the trial plaintiff rested his case on his own testimony and an admission by defendant that Wm. T. Jeter was at all times since January 1, 1903, president of the defendant, the Bank of Santa Cruz County. Plaintiff testified, among other things: "I remember August 8, 1903, and of going to the banking house of the Bank of Santa Cruz County on that day, in the bank building—that portion of the bank building used for the transaction of bank business. I handed Mr. Jeter $1,000 in gold coin. That money was deposited in the bank. The bank has never repaid me that money." The above evidence made out a prima facie case for plaintiff, but subsequently plaintiff testified as follows: "Q. Did Mr. Jeter ever tell you he would repay you that money, or the bank would repay you that money? A. Yes, sir. Q. When? A. As soon as he got the draft back." (This is the first reference to a draft in the testimony.) "Mr. Skirm: He said what? A. That as soon as the draft was returned he would pay me my money back; that was the understanding. Q. But the bank has never repaid you that money? A. No, sir." Thereupon plaintiff rested, and defendant moved for a nonsuit, upon the ground that it appeared that the money was to be repaid when the draft was returned, and it had not been shown that the draft had ever been returned. Whereupon plaintiff, with the permission of the court, further examined the plaintiff, and elicited from him that the promise to repay when the draft was returned was not made at the time of the deposit, but was made subsequently, in December or January. Thereupon defendant renewed its motion for a nonsuit, which the court granted. In this we think the court erred.

At the time the motion was finally made and granted, the evidence fairly tended to show that in August plaintiff deposited with defendant bank $1,000, which had not been repaid, but which defendant at a subsequent time promised to pay when a draft was returned. No evidence was given explaining in any way the connection of the draft with the transaction, or tending in any way to connect the draft with the original transaction.

A deposit of money with a bank raises an implied promise to repay the same. Coleman v. First Nat. Bank, 53 N. Y. 388; Story on Bailments, § 41. "The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom." Goldstone v. Merchants' Ice & Cold Storage Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597. See, also, Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408. The evidence in this case, as it appears in the record, tended to show a deposit of $1,000 by plaintiff with the defendant bank, which had not been repaid, and upon which the law raises an implied promise to repay on demand. It also tends to show that the defendant, or its president, subsequently promised to repay the money when a draft was returned; but the connection of the draft with the original transaction is not shown by any evidence.

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 411

MOODY v. PEIRANO. (Civ. 163.)

(Court of Appeal, First District, California. Nov. 21, 1906. Rehearing Denied by Supreme Court Jan. 17, 1907.)

1. SALES — BREACH OF WARRANTY — SPECIAL DAMAGES—COMPLAINT—SUFFICIENCY.

A complaint in an action for breach of warranty of variety of seed wheat sold, which alleges that the seller warranted the wheat to be "white Australian," but that the wheat was of an inferior variety and produced a crop inferior to that which would have been grown had it been as represented, and that by reason thereof the buyer was damaged in a specified sum, shows a breach of contract of warranty, entitling a recovery of at least nominal damages, as against a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1234–1238.]

2. SAME—FINDINGS—SUFFICIENCY.

Findings, in an action for breach of warranty of variety of seed wheat sold, that the seller warranted the wheat to be "white Australian," and that the wheat was of an inferior variety and produced a crop inferior to that which would have been grown had it been "white Australian" seed wheat, are sufficient to entitle the buyer to a judgment in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1318.]

3. APPEAL—FINDINGS—REVIEW.

Where no objection was made to the evidence, in an action for breach of warranty of variety of seed wheat sold, in support of the allegation that the seed wheat sold was of an inferior variety and produced a crop inferior to that which would have been produced from the variety warranted, resulting in specified damages to the buyer, the finding thereon was conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3964, 3957.]

4. TRIAL—ORDER OF PROOF—ADMISSION OF EVIDENCE IN REBUTTAL.

It is not error to overrule an objection to the testimony of a witness for plaintiff offered in rebuttal that it was not rebuttal; it being in the discretion of the court to permit a plaintiff to offer evidence in rebuttal in support of his cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 152.]

5. WITNESSES—CROSS-EXAMINATION—COLLATERAL MATTERS—IMPEACHMENT.

A party cross-examined on collateral matters may be impeached by contradictory evidence, unless the collateral matters are irrelevant to the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1272, 1273.]

6. EVIDENCE—RELEVANCY—STATUTES.

Under Code Civ. Proc. §§ 1868, 1870 (15), 1958, 1960, declaring that evidence must be relevant to the question in dispute, and authorizing the giving of evidence on the trial of any of the facts from which the fact in issue is logically inferable, etc., it is within the discretion of the court to permit inquiry into collateral facts directly connected with the fact in dispute; and, unless the evidence admitted is without any weight in determining the issue, the ruling of the court in receiving it will not be reversed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 123–296.]

7. SAME.

Where, in an action for breach of warranty of variety of seed wheat sold, the seller denied the making of the warranty, and the evidence showed that he had only a different variety of wheat for sale, evidence that he sold wheat during the same season to third persons, and warranted it to be of the variety warranted to plaintiff, was admissible as bearing on the fact in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 415, 414, 414½.]

8. TRIAL—ORDER OF PROOF—DISCRETION OF COURT.

Where evidence is relevant in support of plaintiff's claim, the court in its discretion may admit it as direct evidence of the cause of action, or on cross-examination of defendant, or in rebuttal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 139, 152.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by W. D. Moody against G. Peirano. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

See 84 Pac. 783.

William P. Veuve, for appellant. F. J. Hambly, for respondent.

HARRISON, P. J. Action for damages for a breach of warranty of the quality of certain personal property. The complaint states that the plaintiff applied to the defendant to purchase from him certain seed wheat of the variety known as "white Australian," for the purpose of planting the same, and that the defendant thereupon sold to him 27,760 pounds of seed wheat, and represented to him and warranted that the same was of the variety known as "white Australian"; that the plaintiff relied solely upon said representation and warranty, and planted the same on his land, believing that the seed wheat so planted was "white Australian"; that the seed wheat so planted produced a crop of about 275 tons of hay; that the seed wheat was not the variety known as "white Australian," but was another and inferior variety, and produced a crop of hay inferior to that which would have been grown had it been "white Australian" seed wheat; and that by reason of the premises the plaintiff had been damaged in the sum of $3,000, for which he prayed judgment. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and, the court having overruled the demurrer, he filed an answer, in which he admitted the sale of the wheat, but denied that he had represented it or warranted it to be "white Australian." The cause was tried without a jury, and the court made findings of fact in accordance with the allegations of the complaint, and rendered judgment accordingly. A motion by the defendant for a new trial was denied, and from this order and from the judgment he has appealed.

1. The demurrer to the complaint was properly overruled. The point relied on in its support is that, if any damages were sustained by the plaintiff, they were special, and should have been specially alleged. The allegation that the seed wheat which was purchased produced a crop of hay inferior to that which would have been produced from "white Australian" wheat showed a breach of the contract of warranty, and entitled the plaintiff to at least nominal damages, making the complaint good as against a general demurrer. McCarty v. Beach, 10 Cal. 461. For the same reason the findings of fact in the language of the complaint are sufficient to entitle the plaintiff to a judgment in his favor. The amount of the judgment is to be determined by the evidence offered in support of the averment, and, as no objection was made to this evidence, the finding thereon is conclusive.

2. Upon the trial of the cause Frank Myall was called as a witness on behalf of the plaintiff, and was permitted to testify, over the objection of the defendant, that the same was incompetent. irrelevant, and immaterial; that he bought some seed wheat during that season from the defendant (shown to be of the same lot from which the sale was made to the plaintiff), and that the defendant represented to him that it was "white Australian" seed wheat; but that, upon planting, it proved to be bearded wheat, and not "white Australian." The defendant was a witness in his own behalf, and upon his cross-examination was asked whether he had sold seed wheat to Myall upon the representation that it was "white Australian." Defendant's counsel objected thereto on the ground that it was incompetent, irrelevant, and immaterial. The court overruled the objection, and the witness answered in substance that he had not. The same objection to a similar question, in reference to a sale of seed wheat by him to H. H. Main, was overruled by the court, and the same answer given. After the defendant had closed his case the plaintiff called Main as a witness in rebuttal, and he testified that he had bought some seed wheat from the defendant during that season, and that the defendant had warranted to him that it was "white Australian" beardless wheat. This testimony was received over the objection of the defendant that it was not rebuttal, and also that it was incompetent, irrelevant, and immaterial. The points chiefly urged by the appellant are that the court erred in permitting this cross-examination of the defendant, and in allowing the above testimony to be given by the witnesses Myall and Main.

It is contended by the appellant that the testimony given by Myall and Main, to the effect that the defendant warranted that the seed wheat which he sold to them was "white Australian," was res inter alios acta, and had no tendency to show that he gave such warranty to the plaintiff, and that in receiving the testimony of Main the court also violated the rule that, when a witness is cross-examined upon a matter which is collateral to the issue, he cannot be impeached by evidence in contradiction of his answers on such cross-examination. It is to be noted, however, that the only objection to the cross-examination of the defendant was that the evidence sought was incompetent, irrelevant, and immaterial. No objection was made on the ground that it was not proper cross-examination. The objection to the testimony of Main that it was not rebuttal was properly overruled, if such testimony was otherwise admissible. It is always in the discretion of the court to permit a plaintiff to offer evidence in rebuttal in support of his cause of action. The rule in reference to contradicting the answer of a witness given upon cross-examination which is invoked by the appellant does not wholly preclude such testimony upon collateral matters, if it is relevant to the issue to be tried. It is only when the cross-examination is upon collateral matters which are irrelevant to the issue that the witness cannot be impeached by contradictory evidence. People v. Dye, 75 Cal. 108, 16 Pac. 537; Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700. The rule as stated by Mr. Greenleaf (section 449) is: "A witness cannot be cross-examined as to any fact collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, and thereby to discredit his testimony." If the collateral fact is relevant to the issue, it may be shown either by the cross-examination of a witness or by direct evidence thereof. In Attorney General v. Hitchcock, 1 Exch. 99, Baron Pollock stated as the test whether a matter is collateral or not: "If the answer of the witness is a matter which you would be allowed on your part to prove in evidence; if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him." In People v. Devine, 44 Cal. 452, the court stated that the rule is subject to the qualification that contradictory evidence may be received, if it is relevant to the issue to be tried, and reversed the judgment of the lower court for its error in excluding certain evidence offered for the purpose of contradicting the answer of a witness given upon her cross-examination upon a collateral subject, on the ground that it was upon a matter relevant to the issue then upon trial; and in People v. Chin Mook Sow, 51 Cal. 597, after stating the rule, the court said: "But, when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have the right to prove as an independent fact, the rule does not apply." Evidence is at all times to be confined to the issue, but "it is not necessary that it should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it." Greenl. on Ev. § 52a. Section 1870 (15) of the Code of Civil Procedure authorizes evidence to be given upon the trial of a fact of any other facts from which the facts in issue are "logically inferable." An "inference" is "a deduction which the reason of the jury makes from the facts proved" (Code Civ. Proc. § 1958), and "is founded upon such a deduction from those facts as is warranted by a consideration of the course of business or the particular propensities of the person whose act is in question" (section 1960 [2]). Section 1868, Code Civ. Proc., declares: "Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact when such a fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness." The direction in this section that collateral questions are to be "avoided" indicates that they are not absolutely excluded from consideration. Whether the collateral fact upon which the evidence is offered is directly connected with the matter in dispute, and is essential to its proper determination, is by the concluding portion of the section placed within the discretion of the trial court for primary determination. Unless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed.

The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or any weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not. Mr. Thayer, in the introduction to his "Cases on Evidence," says: "No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience." And Mr. Stephen, in his Digest of the Law of Evidence, says (chapter 1): "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other." Under these principles it cannot be said that the testimony of either Myall or Main was utterly irrelevant to the issue before the court, or that it was not entitled to any weight in the determination of that issue or of the credibility of the defendant as a witness. The issue to be determined was whether the defendant had warranted the wheat which he sold to the plaintiff to be "white Australian," and the court was required to determine the credibility and weight to be given to his testimony denying that he had so warranted it. Evidence of any collateral fact which had a legal bearing in determining these questions was relevant and admissible, and entitled to consideration. The defendant had only one quality of seed wheat for sale. He had received that upon an order given by him for "white Australian" seed wheat, and had been told by the party from whom he purchased it that it was "'white Australian" wheat, and he so stated to the plaintiff and to other purchasers. The plaintiff testified that he warranted it to him to be "white Australian" wheat. The defendant denied that he made such warranty. If now, under this state of the evidence, it could be shown that in all his other sales from this lot of wheat defendant had warranted to the respective purchasers that it was "white Australian" wheat, such testimony would be relevant for the purpose of showing his course of business in selling the wheat, and it would tend to create a probability that he had made the same warranty in his sale to the plaintiff. The number and frequency of the sales in which the warranty had been made, and their proximity in time to the sale made to the plaintiff, would be circumstances addressed to the discretion of the court in determining the relevancy of the testimony; and, unless it should clearly appear therefrom that the court had abused its discretion, its action in admitting the evidence could not be regarded as error. These circumstances would also be addressed to the jury in determining the inference to be drawn from the testimony, or the strength of the probability in support of which it was introduced. The weight or conclusiveness to be given by the jury is entirely distinct from the question of the relevancy of the testimony. If the fact offered to be shown was proper for their consideration in determining the issue, the court was justified in submitting it to them. See People v. Arnold, 15 Cal. 476. No personal element, such as the skill, ability, capacity, or financial responsibility of the respective purchasers, entered into the consideration for the respective transactions; and, as the defendand testified that he made the sales to Myall and Main upon the same condition as that made by him to the plaintiff, the evidence offered would at the same time have a bearing upon the weight to be given to his testimony in contradiction of that of the plaintiff in reference to making a warranty. As such testimony would have some relevancy to the issue, it would in the discretion of the court be admissible, either upon cross-examination of the defendant or in rebuttal; and it would also be admissible as direct evidence of the plaintiff's cause of action. In Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44, upon the issue whether a steamship agent had authority to make a contract for the transportation of merchandise without requiring a declaration of its value, evidence that he had made contracts with other parties, dispensing with such declaration, was held to be properly admitted on the ground that it was "competent as direct evidence for the purpose of defining the contract which was actually made."

Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact. In civil cases a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. "If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury." Insurance Co. v. Weide, 11 Wall. (U. S.) 438, 20 L. Ed. 197; Swain v. Cheney, 41 N. H. 232, was an action upon a verbal contract between the parties for hauling certain lumber, and the issue before the court was the price for which it was agreed to be hauled. The trial court rejected certain testimony offered by the plaintiff to prove what the defendant paid to other persons for hauling a portion of the same lumber between the same points. Upon appeal the Supreme Court held that the evidence so offered was competent, as tending to show whether it was probable that the price agreed to be paid was that paid by the plaintiff, and should have been received, leaving its weight to be determined by the jury. In an action for damages for fright caused to the plaintiff's horse by the blowing of a locomotive whistle, evidence that the whistle had produced the same effect upon other horses was held admissible in Hill v. P. & R. R. Co., 55 Me. 438, 92 Am. Dec. 601. In an action for damages from fire caused by sparks thrown from a locomotive, evidence of other fires in that vicinity similarly caused is admissible "to show the probability" of the fire in question having been so caused. Sheldon v. H. R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155; Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Butcher v. Railroad Co., 67 Cal. 518, 8 Pac. 174; Steele v. Pac. Coast Ry. Co., 74 Cal. 323, 15 Pac. 851. In an action against the defendant upon his promissory note, which the plaintiff claimed to have purchased at a heavy discount, and which the defendant denied having sold, evidence that the defendant had sold other notes about that time at a discount was held admissible. Turner v. Luning, 105 Cal. 124, 38 Pac. 687. In Lexington Ry. Co. v. Lyons, 104 Ky. 23, 46 S. W. 209, upon the issue whether a railroad ticket agent made certain representations respecting a ticket purchased by the plaintiff, testimony of a witness that on the same occasion he purchased similar tickets, and that the agent made the same representation as testified by the plaintiff, was held admissible. In this cause the agent had testified in cross-examination that he did not make such representation to the witness, and it was held that the testimony could be received as well upon rebuttal as in chief. In Schmidt v. Packard, 132 Ind. 398, 31 N. E. 944, where the issue was whether notes in suit had been delivered after their indorsement, evidence that other notes of the same series were similarly indorsed on the same day, and were not delivered to the indorsees, was held admissible upon the ground that the transactions were so connected in time and in language as to indicate that they were the effect of the same cause.

Under the foregoing considerations, we are of the opinion that the evidence objected to by the defendant was not irrelevant to the issue before the court, and that in receiving it the court did not unwarrantably exercise its discretion.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 430

BOUCHARD v. ABRAHAMSEN et al.

(Civ. 254.)

(Court of Appeal, Third District, California. Nov. 21, 1906.)

1. APPEAL—RECORD—SCOPE AND CONTENTS—OPINION OF LOWER COURT.

An order granting a new trial read as follows: "The court at this time filed an opinion herein in pursuance of which it is ordered that defendants' motion for a new trial be, and the same is, hereby granted." The court, in the opinion referred to, held that the complaint stated no cause of action, and this was the only reason advanced therein for granting the motion. The judge did not sign the order, and the entry in the minutes was made by the clerk. *Held*, that the opinion was not a part of the order, thereby constituting a limitation of the grounds upon which the order was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2339.]

2. SAME.

The opinion of the court in making an order, although printed in the transcript, is no part of the record on appeal, and cannot be considered by the court in any manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2956, 2339.]

3. Same — Questions Considered — Order Granting New Trial—Right to Sustain on Different Grounds.

Notwithstanding the trial court filed an opinion setting forth a specific and erroneous ground as the reason for granting a new trial, the order will be affirmed where the record does not show that other grounds enumerated in the motion were insufficient to support the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408, 3410.]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Ejectment by Henry Bouchard against Jessie Abrahamsen and another. From an order granting a new trial, plaintiff appeals. Affirmed.

J. F. Quinn and L. F. Puter, for appellant. Gillett & Cutler, for respondents.

McLAUGHLIN, J. Ejectment. Judgment was entered in favor of the plaintiff, and the court, upon timely motion, made an order granting a new trial, from which order plaintiff appeals. The motion for a new trial was heard upon specified errors of law occurring during the course of the trial, and numerous specifications of particulars in which the evidence was insufficient to support the verdict. The order granting a new trial reads as follows: "The court at this time filed an opinion herein in pursuance of which it is ordered that defendants' motion for a new trial herein be, and the same is, hereby granted." The lower court, in the opinion referred to, holds that the complaint stated no cause of action, and this was the only reason advanced therein for granting the motion. Basing their contention on the reference to the opinion found in the order, the attorneys for appellant argue that the opinion must be construed as part of the order, constituting a limitation of the grounds upon which the order was made. We do not think this contention can be sustained. The judge did not sign the order, and the entry in the minutes was the mere ministerial act of the clerk, who certainly had no power to limit the order to particular grounds. But, even if this were otherwise, "the opinion of the judge in making the order is not a part of the order itself, but is merely his reason for making the order, and is not subject to judicial review." People v. Flood, 102 Cal. 331, 36 Pac. 663. Moreover, the opinion of the court, although printed in the transcript, is no part of the record on appeal; and hence it cannot be considered by this court in any manner or for any purpose. Code Civ. Proc. §§ 952-661; Spelling on New Trial, etc., § 693; Chabot v. Tucker, 39 Cal. 434; Davey v. S. P. R. R., 116 Cal. 329, 48 Pac. 117.

If, however, it be granted that the court below confined the reason for granting the motion to the specific and erroneous ground mentioned in the opinion, reversal would not follow unless it appeared from the record before us that the order was not supported by grounds enumerated in the motion. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Newman v. Lassing, 141 Cal. 175, 74 Pac. 761; Davey v. S. P. R. R., 116 Cal. 330, 48 Pac. 117. An appellant is charged with the duty of showing error affirmatively, and there is nothing in the record before us to show that the order assailed was not made on sufficient grounds enumerated in the motion.

Every intendment and presumption aids the action of the trial court, and, applying this salutary rule, the order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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7 Cal. Unrep. 319

HARRIS v. HARRIS et al. (Civ. 239.)

(Court of Appeal, Third District, California. Nov. 21, 1906.)

Quieting Title—Issues and Proof.

Where, in an action to quiet title, plaintiff alleged that the lot in question was formerly owned by a certain association, and defendants established that they were the successors in interest of such association, defendants, in order to entitle themselves to recover, were not bound to prove title in such association.

Appeal from Superior Court, City and County of San Francisco; J. B. Hebbard, Judge.

Action by Anna Harris against Michael G. Harris and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Marcus Rosenthal, for appellant. M. G. Cobb and H. K. Wolff, for respondents.

McLAUGHLIN, J. Action to quiet title to a lot in the city of San Francisco. In her complaint the appellant alleged that the lot in question was formerly owned by the Central Park Homestead Association, and defendants, by competent evidence, established the fact that they are the successors in interest of said association. Notwithstanding the above-mentioned averment appellant contends that the evidence is insufficient to justify the findings in favor of respondents, because no evidence was introduced showing title in the said association. It is an elementary rule that the law neither does nor requires an idle act, and it would certainly be idle for defendants to consume time and energy in proving a fact alleged in the complaint and not denied in the answer. The finding that defendants are the owners of the lot in dispute is also assailed on the ground that the evidence shows that plaintiff had acquired title by adverse possession. There is nothing in this point. The evidence is ample to sustain the findings, and, as this is the only point presented for decision, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

4 Cal. App. 521

FISH v. CORRELL et al. (Civ. 279.)

(Court of Appeal, Third District, California. Dec. 3, 1906.)

1. Custom—Varying Terms of Contract.

Where one contracts to construct and erect a Scotch granite sarcophagus, composed of bottom base, second base, die, and cap, on a foundation to be erected by him, he, having erected one with the bottom base made of native granite, may not vary the express terms of the contract by evidence of a custom to so make the lower base.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 34.]

2. Contracts—Performance—Time.

One having contracted in June, 1902, to erect in June, 1903, or within a reasonable time thereafter, a sarcophagus, on a foundation to be furnished by him, is not entitled to recover as for a performance of his contract, he not having erected it till May, 1904, having in the meantime had no communication with the persons with whom he contracted, having used a foundation which he found built on the grave by another, who objected to his use thereof, and his only excuse for the delay being a mistake in the size of the original lower base, though the dimensions of it were given in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1388, 1390.]

3. Assumpsit—Work Not Satisfying Contract.

Where one contracts to erect at a certain time, or within a reasonable time thereafter, a sarcophagus of Scotch granite, on a foundation to be furnished by him, and a year after the time agreed, without any communication in the meantime with the other parties, erects a sarcophagus, the lower base of which is not Scotch granite, and places it on a foundation, which he finds others are building, he cannot recover on a quantum meruit.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by F. N. Fish against George Correll and another. Judgment for defendants. Plaintiff appeals. Affirmed.

L. T. Hatfield and W. H. Carlin, for appellant. Lawrence Schillig, for respondents.

McLAUGHLIN, J. The complaint in this case contains two causes of action. In the first the appellant alleged the full performance of a contract entered into between the parties hereto on June 2, 1903, by the terms of which appellant agreed, during the month of June, 1903, or within a reasonable time thereafter, to construct and cause to be erected a Scotch granite sarcophagus, or tombstone, with foundation upon or near the grave of Dominick Correll at or near Crafton, Yolo county, for the sum of $450, which sum was to be paid to appellant by respondents upon the completion of the work. In the second cause of action it was alleged that respondents were indebted to appellant in said sum for the reasonable value of work, labor, services and material rendered and furnished at the request of respondents in the construction and erection of a "Scotch Granite Sarcophagus," with foundation at or near said grave. The respondents, in their answer, denied the averments of the complaint and set up affirmative defenses which have no bearing on the questions to be decided by this court. Upon the trial, after appellant had rested his case, the court granted a motion for a nonsuit, and this appeal is from the judgment thereupon entered, in favor of respondents. The bill of exceptions contains the evidence and many specifications of errors of law aimed at rulings of the court in the admission of evidence and in granting the motion for a nonsuit. The last-mentioned specification presents the principal point in the case, which will be first considered.

A motion for a nonsuit "admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendants." Hanley v. Cal., etc., Co., 127 Cal. 237, 59 Pac. 577, 49 L. R. A. 597. It is, therefore, apparent that, if there was any evidence which would support findings justifying a judgment for appellant, the nonsuit should not have been granted, and hence our inquiry upon this branch of the case invokes a careful analysis of the evidence introduced by appellant, an epitomized statement of which is essential to the proper understanding of points decided.

The contract between the parties was executed in duplicate, and we can discover no ambiguity in its terms. The appellant therein agreed to erect a Scotch granite sarcophagus, composed of botton base, second base, die, and cap, on a foundation to be furnished by him, during the month of June, 1903, or in a reasonable time thereafter, and the respondents agreed to pay him $450 when the same was delivered and set up. The contract was dated June 2, 1902, and on July 12, 1903, the cap, die, the second base of Scotch granite arrived in Woodland. One Mitchell, who was attending to the matter for appellant, notified the latter of its arrival, and appellant came to Woodland a few days later. Mitchell had the bottom base of Rocklin granite ready, but it proved to be too small, and another was ordered from Rocklin, which was not delivered until October, 1903, about which time some gravel for the foundation was hauled to the cemetery. Between October, 1903, and May, 1904, the ground in and about the cemetery was softened by rain to such an extent that the monument could not be hauled to the cemetery. It reached there on May 2, 1904, and at that time Mitchell found that a foundation had been built upon the grave of Dominick Correll by one Douglass, without the knowledge, consent, or direction of himself or Fish. He had some words with Douglass, who had used a portion of the gravel hauled there in October, and announced his intention to place the tombstone on the foundation so constructed, the cement in which was still fresh and wet. Douglass left the cemetery, saying that he would see the Corrells about it, and on the following day, notwithstanding the protest of a man named Snowball, who said he was a trustee of the cemetery, the stone consisting of a lower base of Rocklin granite, and a second base, die, and cap of Scotch granite was erected on the foundation constructed by Douglass. From the time the contract was executed in June, 1902, until the erection of the monument was completed, no communication, oral or written, passed between the parties. The contract was not altered or modified, and no explanation of the delay in erecting the monument was demanded or made. The testimony shows without conflict that the lower base was, as indicated in the contract, a part of the sarcophagus, and the only reason given for using a lower base of Rocklin, instead of Scotch, granite, was that it was customary to use a base of native granite in the erection of all such monuments.

The foregoing summary of the evidence must inevitably lead an impartial mind to the conclusion that the nonsuit was properly granted. The contract, designated as such on its very face, provided for the erection of a Scotch granite sarcophagus, and both bases were specifically mentioned and their dimensions given. The lower base was placed in the same category with the second base, cap, and die, and no person reading the contract could fail to reach the conclusion that each and every part of the sarcophagus was to be made of Scotch granite. Under the express terms of the contract the appellant had no more right to substitute a lower base of Rocklin granite than he had to furnish a second base, or cap, or die of the same material. It is argued that the custom testified to by appellant and Mitchell justified the course pursued, but the answer to this is that "a usage cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms." Burns v. Sennett, 99 Cal. 371, 33 Pac. 916; Withers v. Moore, 140 Cal. 597, 74 Pac. 159. The gate to a limitless field for the exercise of chicanery and deceit would be opened if parties were permitted to nullify a contract by evidence of a custom at variance with its terms. It is said, however, that, when a contract is ambiguous, evidence of a custom may be introduced as an aid to the proper interpretation of the terms of the contract. This salutary rule has never been questioned in this state, but it has no application to the case before us. The only ambiguity suggested involves the meaning of the term "sarcophagus," and this to us seems entirely immaterial. The parties to the contract definitely agreed that, in this particular instance, the sarcophagus would consist of a lower base, second base, cap, and die of given dimensions, and this made evidence as to the general ordinary meaning of the word unnecessary and immaterial. Had the contract provided for the erection of a sarcophagus, without further data, such inquiry might have been proper, but the appellant having agreed to erect a sarcophagus consisting of certain parts and stated dimensions, made of Scotch granite, he was bound to prove the performance of such agreement, and, having failed to do so, he cannot recover.

There is another reason for holding that the nonsuit was properly granted. The appellant agreed to erect the sarcophagus in the month of June, 1903, or within a reasonable time thereafter. The second base, cap, and die arrived from Scotland in July, 1903, and the evidence makes it very clear that, if the lower base had been of proper dimensions and material, nothing would have stood in the way of the immediate erection of the monument. There can be no doubt that, if the lower base had been included in the order sent to Scotland, it would have arrived with the other parts of the tombstone. It is equally clear that appellant never intended to supply a lower base of Scotch granite, and hence the delay was caused by his willful disregard of the terms of his contract. That contract has never been performed, and undisputed evidence in this record conclusively shows that appellant never endeavored or intended to fulfill his agreement with respondents. He never made an effort to secure a lower base of Scotch granite. On the contrary, he is here asserting a right to furnish a base of native stone. Under our construction of the contract, his conduct was inexcusable and delay resulting therefrom was unreasonable. But, even if we accept his theory of the case and assume that he had a right to substitute a lower base of Rocklin granite, the delay in erecting the monument stands unexcused. The only reason advanced as an excuse for such delay is that a mistake was made in the size of the lower base which was ready when the cap, die, and second base arrived from Scotland. The dimensions of the lower base were given in the contract, and, by the exercise of ordinary diligence and care, a base of proper size might have been procured as easily as the one which was discarded. The appellant seeks to make his own unexplained mistake a shield against consequences which ordinarily fall upon those who are negligent, but, if this was allowed, a premium would be placed upon carelessness, and all would be invited to commit errors that they might excuse delay. But for this mistake, which seems inexcusable in view of the dimensions given in the contract, the tombstone might, confessedly, have been in place within a few days after the stone arrived from Scotland, and under these circumstances we think the delay was unreasonable and inexcusable.

The appellant could not recover on his second cause of action. He had entered into an express contract to erect a Scotch granite sarcophagus, consisting of two bases, a cap, and die. He did not perform such contract, and it would be promulgating an unjust and dangerous doctrine to say that he could deliberately ignore and violate his agreement by substituting a lower base of native granite, and then recover the full contract price by way of quantum meruit. Without consulting or notifying the respondents when he found that others were building a foundation, he hastily placed an inferior tombstone on the foundation which he did not erect, and, if he has suffered detriment through early dilatoriness and subsequent but tardy haste, he can blame himself alone.

The evidence excluded and stricken out on motion was objectionable, because, as above indicated, it was an attempt to vary the terms of a written contract by parol. It was not error to exclude appellant's definition of the term "sarcophagus." The contract itself definitely described the tombstone so designated, and, besides, a similar question had already been answered by the witness.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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4 Cal. App. 547

JOHNSTON v. MULCAHY. (Civ. 304.)

(Court of Appeal, First District, California. Dec. 7, 1906. Rehearing Denied by Supreme Court Jan. 28, 1907.)

1. COMPROMISE AND SETTLEMENT—EVIDENCE—SUFFICIENCY.

In an action for accounting, evidence *held* to sustain a finding that there was an agreement between the parties on a certain date as to the amount due from plaintiff to defendant.

2. EVIDENCE—PAROL EVIDENCE—LEASE.

In an action for specific performance of a contract for the sale of land, executed in connection with a lease to plaintiff, testimony as to a conversation after the execution of the lease and contract regarding the theory on which the amount of monthly payments of rent was based was not admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1736, 1742, 1778.]

3. SPECIFIC PERFORMANCE—DECREE—FORM.

In an action for specific performance in which the defendant filed a cross-complaint pleading nonperformance by plaintiff and praying for general relief, the contention that the judgment should have been for a foreclosure as on a mortgage is untenable.

Appeal from Superior Court, City and County of San Francisco, M. C. Sloss, Judge.

Action by Thomas Johnston against James Mulcahy. From a judgment for defendant, from an order denying a new trial, and from an order denying a motion to strike out defendant's cost bill, plaintiff appeals. Affirmed.

John B. Carson, for appellant. Naphtaly, Freidenrich & Ackerman, for respondent.

HALL, J. This case has been up on appeal once before, when a new trial was ordered, with leave to plaintiff to amend his complaint. Johnstone v. Mulcahy, 132 Cal. 606, 64 Pac. 1077. The case comes before us upon three appeals, to wit, an appeal from the judgment, an appeal from the order denying plaintiff's motion for a new trial, and an appeal from the order denying plaintiff's motion to strike out defendant's cost bill, which are embodied in one transcript.

It appears that plaintiff entered into a contract with defendant May 17, 1878, set forth in two writings. In the first, plaintiff in terms leased certain real estate of defendant for the period of six years, and agreed to pay therefor a monthly rental of $45.07 in advance on the 1st day of each month, and also agreed to pay all taxes, water rent, and for all repairs and expenses for street work of every nature, and to keep the property insured for the benefit of the lessor in the sum of $2,000. In the second writing, executed the same day, it is in terms agreed that, if plaintiff shall faithfully comply with the terms of said lease, and shall further pay to the defendant the sum of $1,350 and interest, according to the terms of a promissory note set forth in the agreement, defendant would convey the property to plaintiff. The note bears date May 17, 1878, and calls for the payment to defendant by plaintiff nine years after date of the principal sum of $1,350, with interest at 9 per cent. per annum from date until paid, and to be compounded semi-annually, if not paid. The second writing repeats the agreement that plaintiff shall keep the property insured for the benefit of defendant and pay therefor, and shall pay the taxes, water rent, and all repairs, and expenses for street work of every nature, upon said property. Both documents bear date May 17, 1878, and are signed by both plaintiff and defendant. Plaintiff's action is for a specific performance of the contract of sale, and for an accounting, he claiming that he had paid more money to defendant than required by his agreement. Defendant answered the complaint, denying performance of the contract by plaintiff, and cross-complained, averring nonperformance on the part of plaintiff, and prayed for general relief. Plaintiff answered the cross-complaint.

Plaintiff in his complaint alleges that he has kept all the terms of the said lease, and avers "That on the, to wit, 1st day of September, A. D. 1887, it was settled, understood, and agreed by and between defendant and plaintiff that all the covenants in said lease had been complied with, and that nothing remained to be paid by plaintiff to defendant but said sum mentioned in said note, viz., $1,350 and interest to accrue, and the sum of $200 paid out by defendant for taxes and insurance, and from said last-named date all payments by plaintiff should be applied to said note and interest and said $200." The court found that "On the 1st day of September, 1887, it was settled, understood, and agreed by and between defendant and plaintiff that the amount then owing by plaintiff to defendant, on account of said lease and agreement, was $2,800, and it was further settled, understood, and agreed between them at said time that there was owing from plaintiff to defendant the sum of $200 for taxes and insurance advanced and paid by defendant, and plaintiff agreed to pay said sums, aggregating $3,000 to defendant, with interest thereon at 7 per cent. per annum." Upon the basis of this finding the court took an account of payments made after September 1, 1887, and as a result found there was due defendant from plaintiff $1,734.04, and gave judgment accordingly that defendant have restitution of the premises unless plaintiff pay said sum with interest at 7 per cent. per annum within 30 days from entry of judgment, and that, if such payment be made defendant execute a deed to plaintiff for the property. The finding of fact as to the settlement of September 1, 1887, is challenged as not supported by the evidence, and this presents the principal point in the case, as there is no dispute as to the payments made after that date.

The evidence relied on to support the finding is largely that given by the plaintiff himself. By the terms of the original contract plaintiff should have made 72 payments of $45.07 in six years, but, in point of fact, according to his own testimony, he was nine years in making said payments. Upon this point the plaintiff testified: "Between the years 1878 and 1887 I paid 72 installments in full, but I did not pay them in six years. I paid them within those nine years. All that remained to be paid in September, 1887, was the note and the $200 which he had paid out and which we agreed was due him for money paid out for taxes, insurance, and such things." Upon cross-examination he testified: "Q. You say on the 1st of September, 1887, or thereabouts, Mr. Mulcahy and you entered into an agreement that the installments due under the lease had been paid? A. Yes, sir; and it was so understood; and all that I owed at that time was the note plus $200. I made no calculations, nor did I see any calculations. Mr. Mulcahy told me the note at that time was about $2,800. Q. You assented to that proposition? A. I didn't know any different. I made no calculations. Q. On or about the 1st of September, 1887, you and Mr. Mulcahy had this conversation. Mr. Mulcahy told you that you owed him $200 for taxes and that the principal and interest on the note amounted to about $2,800? A. That is what he told me." Again he said: "He told me at the time that the principal and interest due upon the note was about $2,800, and the amount owing for taxes, insurance, and other things was about $200." On redirect examination plaintiff's counsel asked him: "You were asked whether or not you assented to the proposition made by Mr. Mulcahy to you that you owed $2,800 and $200 taxes. Go on and explain." To which plaintiff replied: "Well, the period for which I ought to have paid on that house, 9 years, had expired. I had only done in 9 years what I ought to pay in 6. This agreement, a copy of which I had, I read over about that time. I saw in that he could enter into possession and put me out of this any time. I hadn't done all that was called for. I knew the position I was in at that time, and I knew I paid him a great deal of money, and I felt no matter what he said to me at this time I had to put up with because I was in the position I could not do anything else."

From the foregoing statement of the evidence given by plaintiff it may fairly be inferred that the parties intended to agree, and did agree, that on September 1, 1887, the amount that plaintiff owed on the note was $2,800, and that plaintiff agreed to pay the same, and the $200 which it is conceded that he owed for taxes and insurance paid by defendant. This inference is strengthened by the fact that plaintiff proceeded to make payments from time to time thereafter which greatly exceed the amount that he could be called upon to pay if his present contention as to the agreement of September 1, 1887, be correct. It is further strengthened by the fact that the original note of $1,350, with interest at 9 per cent. compounded semi-annually, would in fact have amounted to within a few dollars of $2,800 on September 1, 1887, if no interest had been paid. True, the record shows that interest for the first year ($121.50) and possibly one other year, had been paid, but as against this plaintiff had been greatly in arrears in the payments of $45.07 per month, so that defendant would have been entitled to a considerable sum for interest on deferred payments. While the evidence upon which the finding is based is not as clear and explicit as it might be, we cannot say that the finding is not supported by the evidence.

Plaintiff upon the objection of defendant was prevented from proving a conversation with defendant, and this appellant urges as error. The record is as follows: "Q. After the execution of the lease and agreement, did you have any conversation with defendant regarding the theory upon which he fixed these amounts, $45.07? A. I had a conversation with him as to how it was that way. Q. What was that conversation?" Defendant objected as irrelevant and immaterial, and the objection as sustained. In this we see no error. The lease and agreement of May 17, 1878, are perfectly plain and unambiguous, and any oral statement made after their execution could not be admitted to vary or change the meaning of the written agreement. Plaintiff did not plead that the writing through mistake did not correctly set forth the contract entered into by the parties, as was suggested that he might do when the case was before the Supreme Court. 132 Cal. 606, 64 Pac. 1077.

Appellant also urges that the judgment should have been for a foreclosure as upon a mortgage. This position is untenable. The cross-complaint sets forth a default of payments due under a contract to purchase, and the findings are in accord therewith. The decree follows the approved practice followed in this state in such cases (Odd Fellows' Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109, and cases there cited).

Appellant's motion to strike out defendant's cost bill was made upon the ground that a verified memorandum of costs was not served, although a duly verified memorandum of costs was filed, and copy served, his contention being that the law requires that a duly verified memorandum of costs be filed, and that a duly verified memorandum of costs be also served, and that it is not sufficient to serve a copy of the verified memorandum filed. The record before the court, however, shows that a duly verified memorandum was both served and filed, so that the point urged by the appellant is not presented by the record.

The judgment and orders are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 527

BIXBY v. BASTADY et al. (Civ. 213.)

(Court of Appeal, Second District. California. Dec. 4, 1906. Rehearing Denied by Supreme Court Jan. 28, 1907.)

1. APPEAL—RESERVATION OF GROUND OF REVIEW—STATEMENT.

Though specifications of the insufficiency of evidence to sustain findings were contained in a separate document from the statement, where they were treated by counsel and the trial court as a part thereof, they were so considered on appeal.

2. SALES—BREACH OF WARRANTY—EVIDENCE.

Evidence, in an action for the price of a pumping plant, *held* insufficient to sustain findings that the plant was found on test to conform to the warranties under which it was sold, and that the buyers accepted it as in full compliance with the terms of the contract.

3. SAME—REMEDIES OF SELLER—ACTIONS FOR PRICE.

Where a pumping plant failed to meet the conditions upon which the buyers had agreed to pay $1,600 therefor, the seller could not recover the price.

4. SAME—ACTION FOR VALUE.

Where a pumping plant failed to meet the conditions upon which the buyers had agreed to pay $1,600 therefor, the seller could not recover the value of the plant without showing compliance with the terms of the contract of sale, or the value of the plant actually delivered as compared with that contracted for.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Stafford Bixby against Emanuel Bastady and another. From a judgment for plaintiff, defendants appeal. Reversed.

E. F. Hahn and Hahn & Hahn, for appellants. E. W. Forgy and Taylor & Forgy, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial. The suit was brought to recover the contract price of a pumping plant sold to the defendants by plaintiff's assignor, the Luitweiler Company. The terms of the contract are contained in a written order of the defendants to the Luitweiler Company, accepted by it, of date February 25, 1903, which, omitting immaterial parts, is as follows: "Gentlemen: You will please install on the ranch of E. Bastady at Lamanda Park, Cal., and put in complete running order one of your water pumping plants, complete in all particulars, with all appliances and appurtenances, including the following: * * * All to be installed in good working order by you and at your own cost and expense, and without expense to us, with substantial cement foundations under both engine and pump. It is understood and agreed that this plant shall be of a capacity ample to pump and deliver at least 180 gallons of water per minute, provided that amount of practically clear water is in the well, and not more than 200 feet from the surface, and it shall pump and deliver at surface said amount of water from said well with a fuel consumption of not more than thirteen pints of distillate per hour. In case a test is made and the plant either meets the above requirements or pumps whatever amount of practically clear water is in the well at 200 feet from the surface, we will accept the said plant and pay you for it in cash the sum of sixteen hundred dollars ($1,600) in full for the plant. Plant to be installed by April 1st, 1903." The defendants' answers deny the performance of the contract by the plaintiff's assignor, and assign as breach of the contract that the pumping plant tendered by the plaintiff's assignor has not the capacity stipulated in the contract, specifying the particulars wherein it is deficient. It is also alleged that the contract was rescinded by the defendants, but it is found by the court that the rescission was afterwards waived, and the evidence sustains this finding. The issues to be considered, therefore, are those relating to the capacity of the pump, and as to these the findings of the court (which we number for convenience) are, in effect: (1) That the contract was fully performed by plaintiff's assignor; (2) that the plant was delivered to the defendants and installed in good running order on or before April 1, 1903; (3) that, after the installation of the plant, the plaintiff's assignor caused the same to be tested, and that the same was found to be complete, in good order and of the capacity specified in said contract, and pumped all the practically clear water in said well at a depth of 200 feet from the surface; and (4) that, after the plaintiff's assignor tendered the pumping plant to the defendants on May 20, 1903, as in full compliance with the terms of said contract, defendants retained the same and made use thereof, and that they accepted said pumping plant. These findings are attacked by the defendants for insufficiency of the evidence. But the preliminary objection is made that the statement contains no specifications of insufficiency of the evidence. This contention, we think, cannot be sustained. In the copy of the statement appearing in the transcript, the specifications do not appear, but we have since been supplied with a copy of the specifications, accompanying, though not attached to, the statement, which, it appears from the uncontradicted affidavit of the plaintiff's attorney, were on file at the time of the settlement of the statement and used upon the argument of the motion. The original of this document, it appears, was lost from the records prior to the making out of the transcript, and on the 13th of April, 1906—which was subsequent to the filing of the notice of appeal—an order was made by the court below, "good cause being shown therefor," "that a copy of the aforesaid statement be filed in the records of said case and dated the 20th day of October, 1905, and that the same constitute a part of the record and findings in said action, and also a part of the statement on motion for a new trial." This order, it is claimed by the respondent, in so far as it attempts to make the specifications on file a part of the statement in the case, was beyond the jurisdiction of the court. But, assuming this to be the case (for the purposes of the decision only), the fact appears that the specifications in question, though in a separate document from the statement, were, in fact, treated by the counsel and the court as part thereof, and we are of the opinion that it must, therefore, be so considered.

Of the findings in question, the first must stand or fall with those relating to the particular breaches assigned, and therefore need not be separately considered.

The second finding is without support in the evidence, from which it appears that, though the pumping plant was put in place on or about the 1st of April, it was not put in running order until May 20th, nor was it tendered before then. But, as it does not appear that any damages were suffered on account of the delay, the fact may be regarded as immaterial.

The third finding is, also, we think, unsupported by the evidence. With regard to it, three questions are involved: One as to the capacity of the plant to pump and deliver 180 gallons of water per minute; another as to the amount of water in the well; and another as to the test of the capacity of the plant found to have been made by the plaintiff's assignor.

As to the first question, it appears without conflict from the evidence that the capacity of the plant was much less than 180 gallons per minute. Two of the plaintiff's witnesses, indeed, testify in general terms that the plant had such capacity, but this opinion is based upon the assumption, as stated by them, that every revolution of the pump raises five gallons of water, and the contrary is shown by several actual tests, one of them conducted by the witness Luitweiler, president of the plaintiff's assignor. From these it appears that the amount produced by the pump for each revolution was only a fraction above three gallons, and, as it was proved without contradiction that the extreme rate at which the engine could be run with safety was from 32 to 36 revolutions, the total capacity of the plant was very much less than 180 gallons.

As to the amount of water in the well, the evidence consists of several actual tests or experiments, conducted by several parties. The first of these was made May 20, 1903, by the agent of the plaintiff's assignor in the presence of the defendants; by which, according to the evidence of the agent, it was found that the pump was started at 26 revolutions and operated satisfactorily, resulting in the production of 10 miners' inches of water per minute, equivalent to about 90 gallons; but that when the revolutions increased to about 28 per minute "the sand began to come in quite freely," or, as otherwise expressed by the witness, "considerable sand came in." Thereupon the plaintiff's agent declined to proceed with the test, unless the defendants would assume the responsibility of its running at that rate, which defendants declined to do. The agent then tendered the plant to the defendant Stahlke, who declined to accept it until the plant could show the production of more water. This test, we think—anticipating the third question—was altogether insufficient. The complaint was filed on June 24, 1903. Thereafter, on the 22d day of July of the same year, a further test of the pumping plant was made by two expert engineers, Bishop and Packard, assisted by the defendant Stahlke and one of the defendants' attorneys. The result of this was to show: That the extreme limit of speed at which the engine could be safely run was from 32 to 36 revolutions; that at from 28 to 36 revolutions the water produced was from 104 to 139 gallons per minute; that, except when the pumping began, the water was clear of sand; and that by measurement actually made the surface of the water was about 174 feet from the surface of the ground. Another test was made in January, 1904, with similar results, by expert engineers employed by the plaintiff, Allin and Hodge. There was another test made in the following month by the witness Luitweiler, president of the plaintiff's assignor, accompanied by one of its employés. But their testimony is, we think, quite insufficient to raise a doubt as to the facts established by the previous tests.

As to the fourth of the findings recited, it appears that between May 20th, the date of the tender of the plant to the defendants, and the 22d day of July, the date of the test made by the defendants' experts, the pumping plant was used by the defendants to water some walnut trees, under the advice of their attorney—that "we should use it simply to not let the trees die"; and this, it may be assumed, was sufficient to justify the finding of the court that the plant was accepted. But there is nothing to justify the finding (which seems to be implied) that it was accepted by the defendants "as in full compliance with the terms of said contract." On the contrary, it appears that the defendants refused to accept the plant when tendered, and that they accepted it, if at all, only upon the condition that it should meet the requirements of the contract.

Upon the case thus shown, we are of the opinion that a new trial must be had. By the terms of the contract, as stated in the last paragraph, the promise of the defendants to pay the sum of $1,600 for the plant was not absolute, but was conditioned upon a successful test showing that the plant met the requirements of the contract. The test made by the plaintiff's agent was, as we have said, altogether insufficient to show this, and the contrary was in fact shown by the subsequent actual tests made by the plaintiff's experts. When the suit was brought, therefore, the plaintiff was not entitled to maintain his action for the specific sum named. Nor can he maintain an action for the value of the plant under the preceding paragraph of the contract without showing his compliance with the terms thereof, or the value of the plant actually delivered as compared with the plant contracted for. Civ. Code, § 1477, 1524; Cavanaugh v. Casselman, 88 Cal. 543, 552, 26 Pac. 515, 1 Benjamin on Sales, § 48; 2 Id., § 1032, and note 19.

On another trial, he will be entitled to recover on such showing the value of the plant, not exceeding the sum stipulated in the contract.

The judgment and order appealed from are reversed.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 476

ROWLAND v. WATSON. (Civ. 286.)

(Court of Appeal, Second District, California. Nov. 26, 1906.)

1. BILLS AND NOTES—EXTENSION—CONSIDERATION.

Under an agreement between the maker and payee of a note to extend the note for two months and for the payment of "an additional bonus of fifty dollars per month for each month or fractional part of a month which said note shall be extended," the bonus can be collected for only two months, although the holder of the note did not enforce it until some months after the expiration of the extension.

2. PAYMENT — RECOVERY — DURESS — COMPLAINT.

A complaint alleged that defendant held plaintiff's note secured by an assignment of all plaintiff's interests in real property; that the note was extended for two months under an agreement to pay a bonus of $50 a month; that plaintiff had an opportunity to borrow money for the payment of his debts, provided all liens on his property were released, including that of defendant; that one creditor who had a first lien on his property threatened to sell it if not paid by a certain date, but offered to make a material reduction if he would pay; that defendant, taking advantage of plaintiff's distress, declined to release his lien unless paid a stated amount in excess of the amount then due on the note and bonus; that he had no time before the date set by his creditor for payment of his indebtedness in which to contest defendant's claim, and to prevent the sacrifice of his property he paid the amount demanded by defendant. *Held*, that the complaint stated a cause of action to recover the excess paid defendant, as it was made under compulsion.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. P. Rowland against John W. Watson. Judgment for plaintiff, and defendant appeals. Affirmed.

H. S. Rollins, for appellant. W. C. Petchner, for respondent.

GRAY, P. J. This action is brought to recover the sum of $620.58 alleged to have been overpaid on a note and agreement set out in the complaint. The plaintiff had judgment as prayed, and the defendant appeals therefrom. The appellant contends that the complaint does not state a cause of action, and that the complaint is insufficient to sustain the judgment.

The complaint upon which the trial was had proceeds upon the theory that the defendant by his conduct compelled the overpayment on a certain promissory note of the sum of $620.58. The note, dated April 1, 1903, for the principal sum of $700, drawing interest at 7 per cent. per annum from maturity, is set out in full in the complaint. It is also alleged that on the same date plaintiff and defendant made and entered into an agreement in writing to the effect that, if the said plaintiff Rowland should desire an extension of time to pay the said note, the said defendant Watson would extend said time of payment for two months after August 1, 1903, the date of its maturity. It was further understood and agreed between the parties, as stated in the agreement, that, if such time of payment should be extended, the plaintiff should pay for said extension "an additional bonus of fifty dollars per month for each month or fractional part of a month which said note shall be extended" by the defendant, together with interest on the principal sum of said note and the said bonus of $50 per month at the rate of 7 per cent. per annum; it being understood and agreed between the parties that, in case said note should not be paid upon the 1st day of August, this agreement should be and become a part of said promissory note and the security given for the payment thereof. The complaint then goes on to state, in substance, that the security in said contract referred to consisted of an assignment by plaintiff to defendant of all the title and interest of plaintiff in and to the estate of plaintiff's father, which was then in course of administration in the probate court of Los Angeles county, and, except the interest of plaintiff in said estate, that he did not own any other real property; that on December 20, 1904, plaintiff was indebted in various sums, the aggregate of which was in excess of $4,258, all of which was overdue and payment of which was being demanded by his creditors; that one of his said creditors, J. S. Howland by name, held a judgment against plaintiff for $2,312, which was a first lien on the said real property interests of plaintiff; that on said December 20th the utmost plaintiff could borrow on all his earthly possessions was the sum of $4,000 with which to pay off said total indebtedness of $4,258, and that he could borrow said sum of $4,000 only on condition that he should pay off all his said indebtedness, and that said J. S. Howland, after strenuous solicitation on the part of plaintiff, agreed to remit $612 of his said claim if the same was paid by January 1, 1905, but, if not so paid, he stated he would demand payment of the entire amount, $2,312, and would at once seize and sell all of plaintiff's property under a writ of execution; that on or about December 23, 1904, plaintiff negotiated a loan of $4,000 from one Bidart, which sum was on said last-mentioned date placed with the Title Insurance & Trust Company in escrow for the space of 10 days, to be used by said company for the payment of all the indebtedness that constituted a lien upon plaintiff's said property, provided there was sufficient for said purpose, and provided, further, plaintiff could and would mortgage said property to said Bidart as security for said loan, free and clear of all incumbrances. It is further alleged that to and including the 1st day of January, 1905, there was due to defendant Watson, under said note and agreement hereinbefore mentioned, the sum of $879.42, and no more; that said Bidart required a release of all of said liens, including that of defendant Watson, before he would permit any of said $4,000 to be paid said Howland; that said Watson, taking advantage of the distress and necessity of plaintiff's situation, wrongfully demanded of him the sum of $1,500 before he would give or would consent to give a release of his said lien; that plaintiff had no time between said 23d day of December, 1904, and January 1, 1905, in which, by an action at law, to establish the wrongfulness of said defendant Watson's claim; that if said release from defendant Watson was not secured by said 1st day of January, 1905, plaintiff could not give said Bidart a first lien on his said property, and hence could not secure from said Bidart said loan of $4,000, and, furthermore, could not pay Mr. Howland the sum of $1,700, which he had agreed to accept, in which event Howland would have enforced payment of the original sum of $2,312 by forced sale of all of plaintiff's property, and would have entirely bankrupted him; that in order to secure the release of said assignment from said defendant before January 1, 1905, plaintiff was compelled to and did pay to said defendant, on the 27th day of December, 1904, the sum of $1,500, but did so involuntarily and under protest, of which he notified defendant before the receipt by defendant of said sum of $1,500, and that plaintiff had no alternative to save himself from bankruptcy but to make said payment to defendant; that at the time plaintiff paid defendant said sum of $1,500, under protest as aforesaid, there had accrued and was unpaid on said note, and under said agreement, as principal and interest and as bonus for said extension, the total sum of $879.42, and no more; that plaintiff, in the manner aforesaid, overpaid the defendant the sum of $620.58, repayment whereof has not been made to plaintiff, but is refused, to plaintiff's damage in the sum of $620.58.

1. Whether the complaint supports the judgment for the $620.58 seems to depend entirely upon the construction which should be given to the contract hereinbefore referred to for an extension of time in the payment of

the $700 note. It seems to be conceded by all parties that said contract extended the time for payment of said note for at least two months and attached a penalty or charge of $50 for each of said two months or fraction of month in addition to the regular 7 per cent. interest named in the note. But it is contended by appellant that a proper construction of said contract required the plaintiff to pay, in addition to the 7 per cent. interest, the sum of $50 for each and every month that the note remained unpaid after it fell due according to its terms; and it seems to have been upon this theory that the payment of $1,500 in satisfaction of the note was compelled by him. We cannot agree with this contention. On reading the contract it will be noticed that there was no agreement on the part of Watson to extend the time of payment for any period in excess of two months after August 1, 1903. It must be understood, then, that the agreement related only to those two months, and it was for each of those two months, or for one of those months and a fraction of the other only, that this $50 monthly charge was contemplated by the parties. Immediately at the conclusion of said two months' period the defendant Watson, by the very terms of the agreement, was in a position to bring suit and enforce payment of the promissory note. The time during which he subsequently let the matter rest without beginning suit was voluntary on his part. It was not done in pursuance of the agreement and did not carry with it any right to collect any bonus of $50 for each of the months subsequent to the two months mentioned. This, we think, is a fair construction of the contract, and is strictly in accord with the very letter of its terms; and, this being so, there can be no question but what the judgment for the sum named is clearly supported by the allegations of the complaint, conceding that said complaint states a cause of action.

2. The next question we will consider is: Does the complaint state a cause of action for money paid under compulsion? We think it does. It is clear on the allegations of the complaint that if plaintiff had not paid this $1,500, as required by defendant, he would have suffered great financial loss. Many cases are cited in the brief of the respondent to show that a payment made to avoid financial loss and so made on notice and protest, as it is alleged to have been made in the complaint in this case, is regarded in the law as a payment under compulsion, and where the sum so paid is illegally exacted it can be recovered back. Without citing any of these cases, we deem it sufficient to say that we heartily agree with them, and that in our judgment the allegations of the complaint bring this case in line with those decisions.

3. As to the point made by appellant, that this forced payment was not made direct to defendant, but came to him from the Title Insurance & Trust Company, we think that entirely immaterial. It was money which belonged to this plaintiff. To be sure, it was to be and was in fact borrowed from a third party in this $4,000 loan, but, nevertheless, plaintiff had given security for it, and it was in fact, as well as in effect, plaintiff's money. That it was paid directly by the money lender to the Title Insurance & Trust Company, and went directly from the Title Insurance & Trust Company to the defendant, can make no difference. It was and is the plaintiff's money. It found its way, through some agency, to the defendant, and is now in the hands of the defendant, and belongs to the plaintiff. The judgment in plaintiff's favor and against defendant for that sum was therefore clearly correct.

The judgment is, therefore, affirmed.

We concur: ALLEN, J.; SMITH, J.

4 Cal. App. 470

STAR MILL & LUMBER CO. v. PORTER et al. (Civ. 293.)

(Court of Appeal, Second District, California. Nov. 24, 1906.)

1. PLEADING—IMMATERIAL VARIANCE.

Under Code Civ. Proc. § 469, declaring immaterial a variance between pleading and proof unless it has actually misled the adversary to his prejudice, it is immaterial that the complaint alleges the furnishing of material of the value of $132, on which nothing has been paid, and that proof shows the furnishing of material of the value of $212, on which $80 has been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1307, 1310.]

2. MECHANICS' LIENS—NOTICE—VARIANCE.

The doctrine of variance in pleadings does not apply to a notice of mechanic's lien. All that is necessary as to the statements in such a notice is that they be true in all essential particulars, so that it is immaterial that the notice states material of the value of $132 was furnished, none of which has been paid, when $212 worth was furnished, on which $80 was paid, or that a lien was allowed for only $32; or that the notice states the material was to be paid for at the market price, when part of it was sold at a fixed price, the evidence showing that such fixed price was also the market price.

3. PAYMENTS—APPLICATION.

Under Civ. Code, § 1479 (3), providing for application of a payment in the absence of direction on the obligation "earliest in date of maturity," payments should be applied pro rata on obligations maturing at the same time, though they were not contracted at the same time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 124.]

4. APPEAL—HARMLESS ERROR.

Where, under the evidence, it appears that respondent was entitled to a mechanic's lien for the whole of his claim, but was allowed one for less, error in applying a prior payment on the item for which he was not allowed a lien, rather than on the one for which he was allowed a lien, is harmless to appellant.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Suit by the Star Mill & Lumber Company against James E. Porter and another. Judgment for plaintiff. Defendant Porter appeals. Affirmed.

John E. Daly and A. D. Laughlin, for appellant. A. C. Lawson, for respondent.

SMITH, J. This is an appeal from a judgment for the plaintiff, and from an order denying the defendant's motion for a new trial.

The suit was brought to foreclose several liens for materials furnished the defendant by the plaintiff or the plaintiff's assignors. The judgment and findings with reference to three of these are attacked on various grounds.

The first of these liens set out in the first count of the complaint is attacked on the ground of an insufficiency of evidence to justify the findings of the court as to the contract and notice of lien; and also on the special ground that there is a variance between the allegations of the complaint and the statements of the notice and the facts proven. But we find nothing in the record to sustain these objections.

Another of the liens attacked was that of the O. M. Dunham Company assigned to the plaintiff, and which is set up in the second count of the complaint. With regard to this, the allegations of the complaint are, in effect, (1) that the contract was made by the contractor with the Dunham Company for the furnishing of certain materials "to be paid for at the prevailing market value at said time and place, and to be paid for upon the delivery or the completion of the building, or not later than thirty-five days after the completion of said building"; (2) that the material was furnished in pursuance of the agreement between January 25 and May 16, 1904, and used in the building; (3) that the market value of the material furnished was $132.16, on which nothing had been paid; and (4) that on July 22, 1904, a notice was filed for record by the Dunham Company, duly verified, and so on, containing "a true statement of the demand of said company after deducting all just credits and offsets," etc., "with a statement of the terms, time given, and conditions of its agreement," etc.

From the findings of the court it appears (1) that the material used in the building was furnished by the Dunham Company under a contract between it and the contractor, but that of the materials furnished a portion was sold for the fixed price of $173, and the balance, $39, at their reasonable market value; (2) that $80 had been paid on the account, leaving due July 22, 1905, $132; (3) that the notice of the claim was filed for record July 22d, as alleged, stating "the terms, time given, and conditions of its contract, except that it is therein erroneously stated that all of said material was furnished at its market value instead of stating, as in truth it should, that of the materials furnished $173 worth was at a fixed price and the remainder, viz., $39 worth, at its market value, but that said incorrect statement was not made fraudulently, or with intent to deceive"; and (4) as conclusion of law that the plaintiff was entitled to a lien on the premises of the sum of $39.

One of the points urged by the appellant is that there is a variance between the amount of materials furnished, $212.16, and the amount claimed in the lien and complaint, $132.16. With regard to the complaint, this is true, though immaterial. Code Civ. Proc. § 469. The court, in effect, finds that the amount of material furnished under the contract was $212, and that the notice of lien contained a true statement of the terms of the contract, except in certain particulars mentioned, other than the one now under consideration. Whether the full amount of the contract price was stated, with credits, or the true amount due after deducting credits, is immaterial, provided the facts were correctly stated. In this respect the case differs from that of Santa Monica L. & M. Co. v. Hege, 119 Cal. 381, 51 Pac. 555, cited by the appellant, where there was a false statement of the terms of the contract in this respect.

Another point urged is that of the amount claimed in the lien only $39 worth is allowed by the finding, which is also claimed to be a fatal variance. But we do not understand the doctrine of variance in pleadings to have any application to the notice of lien. In the latter case all that is required is that the statements therein contained shall be true, and if of a claim of $212 or $132 $39 is found to be due, the statement is true to that extent.

Another point urged is that the $80 credit referred to in the findings was wrongly applied, and this, though affecting the judgment only to a small amount, presents several interesting questions. From the bill of goods rendered to the contractor, and appearing in the record, it appears that the credit of $80 was of date February 8th; and it is claimed by the appellant that prior to that date materials had been furnished to the value of $23.04, to which under the provisions of subdivision 3 of section 1479 of the Civil Code, the credit should have been applied pro tanto, leaving only $56.96 to be applied on the $173 contract price. But this is incorrect, both in fact and law. The amount of materials furnished prior to February 8th was $17.66, instead of $23.04 as claimed by the appellant, and the rule given in the section of the Civil Code cited is not that the payment is to be applied to the obligation earliest in date, but to "the obligation earliest in date of maturity." Here it does not appear that the purchase money was to be paid on the several items as delivered, and from the form of the account it must be presumed that they all matured at one time; that is to say, upon the completion or 35 days after the completion of the building, as alleged in the complaint, or at some other one date. Accordingly, the payment is credited to the whole bill. All the various items of the account, therefore, belong to one class, and under the provisions of subdivision 3 of section 1479, Civil Code, it would seem that the payment should be applied to all items ratably. Under this rule, the amount to be applied on the $173 obligation would be something over $66, leaving only something over $13 to be deducted from the amount of the items allowed.

The court, however, credited the whole of the $80 to the $173 obligation, and this, we think, was error. But we are also of the opinion, that under the facts disclosed by the records the appellant was not injured by it. It is true that the court finds that "of the materials furnished $173 worth was at a fixed price," and as conclusion of law holds that the plaintiff was not entitled to a lien for this portion of its account. But it does not appear from the finding of the court that the price fixed for this portion of the material was not also the market price; and from the evidence in the case it appears, without contradiction, that this was in fact the case. Stevenson v. Woodward, 2 Cal. App. Dec. 777, 86 Pac. 990. The statement in the notice of lien was, therefore, substantially true, which was all that was required to give it validity. Wagner v. Hansen, 103 Cal. 107, 37 Pac. 195.

The notice is, indeed, incorrect in stating as one of the terms of the contract that the claim was based upon a quantum meruit, instead of upon a special promise to pay a fixed amount; and this doubtless as a matter of pleading would constitute at common law a material variance, though hardly under existing practice. Code Civ. Proc. § 469. But, as we have already said, the technical doctrine of variance has no application to a notice of lien, where all that is required is that the statement of the terms of the contract shall be substantially true. There are, indeed, many cases cited by the appellant, and other cases, which might be conceived to hold the contrary doctrine. Reed v. Norton, 99 Cal. 619, 34 Pac. 333; Palmer v. Lavigne, 104 Cal. 34, 37 Pac. 775; Santa Monica L. & M. Co. v. Hege, 119 Cal. 380, 51 Pac. 555; Wilson v. Nugent, 125 Cal. 283, 57 Pac. 1008; Malone v. Big Flat Gravel M. Co., 76 Cal. 580, 18 Pac. 772. But these, or most of them, are distinguished from the present case in that it did not appear that the fixed price stated was the market price. In the absence of this fact, the statement would be substantially false and might mislead the owner to his prejudice. But where the fact appears, no injury can result to the owner; nor can the misstatement be regarded as material. The general effect of the decisions is, therefore, simply to establish the principle laid down in Wagner v. Hansen, supra, which is that a compliance with the statute upon the part of the claimant is essential to the validity of his claim; from which it follows that the statements in the notice must be true "in all essential particulars," and that "there must be a substantial compliance with all these conditions to the right." The case here, we think, comes within this principle.

We are of the opinion, therefore, that upon the evidence before the court a lien should have been allowed for the whole of the plaintiff's claim; and, while on this appeal the error cannot be reviewed, yet it appears, without contradiction, from the evidence in the record that the plaintiff has recovered less than it was entitled to, and that the defendant was, therefore, not injured by the error in the application of the $80 credit.

As to the third cause of action, which is that of a lien in favor of one Cruickshank for materials furnished, assigned to the plaintiff, it is found by the court that materials amounting to $789 had been furnished, of which materials of the value of $42.90 were not used in the construction of the building, and of the remainder a portion was sold at the fixed price of $620 and the balance at its reasonable or market value of $169. It is further found that there was a credit upon the bill of $550.55; and as conclusion of law it is found that the plaintiff has a lien for the sum of $120.10. The objection urged by the appellant is substantially similar to the last of those urged against the lien set up in the second cause of action. But in the case of this lien it is expressly found that the $550.55 was paid on the $620 obligation; and this finding is not attacked in the specifications. This would leave the $169 obligation for which there was a lien unaffected, unless by a deduction of the $42.90 not used in the building, or some other part of it. The amount allowed by the court, therefore, seems to be less than the amount due to the plaintiff.

We are of the opinion, therefore, that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 448

STEEN v. SANTA CLARA VALLEY MILL & LUMBER CO. (Civ. 316.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. APPEAL—REVIEW—DELAY IN SERVING NOTICE—DISCRETION OF TRIAL COURT.

The discretion of the trial court in refusing to set aside a default in failing to serve notice of intention to move for a new trial within 10 days after the service of notice of decision, on the ground that the party seeking relief was misled by the fact that the notice of decision was interlined in writing upon the printed indorsement upon the memorandum of costs, and that for that reason he did not ascertain, until after the time for serving the notice of intention had expired, that the notice of decision was upon the document, will not be reviewed where the original document upon which the indorsement was made, as well as the interlineation thereunder, was before the trial court for inspection at the hearing of the motion to set aside.

2. NEW TRIAL — NOTICE OF INTENTION TO MOVE — DELAY IN SERVICE — RELIEF FROM DEFAULT.

An application for relief from a default in failing to serve notice of intention to move for a new trial in time, which was not made until nearly a year after the default, was too late to give the court jurisdiction under section 473, Code Civ. Proc., limiting the time within which application may be made for relief from such default to six months from the time of default.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Jacob Steen against Santa Clara Valley Mill & Lumber Company. From an order denying defendant's motion to be relieved from a default, he appeals. Affirmed.

See 79 Pac. 171.

Carl E. Lindsay, for appellant. Z. N. Goldsby and C. B. Younger, for respondent.

HARRISON, P. J. The action between the parties herein was tried by the court without a jury, and its decision in favor of the plaintiff filed and judgment entered thereon December 26, 1902, and on the same day the plaintiff served upon the defendant a memorandum of his costs and disbursements, together with a written notice of said decision, and filed the same, together with the defendant's acknowledgment of service indorsed thereon, in the office of the clerk. The said notice is in the following words: "You are hereby notified that the within memorandum of said plaintiff's costs and necessary disbursements in said action (with a copy whereof you are hereby served) has been filed with the clerk of said court and that said court has rendered its decision herein containing its findings of fact and conclusions of law." The first portion of this notice was printed, and the latter portion was interlined thereunder in writing. To this notice the defendant's attorney had signed his acknowledgment of a receipt thereof. January 10, 1903, the defendant served upon the plaintiff and filed with the clerk a notice of its intention to move for a new trial. The plaintiff admitted service thereof, but reserved in said admission "all objections thereto, particularly that it was not served within ten days after the service of the notice of decision." Thereafter, within the time stipulated by the parties, the defendant served upon the plaintiff its proposed statement on motion for a new trial, to which the plaintiff served upon the defendant proposed amendments—plaintiff in each of said stipulations reserving the objection that the notice of intention to move for a new trial was not served in time. The matter of the settlement of the statement came on for hearing November 9, 1903, and the plaintiff made objection to its settlement upon the same ground, and, the respective parties having offered evidence thereon, the court held that the service of the notice of intention to move for a new trial was not within the time allowed by law. Thereafter the defendant, having given the plaintiff notice thereof, made application to the court for an order relieving it from its default in serving said notice of intention, and in support of said motion read the affidavit of its attorney and the aforesaid memorandum of costs, together with the indorsement thereon. It was admitted by the defendant's attorney that the notice indorsed upon the back of the memorandum was served upon him personally at his office December 26, 1902, and that he at that time signed the said acceptance of service. In his affidavit he states that, by reason of the use of the blank form which was entitled "Memorandum of Plaintiff's Costs and Disbursements," the interlineation in writing escaped his notice, and that he did not ascertain that there was interlined therein a notice of the decision until January 10, 1903, while he was examining the papers in the cause in the office of the clerk for the purpose of taking steps for obtaining a new trial; "that said interlineation was made in such a manner as to cause the same to be readily overlooked, and by reason thereof he had not before ascertained that such notice was contained in the document;" and that he immediately on said January 10th prepared and served upon the plaintiff's attorney a notice of the intention of the defendant to move for a new trial; that said attorney admitted service thereof, but expressly reserved in said admission an objection thereto on the ground that it was served within ten days after the service of the notice of decision. Upon the hearing the court denied the motion, and the present appeal is from this order. "The rule has been so often declared as not to need the citation of authorities that the action of the superior court upon an application to set aside a default, or grant relief therefrom, rests so largely within its discretion that it will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of this discretion." Ingrim v. Aperson, 137 Cal. 370, 70 Pac. 165. See, also, Winchester v. Black and cases therein cited, 134 Cal. 125, 66 Pac. 197.

1. The point relied upon by the appellant is that it was misled by the fact that the notice of decision was interlined in writing upon the printed indorsement upon the memorandum of costs, and that for this reason he did not ascertain until January 10th that such notice was upon the document. The original document, upon which this indorsement was made, as well as the interlineation therein, was before the court at the hearing of the motion, and, considering that the very fact that the notice of the decision was interlined in writing upon a printed document would naturally attract the attention of the attorney to its contents, it may be assumed, in support of the order denying the

motion, that the court was satisfied from an inspection thereof that the interlineation was not made in such a manner as to be readily overlooked, but was of such a character as to attract attention, and that there was no reasonable ground for the failure of the attorney to observe the notice of decision written thereon.

2. The notice of the decision of the cause was given December 26, 1902, and the 10 days within which the notice of intention to move for a new trial should have been given expired January 5, 1903. The default occurred when that time was allowed to elapse without giving such notice. Section 473, Code Civ. Proc., limits the time within which application may be made for relief from such default to six months from the time of the default. The application herein was not made until December 9, 1903, and at that time the court had no jurisdiction to grant the relief. Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344. See, also, Latin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

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4 Cal. App. 510

NAPA STATE HOSPITAL v. SOLANO COUNTY. (Civ. 184.)

(Court of Appeal, Third District, California. Dec. 3, 1906. Rehearing Denied by Supreme Court Jan. 28, 1907.)

INSANE PERSONS—SUPPORT IN ASYLUM—COMPENSATION—LIABILITY OF COUNTY.

Under Pen. Code, § 1368, providing that when an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arise as to his sanity, the court may submit the question to a jury, and the trial or pronouncing of judgment must be suspended until the question is determined, and section 1373, providing that the expenses of sending the defendant to the asylum and keeping him there and of bringing him back are in the first instance chargeable to the county in which the indictment was found or information filed, where the question of the defendant's sanity is submitted to a jury before his arraignment and he is committed to the asylum, the expense is not chargeable to the county.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by the Napa State Hospital, by C. B. Seeley, as its treasurer, against the county of Solano. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

John W. Stetson, for appellant. T. T. C. Gregory, Dist. Atty., for respondent.

CHIPMAN, P. J. This is an action to recover the cost of caring for one John Welch, who was adjudged to be insane. The cause was tried by the court without a jury, and it was found that defendant was not indebted to plaintiff in the sum claimed, or any other sum. Judgment passed in favor of defendant for costs, from which, and from the order denying its motion for a new trial, plaintiff appeals.

It appears that in the year 1885 Welch was charged by information, duly filed in the county of Solano, with the crimes of burglary and grand larceny, that on February 12, 1885, Welch "came to the bar of the superior court for arraignment upon said charges," but was not in fact arraigned; "that thereupon, on the 12th day of February, 1885, a doubt having arisen as to the sanity of said Welch, when said defendant so came to the bar of the court for arraignment," the court "ordered the question of the sanity of said Welch to be submitted to a jury, and all further proceedings upon said information were suspended pending the determination of his sanity by a jury"; Welch was found to be insane and the court ordered him to be committed to the Napa State Asylum (now called Napa State Hospital), where he was admitted as, and ever since has been, an insane inmate. The record contains the formal commitment signed by the judge of the superior court, and recites the pendency of the information against Welch and the fact that, a doubt of his sanity having arisen, a jury had by order of the court inquired into the matter and found him to be insane, and directs the suspension of further proceedings under the information, and that he be committed to the State Insane Asylum at Napa.

As amended in 1880, section 1368 of the Penal Code read as follows: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity." The section prior to 1880 read "indictment," where it was made to read "action." Section 1373 of the same Code provides that "the expenses of sending the defendant to the asylum and keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or information filed; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere." Appellant contends that section 1368 should be given such liberal construction as would make the county liable where the defendant is committed as insane at any time after the information is filed or the indictment is found against him. On the other hand, respondent contends that no liability of the county accrues except in the case mentioned in the statute, namely, where the "action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction."

It is doubtless true, as urged by appellant, that after information or indictment, and before arraignment, it would be the duty of the court, if a doubt arises as to the sanity of the defendant, to suspend further proceedings until the question of sanity has been determined. It was held in People v. Ah Ying, 42 Cal. 18, that, if a doubt arises at any time as to the sanity of the defendant, it is the duty of the court, on its own motion, to suspend the trial or further proceedings in the case at whatever stage the doubt arises. It was so at common law in a capital offense, for it was said that, if insane, the accused "ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought." Blackstone, book 4, *25. But, this duty of the court conceded, we are brought no nearer a solution of the question here. The Napa State Hospital, as its name implies and as is the fact, is a state institution whose expenses are borne by the state. We must look to the statute alone for authority to charge a county with the expense of keeping an inmate in a state hospital. The only statute to which our attention has been called, which it is claimed fixes any liability upon the county, is found in the two sections above quoted. It does not follow, because the court may and should inquire into the sanity of a person resting under indictment or information before arraignment or when arraigned, that a commitment at that stage of the action would cast the burden of keeping the accused at the state hospital upon the county. The Legislature has said that "when an action is called for trial," or during the trial, or when the accused is brought up for judgment (section 1368), the expense of keeping the prisoner, when committed to the state hospital, shall be borne by the county (section 1373). In all other cases we must assume that the Legislature intended that the expense should fall upon the state.

The question then would seem to be: Can an action be said to be "called for trial" when the accused is brought into court for arraignment, but is not arraigned, and at this stage of the proceedings his insanity is adjudged, and he is committed to the state hospital? Under the criminal procedure provided by the Code, when the indictment or information is filed, the defendant must be arraigned thereon (Penal Code, § 976); if for a felony, he must be personally present, otherwise he need not be (section 977); to secure his personal appearance a bench warrant may issue (sections 980, 986); on his appearance for arraignment he is entitled to counsel, and if necessary the court must appoint one (section 987); if, on arraignment, he requires it, he must be allowed a reasonable time, not less than one day, to answer, move to set aside, demur, or plead to the indictment or information (section 990). Many steps may be taken by the defendant to test the validity of the indictment or information and commitment before any trial can be had. To what extent a hearing and order of discharge on demurrer to the indictment or information may be regarded as a trial need not be considered, for that stage had not been reached. We are satisfied that there was no trial in the present case; for no issue of law or of fact had been framed, and, of course, none was heard.

Appellant would have us read the section as though the language "when an action is called for trial" means "at any time during the pendency of a criminal charge." To do this would be to legislate, which is the exclusive function of the Legislature. It may be difficult to advance any good reason for charging the county with the expense of keeping prisoners at state hospitals who are found to be insane when called for trial, and to relieve the county from such expense when they are found insane before being called for trial. If there is injustice in the law, the remedy is not with the courts. In this instance the accused has been at the state hospital for over 21 years and is probably incurable. Whether, in such case, under any circumstances, he should be a perpetual charge upon the county, would seem to call for some more definite provision than we now have in the law.

The judgment and order are affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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4 Cal. App. 455

BARLING v. WEEKS. (Civ. 301.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. APPEAL—DISCRETION OF LOWER COURT—SETTING ASIDE DEFAULTS.

The setting aside of defaults taken against litigants through their mistake, inadvertence, or excusable neglect is within the discretion of the trial court, and the appellate court will only interfere where the trial court abused its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3823.]

2. PLEADING—AMENDMENT.

A demurrer to a complaint was sustained December 12th, with leave to amend in 10 days. Notice of the order was served December 16th. No amendment was filed within the time fixed. The affidavit of plaintiff's attorney showed that he was led to believe that the notice served upon him was a mistake, in view of what he saw in the offcial organ of the court, and that he employed a third person to investigate the records of the court, who reported that the records showed the demurrer to have been sustained December 17th with leave to amend in 10 days. The affidavit was accompanied by an affidavit of merit made by plaintiff, and by a verified amended complaint. *Held*, that the court did not abuse its discretion in setting aside the default and granting leave to amend.

3. SAME.

A complaint set forth an action to recover on an implied assumpsit money paid by plaintiff as surety on a note, a copy of which was attached to the complaint. An amended complaint alleged that the note was transferred to plaintiff, and he sought to recover as the owner thereof. The copy of the note as set forth in the complaint did not appear to be indorsed to plaintiff, but bore the stamp "Paid" on its face. *Held*, that the court, in allowing the amended complaint, did not abuse its discretion, though the cause of action set forth in the original complaint was barred by Code Civ. Proc. § 339, subd. 1, limiting an action on an obligation not founded on an instrument in writing to two years.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Maurice L. Barling against S. F. Weeks, administrator of S. F. Weeks, deceased. From an order granting a motion to set aside a default for failure to file an amended complaint after sustaining a demurrer, and granting leave to file an amended complaint, defendant appeals. Affirmed.

J. M. Rothchild, for appellant. Campbell, Metson & Campbell, for respondent.

HALL, J. This is an appeal from an order granting plaintiff's motion to set aside the default of plaintiff for failure to file an amended complaint after demurrer sustained, and granting plaintiff leave to file an amended complaint. The motion was made upon the usual ground that the failure to file the amended complaint in time occurred through the mistake of plaintiff's attorney, and it is first urged as a ground for the reversal of the order that the showing made by plaintiff as to the mistake was insufficient to justify the order made by the court.

The granting of motions to set aside defaults taken against a litigant through his mistake, inadvertence, or excusable neglect lies largely in the discretion of the trial court, and this court will only interfere where it appears that the trial court has abused its discretion. In Watson v. Railroad Co., 41 Cal. 17, it is said: "The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." See, also, Nicholl v. Weldon, 130 Cal. 666, 63 Pac. 63; Winchester v. Black, 134 Cal. 125, 66 Pac. 197; Wolff & W. v. C. P. Ry., 89 Cal. 332, 26 Pac. 825; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Pelegrinelli v. McCloud River Lumber Co., 1 Cal. App. 593, 82 Pac. 695.

The record in the case at bar shows: That after the filing of plaintiff's original complaint a demurrer thereto was filed, but before action thereon an amended demurrer was filed. This demurrer was sustained December 12, 1902, with leave to plaintiff to amend her complaint in 10 days. Notice of the order sustaining the demurrer, with leave to amend the complaint, was served on the attorneys for plaintiff December 16, 1902. The affidavit of Robert W. Campbell, one of the attorneys for plaintiff, shows he is one of the firm of Campbell, Metson & Campbell, the attorneys of record for plaintiff. That on the 5th day of December it was reported to him by one of the clerks of said firm that upon the calling of the demurrer for argument in the court in which the action was pending an amended demurrer was filed, argued, and submitted upon briefs, five and five, plaintiff to submit first brief. Plaintiff thereafter, on December 10, 1902, served and filed her brief. On December 13th affiant noticed in the Daily Recorder, the official organ of the court, under the heading of "Yesterday's Proceedings, Department One of said Superior Court, Seawell, J.," the following: "82661. Barling v. Weeks, Administrator, etc., Dem. to complaint sustained, ten days to amend." That there was also in said Recorder of said date, under the title of "Yesterday's Proceedings, Dept. 2, Murasky, J.," the following entry: "21, Barling v. Weeks Adm., etc., Amd. dem. to compl. ordered off calendar." "That affiant, observing the above-mentioned entries in said Recorder of said 13th day of December, 1902, and noticing the conflicting terms thereof, believed that an error had been committed. That thereafter, on the 15th day of December, 1902, affiant's belief was confirmed by the receipt of defendant's brief in support of demurrer, which was served on said firm on said 15th day of December. That thereafter, and on the 16th day of December, the said firm of Campbell, Metson & Campbell received a copy of the notice of sustaining of the demurrer, with 10 days to amend, said notice specifying that said demurrer had been by the above-entitled court, Department No. 2 thereof, sustained. That affiant, believing that said notice was an error, and that it had been based upon what affiant believed to be an erroneous and incorrect entry in the Recorder of said 13th day of December, caused inquiry and investigation to be made at the office of the county clerk of the city and county of San Francisco, and on the 18th day of December, requested Thomas A. Keogh, one of the clerks in the employ of said firm of Campbell, Metson & Campbell, to make such inquiry and investigation. That said Thomas A. Keogh reported back to affiant that he had investigated the records in said cause, and made in the record book in the office of said firm the following entry: 'Barling v. Weeks, Demurrer sustained Dept. 2, December 17, 10 days to amend.' "

Affiant further stated that he believed the report of Keogh, and that it confirmed his former belief as to the error in the entry in said Recorder of December 13th, and he believed that the notice of the sustaining of the demurrer had been erroneously given; that he was also influenced in this belief by the additional fact that the amended demurrer had been submitted on December 5th upon briefs, whereas the entry in the Recorder with respect to the sustaining of the said demurrer, and also the notice received by affiant's firm, referred to the demurrer of defendant, and not to the amended demurrer. The affidavit was accompanied by the usual affidavit of merit made by plaintiff, and by a verified amended complaint offered for filing.

From the foregoing facts we cannot say that the court abused its discretion in finding that the default was entered through the excusable mistake of plaintiff.

It is further urged that the default should not have been opened, nor leave granted to file the amended complaint, because the same was not in furtherance of justice. The original complaint set forth an action to recover money paid by plaintiff as surety upon a note, although she did not appear to be such surety on the face of the note. The original complaint does not allege an assignment, indorsement, or transfer of the note to plaintiff, but she sought to recover upon an implied assumpsit arising from the fact that as surety she had paid the note. A copy of the note is attached to the complaint, and it appears to be stamped "Paid." A demurrer that the action was barred by section 339, subd. 1, Code of Civil Procedure, was sustained, with leave to amend.

In the amended complaint it is alleged that the note was transferred and assigned to plaintiff, and she seeks to recover as the owner of the note. Upon this theory of her case the action is not barred by the above section, and it is not contended that the amended complaint does not state a cause of action. It is, however, insisted that the amended complaint is inconsistent with the facts set forth in the original, and therefore must be false and sham, and an order allowing the same to be filed would therefore not be in furtherance of justice. Upon this point much stress is laid upon the fact that the copy of the note set forth in the original complaint does not appear to be indorsed to plaintiff, but bears the stamp "Paid" upon its face. This may all be true, and yet the note may have been transferred and assigned to plaintiff. It may have been transferred and assigned by a separate instrument, and the fact that the note is stamped "Paid" is not conclusive on this point. The amended complaint is duly verified, and the motion was accompanied by an affidavit of merit, in which plaintiff stated that she had fully and fairly stated all the facts of the case to her counsel, and after such statement she was advised by them and believes that she has a good, true, legal, and meritorious cause of action against defendant on its merits. We see no reason to hold that the trial court abused its discretion in opening the default or in allowing the amended complaint to be filed.

The order is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 500

ARNOLD v. WOOLLACOTT et al. (Civ. 287.)

(Court of Appeal, Second District, California. Dec. 1, 1906. Rehearing Denied by Supreme Court Jan. 28, 1907.)

BROKERS—COMPENSATION—FAILURE TO COMPLETE TRANSACTION.

Defendant, the owner of a building, informed plaintiff, a real estate broker, that he desired a tenant, and stated that plaintiff should bring him an offer if plaintiff could get one. Plaintiff then presented the question to a third person who made two written offers to defendant, both of which were declined, after which the one making the offer told plaintiff that the matter was ended, but, several weeks after such offers had been declined, the one who had made them entered into negotiations with defendant, which resulted in the making of a lease. *Held* that, in the absence of any evidence of bad faith to defeat the rights of plaintiff to a commission, the facts did not show him entitled to the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 85-89.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by W. R. Arnold against H. J. Woollacott and others. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, defendants appeal. Reversed.

Lawler, Allen & Van Dyke, for appellants. W. P. L. Stafford and F. C. Austin, for respondent.

SMITH, J. This is an appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial. The complaint alleges that the plaintiff with his assignor, as copartners and brokers, procured a tenant for the defendants for the two upper floors of the building in the city of Los Angeles known as "Leonide," and that defendants promised and agreed to pay the plaintiff and his copartner therefor a commission of 1½ per cent. of the aggregate rentals to accrue during the term of the lease, amounting to $378, no part of which has been paid, etc. The court finds these allegations to be true, and also finds the specific facts of the transaction as it understood them. But the case presented by the evidence, in which there is no material conflict, is, we think, essentially different from the case found, and is as follows: The transaction under which the plaintiff's cause of action grew is thus detailed by the plaintiff, referring to his first interview with Mr. Woollacott touching the renting of the building in question, and to a pending offer from another party on which a deposit had been paid: "I asked him if he was in a position to consider an offer from another party, and he said he was. I asked him what rent he wanted, and he told me $450 a month. I told him then I thought the rent was too high; he would not be able to secure it. He told me it might be so, but to bring him an offer if we could get one. I then spoke to him and asked him what commission he would be willing to pay if we were successful in procuring a tenant, and he asked me what we would charge and I told him 1½ per cent. on the entire amount. He said that was satisfactory. * * * I told him I would endeavor to secure him a tenant." Plaintiff then presented the matter to one Grider, by whom the firm had been previously employed, advising him to rent the building; and accordingly two written offers were made accompanied by Mr. Grider's check in each case for two months' rent. The second offer was made May 12th and proposed to rent the building for $372 a month for the year ending January 1, 1906, and $403 per month for the remaining portion of the term. In the concluding paragraph of this offer is contained the statement: "This order is made for immediate acceptance." The previous offer was in the same terms, except the amounts of rental proposed, which were less. When the second offer was declined, plaintiff reported the matter to Grider and returned to him his check. On this occasion he testifies: "I urged upon him to increase his offer. He didn't give me any positive assurance that he would or would not. In fact, he seemed at that [time] rather adverse to increasing his offer. I believe he stated at that time that he had offered all the building was worth." Afterwards, "in the latter part of May or the early part of June," the plaintiff learned that Mr. Grider had leased the building, and thereupon called upon the defendant, Woollacott, who admitted the fact. The date of the lease was July 15th, but the oral agreement for the lease had, perhaps, been consummated some time previously. The plaintiff claimed he was entitled to commission, which the defendants denied. Grider, as a witness for the plaintiff, testifies that when the declination of his second offer was reported to him by Cason & Arnold, "they asked me * * * 'did I want to make another proposition?' They returned the checks. I told them 'No'; I thought I had come up as high as I could on the lease. * * * When they returned the checks, * * * I said in a business way that ended it with me; I had nothing to say, and I immediately figured with Mr. Cason on other property." It also appears from the testimony of Grider, as well as from that of the defendant, Woollacott, that, prior to Wollacott's employment of Cason & Arnold, Grider had examined the building with a view to leasing it, and obtained from Woollacott the terms on which he proposed to lease it, which, apparently, Grider thought were too high. The plaintiff's partner, Cason, was also examined, but his testimony adds nothing to that of the plaintiff. A motion for a nonsuit was made by the defendants on appropriate grounds and denied.

This, we think, should have been granted. There was a proposition upon the part of the defendants to the plaintiff's firm that they would pay the agreed commission upon their procurement of a tenant at the rental of $450 a month; but nothing was done by the plaintiff's firm to meet this proposition. There was also a proposition from the defendants that plaintiff's firm might "bring [them] and offer if [they] could get one." This, if accepted, would have equally entitled the firm to its commission, and accordingly the firm did make to the defendants the two propositions of Grider. But these were finally declined. This, we think, ended the matter. It was optional with Grider to discontinue the agency of the plaintiff's firm, and this he did. It might have been otherwise had an irrevocable agency been given to them. Nor were the defendants at all concerned with the relations between him and the plaintiff's firm. They had authorized the firm to make them an offer. This had been done and they declined it. When Grider came to him, therefore, several weeks after these offers had been declined, unless he had notice of some existing relation between the firm and Grider giving them the exclusive agency for him, they were at liberty to deal with him. Nor is there any evidence, in the record of bad faith on their part, or that of Grider, or of any fraudulent combination between them to defeat the rights of plaintiff's firm to a commission, assuming that it had any. It may be added that, during the period of more than two months elapsing before the execution of the lease to Grider, no other offer had been made by the plaintiff's firm. Nor was it in their power to make a proposition for Grider without his concurrence.

The judgment and order appealed from are reversed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 482

STEBBINS v. LARSON. (Civ. 281.)

(Court of Appeal, Second District, California. Nov. 27, 1906.)

1. APPEAL—DECISIONS REVIEWABLE—ORDER OF NONSUIT.

No appeal lies from either an order of nonsuit or an order directing judgment on a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 721, 722.]

2. SAME—DISMISSAL—DEFECTS IN RECORD.

An appeal from a judgment of nonsuit must be dismissed where the transcript fails to disclose a final judgment.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Tracy N. Stebbins against L. P.

Larson. From an order of nonsuit, plaintiff appeals. Dismissed.

Geo. A. Corbin and A. M. Gates, for appellant. F. H. Thompson, for respondent.

GRAY, P. J. This action is brought to enforce specific performance of a contract. Upon the trial, at the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit upon certain grounds stated in said motion. The motion seems to have been granted. The only recital in relation thereto that we find in the transcript on appeal is as follows: "Minutes Superior Court. Dept. 2. November 2, 1905. Order Granting Motion for Nonsuit. [Title of Cause.] Defendant's motion for nonsuit is granted and judgment of nonsuit is ordered." The notice of appeal is "from a judgment of nonsuit therein made and entered in the said superior court on the second day of November, 1905, in favor of the defendant in said action and against said plaintiff, and from the whole thereof." We find nothing in the transcript indicating that any final judgment was ever entered in the case, except as above quoted. The order quoted above does not purport to be, and is not in fact, a final judgment in the case, and under the law no appeal is permissible from either an order of nonsuit or from an order directing judgment on a nonsuit. Kimple v. Conway, 69 Cal. 71, 10 Pac. 189. Nor can we entertain an appeal from a judgment of nonsuit where the transcript fails to set out or disclose a final judgment. Granger v. Richards, 126 Cal. 635, 59 Pac. 118. See, also, Estate of Moore, 143 Cal. 493, 77 Pac. 407.

Upon the authority of the foregoing cases the appeal is dismissed.

We concur: SMITH, J.; ALLEN, J.

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4 Cal. App. 505

NATIONAL PARAFINE OIL CO. v. CHAPPELLET. (Civ. 264.)

(Court of Appeal, First District, California. Dec. 3, 1906.)

1. Corporations — Stock — Assessments — Personal Judgment—Recovery.

The liability of a stockholder in a corporation, as well as the right of the corporation, to recover a personal judgment for an assessment on the stock, exists solely by virtue of Civ. Code, §§ 331–349, so that a strict compliance by the corporation with such provisions is essential to a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 368, 370.]

2. Same — Time of Payment — Delinquent Sale—Extension.

Civ. Code, § 345, provides that the dates fixed in any notice of assessment or notice of delinquent sale of corporate stock for nonpayment of assessments, published according to the provisions of the section, may be extended from time to time for not more than 30 days by order of the directors, entered on the records of the corporation, etc. *Held*, that such section did not authorize an indefinite number of extensions, provided each was for a period of less than 30 days, but only authorized extensions for 30 days in the aggregate.

3. Same—Sale of Stock—Waiver—Personal Action.

Civ. Code, § 345, authorizes the extension of any notice of assessment of corporate stock and notice of delinquent sale for not more than 30 days; and section 349 declares that on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of delinquent stock, the directors may elect to waive further proceedings for the collection of delinquent assessments and proceed by action to recover the amount of the assessment, the costs and expenses already incurred, or any part or portion thereof. *Held*, that where a corporation, by making several extensions of time to pay assessments, together with the date of the delinquent sale, for a period exceeding 30 days, had lost its right to sell the stock for nonpayment of such assessments, it could not thereafter waive further proceedings to sell the stock and proceed to collect the assessments by suit against the stockholder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 391–393.]

Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by the National Parafine Oil Company against Felix Chappellet, Jr. From a judgment for defendant, plaintiff appeals. Affirmed.

Hill & Ryker, for appellant. W. R. Davis, for respondent.

HARRISON, P. J. The plaintiff is a corporation organized under the laws of this state, and on September 8, 1902, its board of directors made an order levying an assessment upon its capital stock, and in said order fixed October 15th as the day on which any unpaid assessment should be delinquent, and November 3d as the day for the sale of delinquent stock. October 13th said board of directors, by an order duly passed and entered upon its records, extended the date fixed in the notice for said assessment to become delinquent until November 11th, and the date fixed therein for the sale of delinquent stock until December 1st. November 29th, by another order, the board extended the date fixed for the sale of delinquent stock until December 15th, and on December 13th again extended the date for said sale until January 8, 1903. Appropriate notices of each of the above orders were duly published. January 8, 1903, said board of directors, by resolution entered upon its records, elected to waive further proceedings for the collection of delinquent assessments upon the shares of capital stock held by the defendant by sale of said stock, and elected to proceed to recover the amount of the assessment by action, and thereupon the present action for such recovery was commenced. At the time of levying the assessment, and thereafter until the commencement of the present action, the defendant was a stockholder of the plaintiff, having 34,920 shares of its capital stock standing in his name upon its books. To the complaint setting forth the foregoing facts the defendant demurred, upon the ground that it did not state a cause of action, and, his demurrer having been sustained, the plaintiff has appealed.

The liability of the defendant, as well as the right of the corporation to recover a personal judgment against him for the amount of the assessment, exists solely by virtue of the statute (Civ. Code, §§ 331–349); and a strict compliance by the corporation with the provisions of those sections is essential to its recovery. Section 349 is as follows: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred, or any part or portion thereof." The right of the corporation to recover the amount of the assessment by an action against the stockholder depends upon the condition that it shall have elected to "waive" its right to collect it by a sale of the stock upon which the assessment is delinquent; and if, at the time it elected to proceed by action, it had no authority to make such sale there was no existing right which it could waive. "The term 'waiver,' or 'to waive,' implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver, unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost. * * * Under a statute conferring a special remedy for enforcing a right, and providing that a party may have a different remedy on condition that he will surrender his right to the first, such surrender must be made while he has the right to enforce the original remedy." San Bernardino I. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

Section 345, Civ. Code, is as follows: "The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time for not more than thirty days by order of the directors entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates." The date fixed in the order levying the assessment for the sale of the delinquent stock was November 3, 1902, and under this section could have been extended until December 3d. The orders of the board of directors extending the date beyond this were not only without authority, but were in direct contravention of the provisions of section 345. This section cannot be construed as authorizing an indefinite number of extensions, provided each is for a period of less than 30 days, but is to be construed as limiting the right to extend the dates fixed in the order levying the assessment to 30 days in the aggregate. See Cameron v. Arcata, etc., R. R. Co., 129 Cal. 279, 61 Pac. 955. On January 8, 1903, when the board elected to proceed by action, the corporation had lost its right to sell the stock, and with it its right to proceed by action.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

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4 Cal. App. 444

GOLDSTEIN v. HENSLEY et al. (Civ. 267.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—RESERVATIONS IN DEED.

A contract of sale evidenced by receipt for money recited to be payment on purchase of two lots, "Title guarantied," impliedly agrees that all of said lots shall be conveyed in fee, and is not satisfied by a deed reserving the exclusive right to construct and operate railroads on the streets bounding the lots, and to lay and operate therein and thereon mains, conduits, and wires for gas, water, and electricity.

2. SAME—ACCEPTANCE OF DEED.

A purchaser of land by directing the vendor to make and record a deed does not accept one so made and recorded, but of which he was not informed, making unwarranted reservations.

Appeal from Superior Court, City and County of San Francisco. James M. Troutt, Judge.

Action by S. Goldstein against George A. Hensley and others. Judgment for defendants. Reversed.

Austin Lewis and R. M. Royce, for appellant. Welles Whitmore and R. M. Smith, for respondents.

COOPER, J. This is an action to recover damages for alleged breach of a contract to convey real estate. The findings were for defendants, and judgment was thereupon entered. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

There is no question as to the facts that the plaintiff paid to the defendant the sum of $600 on April 14, 1904, being the purchase price for lots 12 and 45 in block 7 in San Bruno Park, and that defendants agreed to give the plaintiff a deed to said premises. Defendants claim that they did make, execute, and deliver the deed as they agreed to do, and the court found that they did so, and that they complied with their contract. This finding is challenged as not being supported by the evidence, and we are of opinion that the contention will have to be sustained. It may be conceded that the evidence is sufficient to show that a deed was, by the previous request of plaintiff, sent to the county recorder of the county of San Mateo and placed of record, and that, under the circumstances of this case, the evidence was sufficient to show a delivery of the deed which was recorded, but such delivery was not a delivery of the deed called for by the contract, because no such deed was executed. The receipt for the purchase price was as follows: "Apr. 14th, 1904. Received from S. Goldstein the sum of six hundred ($600) dollars, being deposit and part payment on purchase of two lots in San Bruno Park this day sold to him for the sum of $600.00. Title guarantied. Lots applied for, Lots 12–45, Block 7. Geo. A. Hensley, Agent for Hensley-Green Co." This memorandum contained the implied representation that defendants had a good and sufficient title, and that they would execute a proper deed of conveyance transferring such title. The title tendered, under such agreement to convey, must have been free from litigation, palpable defects, and grave doubts, fairly deducible of record, and unincumbered. Without discussing the meaning of the words "title guarantied," it is plain that by it the defendants impliedly agreed to convey a good and sufficient title. It will be presumed that defendants intended, and by implication agreed, to convey all of the said lots and all their interest therein. The deed that was placed of record does not purport to convey the said lots in fee, but reserved certain rights for the use of defendants. The reservation is as follows: "Reserving, however, the exclusive right to construct, operate and maintain street or other railroads through, across, or upon the streets bounding said property, or that may be laid out thereon; said railroads to be operated by such power as to first parties may seem proper; also to lay, operate and maintain through, across and upon said streets, such gas, water and other mains, conduits for electricity, wires or cables as to the first parties may seem proper." This conveyed the property subject to the right of defendants to operate and maintain railroads, to lay and operate gas, water, and other mains, conduits for electricity wires or cables, across or upon the streets bounding the said property. Not only does the reservation apply to the use of the streets bounding said property, but applies to all streets that may in future be laid out thereon. Whether or not the streets, in any event, might be used by public service corporations, or individuals engaged in such business, in supplying the town or the community with necessary means of transportation, gas, electricity, or water, need not be discussed. It is sufficient to say that the reservation in this deed is for the grantors, the defendants here. It is a reservation as to important rights and easements for private purposes. It is a reservation as to land, agreed to be conveyed, that has never been laid out or used as a public street, but that may at some future day be so used. The agreement to convey contains no such reservations, and the deed recorded does not comply with the contract. The finding of the court is not to be given broader scope than the probative facts therein set forth—and hence the deed does not show that a good title was tendered—but, on the contrary, shows a title encumbered by important reservations of rights in the grantors.

It may be conceded that, if plaintiff had accepted the deed, it would have superseded the contract, but he did not accept it. The request to make out a deed and place it of record, if made, was upon the implied understanding and agreement that such deed would convey a good and valid title to the property described in the agreement. Plaintiff cannot be held by the mere fact of the deed being recorded without his knowledge to have accepted the deed, which did not convey the title he bargained for. He went to the office of defendants and made demands for the deed at different times, but did not succeed in securing it. Royce, one of the plaintiff's attorneys, went to the defendants a few days after the plaintiff had paid the money and received his receipt, and demanded a deed for plaintiff. He was informed that defendants would not make a deed under any circumstances, but would fight the case through all the courts. Lewis, the other attorney of plaintiff, went to defendants on another occasion and demanded a deed for plaintiff, but defendants refused to give such deed, and stated that they would not make the deed. Although defendant Smith testified that plaintiff requested defendants to have the deed recorded "and let him know," it does not appear that defendants ever notified the plaintiff that the deed had been made or recorded until after the action was brought. Plaintiff never saw the deed; it was never sent to him or placed in his possession. The first time that plaintiff learned anything about a deed having been made out or recorded was a short time before the trial, when plaintiff's attorney went to defendants' office to see if any compromise could be made, and then defendant Smith said to plaintiff's attorney "I suppose you know about that deed," and then told him that defendants had executed and recorded the deed. Under such circumstances it cannot be held that plaintiff accepted a deed that he had never seen, that did not comply with his contract, that was placed upon record without his knowledge, and of which he had no information until long after this action was commenced. It must be held that the deed was not the deed to which the plaintiff consented that it be recorded, and that plaintiff has never accepted the deed which was placed upon record.

It becomes unnecessary to discuss the value of the property. The finding that defendants "did not refuse to make, execute, or deliver a deed to said property," not finding support in the evidence, necessitates the reversal of the case.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

4 Cal. App. 451

VASEY v. CAMPBELL et al. (Civ. 277.)

(Court of Appeal, First District, California. Nov. 23, 1906. Rehearing Denied by Supreme Court Jan. 22, 1907.)

REPLEVIN—FINDINGS—CONSTRUCTION.

In replevin, the court found that plaintiff was the owner of the property and entitled to the possession thereof. It appeared from other findings that the property was adapted to use in carrying on gambling games, and that it was taken possession of under the direction of defendant as district attorney, that plaintiff was arrested for carrying on gambling games, and that at the time of the seizure of the property one article was in use for gambling purposes, but it was not found that the property was intended by plaintiff to be used in violation of the gambling laws of the state, or that it could not be put to any legitimate use. *Held*, that the findings as a whole supported a judgment in favor of plaintiff.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by M. G. Vasey against J. H. Campbell and another. Appeal by defendant Campbell from a judgment in favor of plaintiff, and against such defendant. Affirmed.

J. H. Campbell, for appellant. W. A. Beasley, for Frank H. Ross. Cobb & Rea, for respondent.

HALL, J. This is an appeal by defendant Campbell from a judgment in favor of plaintiff and against Campbell for the recovery of certain personal property, and $1 damages for the detention thereof, and comes to this court upon the judgment roll.

The complaint is in the usual form of an action for claim and delivery of personal property. The contention of appellant is that although the court in express terms found "that the plaintiff is now, and for more than one year last past has been, the owner of and entitled to the possession of" the property sued for, the judgment is not supported by the findings, because from other findings it appears that the property sued for is ordinarily used in playing a banking game prohibited by the statutes of this state. The finding that the plaintiff is the owner of and entitled to the possession of the property is a finding of an ultimate fact, and with the other findings as to the possession of the property by defendant, the demand for the delivery thereof, the refusal to deliver the value and damage are sufficient to support the judgment.

It is insisted, however, by appellant that the findings as a whole do not support the judgment, and that the same should be reversed, because, as it is claimed, other findings show that the property sued for is used for the purpose of playing a banking game prohibited by the statutes of this state, and was taken possession of under the direction of defendant as district attorney. An examination of the findings discloses that it is nowhere found that plaintiff ever used any of the property recovered for gambling purposes, or that any of it was ever so used with his knowledge, or that he intends to so use it in the future, or that it can only be used for such purposes. Thus, while it is found that a bird's-eye ball-bearing wheel "is commonly known as and used as a roulette wheel, and that roulette is a gambling game and a banking game; that plaintiff has used said roulette wheel for other purposes not unlawful"—it is not found that plaintiff used it for unlawful purposes. As to a cardholder, it is found that it "is an ordinary cardholder, capable of being used in numerous legal ways, but is commonly known as and used as a faro bank cardholder."

It is found that a square indicator and rectangular board and composition checks have been and may be used as a faro lay-out in the game of faro; that a certain table "is commonly known as and used as a crap table in the game of craps, which is a banking game, but that said table might be used for any of the ordinary purposes for which any table might be used; * * * that all of said property above mentioned is ordinarily used in playing a banking game or gambling game, prohibited by the statutes of this state, but is harmless when not so used."

The court further found that plaintiff was arrested for carrying on gambling games, and that at the time of the seizure of the property the crap table was in use and the game of craps was being played thereon, but none of the other property was being used, and that at the time of the commencement of this action none of the property was held as evidence or to be used as evidence in any criminal action or proceeding.

Going back to the finding that plaintiff is the owner and entitled to the possession of the property sued for, the question is presented: Do the other findings overcome the effect of such finding? The finding of ownership and the right to the possession of the property is the finding of an ultimate fact upon which the right to recover depends. The finding follows the allegation of the complaint, which is in the usual and approved form for an action of claim and delivery. See Daly v. Sorocco, 80 Cal. 367, 22 Pac. 211; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738. "Findings should state the ultimate facts pleaded, and not probative facts." McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14. "The only purpose of the findings is to answer the questions put by the pleadings, and, if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient." Dam v. Zink, 112 Cal. 91, 44 Pac. 331. Findings as to ultimate facts control as against findings of probative facts. Barraute v. Garratt, 50 Cal. 112; Gill v. Driver, 90 Cal. 72, 27 Pac. 64; Smith v. Acker, 52 Cal. 217; Brown v. Mutual, etc., Ass'n, 137 Cal. 278, 70 Pac. 187. Findings should be construed so as to uphold rather than to defeat the judgment. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257.

It may be conceded for the purposes of this case that if it had been found that the property sued for was intended by plaintiff to be used in violation of the gambling laws of the state, and that it could not be put to any legitimate use, replevin would not lie for the recovery thereof. Board of Police Com'rs, etc., v. Wagner (Md.) 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423. But applying the principles above set forth concerning the interpretation of findings we have no such case. In the face of the express finding that plaintiff is the owner and entitled to the possession of the property sued for, we cannot infer from the finding that the property is commonly used for unlawful gambling, and that a part was being so used when seized by defendant's order; that plaintiff ever so used it, or intends to so use it; or that it cannot be used for lawful purposes. The finding that the articles are commonly used for unlawful gambling purposes suggests the inference that plaintiff seeks the possession of the property with the object of using it for such purposes, and together with other evidence would have justified a finding to that effect by the trial court. But we cannot indulge in such inferences in the face of the express finding of the ultimate fact that plaintiff is entitled to the possession of the property sued for.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 438

HUMBURG v. LOTZ. (Civ. 262.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. Joint Adventures—Mutual Rights and Duties.

Under Civ. Code, §§ 2411, 2228, respectively, prohibiting partners and trustees from obtaining any advantage over their partners and beneficiaries by misrepresentation or concealment, where defendant obtained property which was turned into an enterprise formed jointly with plaintiff for $5,000, but represented to plaintiff that it cost $8,000, plaintiff, having contributed to the enterprise on that theory, could, upon discovering the concealment, recover one-half of the $3,000; it being immaterial whether plaintiff was injured financially or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Joint Adventures, §§ 3, 6.]

2. Same—Immateriality of Relationship.

In an action to recover one-half of a $3,000 advantage defendant obtained over plaintiff by concealment in the purchase of property used in a joint enterprise, it was immaterial to plaintiff's right of recovery whether the relationship between them was technically a partnership or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Joint Adventures, § 7.]

3. Same—Action Between Parties—Findings—Sufficiency.

Where, in an action to recover one-half of a $3,000 advantage obtained by defendant over plaintiff by concealment in the purchase of property used in a joint enterprise, defendant answered that, being the owner of an option to purchase the property, he bargained with plaintiff to sell an undivided one-half interest in the property for $4,000, the court's finding that the parties agreed to purchase the property of the owner was, in effect, a finding against such allegation.

4. Same—Defenses.

In an action to recover one-half of a $3,000 advantage obtained by defendant over plaintiff by concealment in the purchase of property used in a joint enterprise, it was immaterial to plaintiff's right of recovery that he and defendant had formed a corporation to conduct the enterprise after the purchase of the property, and that plaintiff sold his shares at a profit.

5. Same—Admissibility of Evidence.

In an action to recover one-half of a $3,000 advantage obtained by defendant over plaintiff by concealment in the purchase of property used in a joint enterprise, it was material to show whether or not plaintiff would have gone into the enterprise had he known defendant was receiving a $3,000 advantage in the transaction.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Henry Humburg against Joseph A. Lotz. From a judgment for plaintiff, defendant appeals. Affirmed.

C. T. Bird and Charles Clark, for appellant. Jackson Hatch, for respondent.

COOPER, J. This is an appeal from a judgment and order denying defendant's motion for a new trial.

The facts, as shown by the findings and the evidence, are substantially as follows: Defendant is a brother of Augustus Lotz, who was during the years 1903 and 1904 the president of the "Sanitary Compressed Air & Suction Dust Removing Company," a corporation doing business in California, and which was at the times herein named the owner of certain letters patent for certain automatic air dust-removing and cleaning devices, and portable wagons, used in its business. In the early part of the year 1903 the said corporation agreed with defendant that he should have the exclusive right to purchase and sell the said letters patent, and the devices and portable wagon in connection therewith, in the territory covered by the county of Santa Clara, for the sum of $8,000, out of which defendant was to be paid a commission of $3,000, making the net price to defendant of $5,000, and this arrangement was in force at all the times the defendant was negotiating with plaintiff. Plaintiff and defendant had known each other for many years, and during such time had been upon friendly terms, and plaintiff had faith and confidence in the honesty, integrity, and friendship of the defendant.

In the month of September, 1903, plaintiff was engaged, and for a long time prior thereto had been engaged, in the business of beating and cleaning carpets in the city of San José, and had a fixed place of business in said city, with a plant and necessary appliances therefor, of the value of $3,000. About this time the defendant, without informing plaintiff anything about his arrangement and contract with the corporation of which his brother was president, went to plaintiff and told him of the merits of the patent and devices of the corporation, and that they were the best and most practical and valuable of such rights and devices. Defendant further told plaintiff that because of the fact that his brother was the president of the corporation he (the defendant) could purchase the patent for Santa Clara county and the devices upon very favorable terms. After several interviews the defendant informed plaintiff that the said patent right and appliances could be purchased for Santa Clara county for $8,000. Plaintiff did not know of the fact that the defendant had an arrangement by which he could purchase the letters patent and devices for $5,000, and had no means of knowing such fact, but relied solely upon the statements and representations made to him by defendant. The result of the interviews was that plaintiff and defendant agreed that they would jointly purchase the letters patent and devices for $8,000, and also the plaintiff's plant at its value, $3,000, making $11,000, and that each should become the owner of and pay for an undivided one-half thereof, $5,500. The plaintiff turned over his plant at its valuation and paid the balance, $2,500. The defendant only paid in $2,500 and not $5,500, and the sum of $5,000 was all that was paid to the corporation for the letters patent and devices.

When the plaintiff and defendant agreed to purchase the letters patent and devices from the corporation for $8,000, they entered into and signed contracts by which they agreed to pay said $8,000 according to the terms of the contracts. The account of sale was kept by the corporation, and the patents and devices charged at the sum of $8,000 to plaintiff and defendant jointly. The corporation, in entering the credit of $3,000, entered it as follows: "Commission account debtor to Joseph A. Lotz and Henry Humburg $3,000." After the purchase of the said letters patent and devices and the plant of plaintiff, the plaintiff and defendant began and for a time carried on the business together in the city of San José. The plaintiff did not discover the fact that defendant had only paid in $2,500, nor the fact that the amount paid to the corporation for the letters patent and devices was only $5,000, until long after the said amounts had been paid and the plaintiff and defendant had been in business together. The defendant concealed the fact from the plaintiff that he could purchase the letters patent and devices for $5,000, and by such concealment procured the plaintiff to pay $3,000 more into the business than the defendant paid. The defendant in his own testimony says: "I did not tell Mr. Humburg about this $3,000 commission to me. * * *" When asked in cross-examination why he did not tell plaintiff about the $3,000 commission, defendant replied: "It was none of his business, nor anybody's business. If I had the option, and I wanted to sell it for $10,000 or $20,000, it was not anybody's business whether I paid $1 or $5 for it. * * * I virtually led him to believe that I was going to put into it the same amount that he did. * * * I did not tell Humburg at the time about my credit of $3,000 because it was not any of his business particularly. I took care of the balance of the money, and if I got a credit by commission for services rendered that was a payment. * * * I told him about October 12th that there was paid $8,000." He further testified, in speaking of the price paid to the corporation: "They agreed to let it go to me at $5,000, and I sold it for $8,000." The defendant declined to repay to the plaintiff one-half of the excess paid by plaintiff into the business, and hence this action.

Upon the findings judgment was entered for plaintiff for the sum of $1,500, and we are of the opinion that the judgment is correct. Upon plain principles of common honesty the plaintiff was entitled to recover. Defendant was entering into a business arrangement with his friend, and he knew that his friend believed they were going in on equal terms. He informed the plaintiff that he could make the purchase of the letters patent and devices upon favorable terms for the reason that his brother was president of the corporation. Defendant did not disclose the true facts to plaintiff. Honesty and fair dealing required that he should have done so. When the plaintiff and defendant agreed to enter into the common enterprise together, each one became the agent of the other in regard to the purchase of the property and the management of the business. They occupied fiduciary relations to each other, and neither one could take advantage of the other for his own benefit by dealings in the name of both and in furtherance of the common enterprise. Defendant was bound to act in the highest good faith to plaintiff. He will not be allowed to obtain any advantage over him by misrepresentation or concealment. Civ. Code, §§ 2411, 2228; King v. Wise, 43 Cal. 628; Richards v. Fraser, 122 Cal. 460, 55 Pac. 246.

It is urged by appellant that the plaintiff cannot recover, because he has not shown that he suffered any financial injury by reason of the matters alleged and found. He did suffer damage by reason of the fact that he paid $1,500 more than he would have been required to pay if defendant had paid his just part of the purchase price. But aside from this the proposition is without merit. A person standing in a relation of trust and confidence with another will not be upheld in violating his trust to his own benefit because the entire trust transaction did not injure the party whose trust has been betrayed in the particular transaction. Each party in such case has the right to enjoy his proportion of the benefit of a bargain made by either. Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486.

The findings support the judgment. While they are very full, and contain some unessential matters, we conclude, after a careful examination, that all the material portions of them are supported by the evidence. It was not necessary for the court to find in express terms upon the issue made by the pleadings to the effect that plaintiff and defendant entered into an agreement, by the terms of which they were to become copartners. The finding of the probative facts shows the position they occupied towards each other in the transaction, and whether they were copartners in the technical sense is immaterial. The answer contained the following averment: "That on or about December 18, 1903, this defendant, being the owner and holder of said option, as aforesaid, bargained with and agreed to sell to Henry Humburg, plaintiff herein, for the sum of $4,000, an undivided one-half interest in and to said patent right to use said devices and portable plant in Santa Clara county." Complaint is made that there is no finding upon this allegation. Upon an examination of the findings we are of opinion that they in effect find against defendant on the allegation. The court found that the plaintiff and defendant agreed, by virtue of certain written contracts, to purchase of the corporation the letters patent and devices. This is inconsistent with and negatives the allegation of the answer referred to.

The allegation in the answer as to a transfer and sale of stock by plaintiff in a corporation that had been created was wholly immaterial. The fact, if true, that plaintiff and defendant formed a corporation to conduct the business after the purchase, and that plaintiff sold his shares at a profit, would not justify the defendant in keeping the $1,500 which in justice he owes to the plaintiff.

In direct examination the plaintiff was asked by his counsel the following question: "Q. If you had known that he had a credit of $3,000 at the time and was to pay $2,500 only, would you have gone into the arrangement?" Defendant claims that the court erroneously overruled his objection to the question. We find by an examination of the record that the question was not objected to until after the witness had answered, and then no motion was made to strike out the answer. The question was then objected to upon the sole ground that it was immaterial. The subject-matter of the question was certainly material. It was material to know whether or not the plaintiff would have gone into the arrangement if he had known that defendant was taking advantage of him to the extent of $1,500. There was no error in the ruling.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 488

HARRON, RICKARD & McCONE v. WILSON, LYON & CO. (Civ. 196.)

(Court of Appeal, First District, California. Nov. 28, 1906.)

1. SALES — CONDITIONAL SALES — CONSTRUCTION—EVIDENCE.

Whether the parties to a transfer of personal property, the title to which does not pass until the purchase price is paid, intended to make a sale, in the absence of evidence of subsequent conduct of the parties, must be ascertained from the terms of the instrument.

2. PLEADING—ANSWER—SEPARATE DEFENSES —COUNTERCLAIM.

In an answer setting up separate defenses and a counterclaim, the sufficiency of each defense as well as the counterclaim is to be determined without reference to matters elsewhere set forth in the answer, unless connected therewith by direct reference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 192.]

3. BAILMENT—ACTIONS—PLEADING—DEFENSE.

In an action to recover for machinery transferred under an instrument specifying a certain sum for use of the property and another sum for which it might be purchased after payment of the rent, the answer admitted the allegations of the complaint, but alleged that the instrument was executed and possession taken under a warranty that the machinery had a certain capacity which it did not have; that the agreement to take and pay for it was in consideration of such warranty; that it was not fit for the purposes for which it was purchased, and has always been useless; and that on ascertaining such facts an offer to return it was immediately made. *Held* not to constitute a defense, as the admission did not give a construction to the instrument different from that derived from its language, and the allegations as to warranty and purchase were by way of recital, and those as to ascertaining defects and offer to return were uncertain.

4. SAME.

In an action to recover rent for machinery transferred under an instrument specifying a certain sum for use of the property, and another sum for which it might be purchased after payment of the rent, the answer set forth an agreement of plaintiff to sell certain machinery at an agreed price, which he warranted to have a certain capacity and to be fit for the purposes for which defendant stated to plaintiff it desired to obtain machinery, and defendant agreed to purchase on that condition, that it did not possess that capacity, and that on ascertaining such fact defendant offered to return it, but plaintiff refused to take it back. *Held* not to constitute a defense, as it did not apparently relate to the transaction on which the action was brought.

5. PLEADING—COUNTERCLAIM.

In an action to recover rent for machinery transferred under an instrument specifying a certain sum for use of the property, and another sum for which it might be purchased after payment of the rent, defendant set up as a counterclaim an agreement to purchase certain machinery of plaintiff under a warranty, that defendant paid for the machinery, and that it was not as warranted, by reason of which defendant sustained damages to an amount specified. *Held*, that the counterclaim was not well pleaded, as under Code Civ. Proc. § 438, it is necessary either that the counterclaim arise out of the same transaction on which suit is brought or upon contract when plaintiff sues on contract, and aside from payment no specific or substantial damages were pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 294.]

6. Same—Proof—Evidence Admissible.

A pleading is defective when no evidence is admissible in its support.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Harron, Rickard & McCone against Wilson, Lyon & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Owens and Frank J. Hennessy, for appellant. Chickering & Gregory, for respondent.

HARRISON, P. J. Action to recover from the defendant rent for the use of certain personal property according to the terms of a lease thereof, amounting to the sum of $956.28. It is alleged in the complaint that on May 11, 1904, the plaintiff and the defendant entered into and executed a lease in writing of certain personal property (setting forth a copy thereof); that upon the execution of said lease the defendant, by virtue of its provisions, took possession of the property therein described, and has ever since retained the possession thereof, and that no part of the money therein agreed to be paid by it for its use has been paid, and asking judgment therefor.

The following is a copy of the said lease, viz.:

"Lease.

"Harron, Rickard & McCone, of San Francisco, California, lessor, hereby leases unto Wilson, Lyon & Co., 220 Market street, San Francisco, lessees, the following property for the period of three (3) months from the 10th day of May, A. D. 1904, to wit:

"1—No. 1 American Hoist & Derrick Co. Double Friction Drum Hoist with 15 H. P. Type 'C' Westinghouse Motor direct connected to sketch.

"1—Gipsy for front drum of hoist.

"Said property is to be used only at Franklin, Contra Costa Co., California, and said lessees agree to pay to said lessor at San Francisco, for the use of said property the sum of nine hundred and fifty-six and 28-100 dollars ($956.28) payable as follows:

"June 20th, 1904, four hundred seventy-eight and 14-100 ($478.14).

"July 20th, 1904, four hundred seventy-eight and 14-100 ($478.14).

"Said lessees agree that they will pay the rent at the times and in the manner aforesaid; that they will not permit said property, nor any part thereof, to be affixed to real estate, nor removed from where it is to be used aforesaid, nor to deliver the same to anyone, nor suffer it to be taken away by anyone, except lessor, nor in any manner transfer or attempt to transfer this lease, or any interest therein, or in said property, without the written consent of lessor; that they will keep said property in good condition and repair, and pay all expenses relating to said property, hereafter incurred, including transportation thereof, and all damages to said property suffered by lessor. Said lessees further agree to insure said property in the name of lessor, and that the policy shall be held by lessor.

"It is further agreed that time is of the essence of this agreement, and that upon the failure of the lessee strictly to keep and perform any of the covenants or provisions hereof, by them agreed to be performed, then and thereupon without any notice this instrument shall be deemed to be canceled and of no further effect as against lessor, and all rights and interests of lessee in or to said property shall cease, and all rent by lessee theretofore paid shall belong to lessor as full payment for the prior use of said property, and lessor shall be entitled to take into its possession all said property.

"Said lessor further agrees that upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall then (but not otherwise) have the right to purchase said property by the prompt payment to lessor of the sum of two and 00-000 ($2.00) dollars.

"Witness the hands and seals of the parties hereto this 11th day of May, A. D. 1904.

"Harron, Rickard & McCone. [Seal.]
"J. O. Harron.

"Witness to signature of
"Harron, Rickard & McCone,
"E. A. St. Germain.

"Wilson, Lyon & Co. [Seal.]
"Per J. A. Byrne, Act. Pres.

"Witness to signature of
"Wilson, Lyon & Co.,
"E. A. St. Germain."

In its answer to the complaint the defendant made no denial of any of its allegations, but set forth two separate and distinct defenses thereto and also a counterclaim against the plaintiff for the sum of $1,265.72, for which it asked judgment in its favor. The plaintiff demurred to the answer of the defendant on the grounds of ambiguity and uncertainty, and also of its insufficiency to constitute a defense; and also demurred to the counterclaim upon the same grounds. The court sustained these demurrers, and, the defendant declining to amend, judgment was rendered in favor of the plaintiff as prayed for in its complaint. From this judgment the present appeal has been taken.

1. Instruments connected with the transfer of personal property from one person to another, which is in reality a purchase and sale of the property, but where the vendor seeks to retain his ownership until he has been fully paid the purchase price, have been frequently presented to the courts for construction, but the question has generally arisen in actions for determining the right of possession or ownership of the property involved in the transaction; and, when it appears from the terms of the instrument that the intention of the parties was to make a sale of the property, courts will give such construction to the instrument irrespective of

the name by which the parties have designated it. This intention, however, in the absence of any evidence of subsequent conduct of the parties in reference to their rights under the instrument, is to be ascertained from the terms of the instrument itself. "The question is always one of intention, and whenever, upon a proper construction of the instrument, it appears that it was the intention of the parties thereto that the sale should be conditioned upon the payment of the price, it is the duty of the court to carry out that intention." Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448. "The question is to be determined wholly by the intent of the parties expressed in and deducible from the contract itself. In arriving at the solution of the question, the whole contract is to be considered, and no detached term or condition to be given prominence or effect over and above another." Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. The construction to be given to the contract "is found in the ruling intention of the parties gathered from all the language they have used." Herryford v. Davis, 102 U. S. 235, 26 L. Ed. 160.

The case herein presented does not involve any question of ownership or right to the possession of the property described in the instrument, but simply calls for the construction of the instrument for the purpose of determining whether any obligation on the part of the defendant is thereby created in favor of the plaintiff. The defendant admits its execution of the instrument, and that it took and still has the possession of the property described therein, and it does not allege any facts tending to show that the instrument does not correctly set forth the transaction between it and the plaintiff, by virtue of which it received the property. The instrument is entitled "Lease," and by its terms the plaintiff "leased" the property therein described to the defendant for the term of three months, and the defendant agrees to pay to the plaintiff "for the use of the property" the amount of money sued for "at the times and in the manner" designated in the instrument. These are terms peculiarly appropriate to instruments of hiring and lease, and not only do not confer upon the defendant any right in the property except to use it as bailee during the prescribed period, but expressly impose upon it an obligation to pay the plaintiff for such use. The other terms in the instrument restrictive of the manner in which it may use the property are for the benefit of the plaintiff and inconsistent with its ownership by the defendant. The provision giving to the defendant the right, after it should have fully performed the agreements on its part contained in the instrument, to purchase the property by paying to the plaintiff an additional sum of money, placed it under no obligation to make the purchase or to pay the money, and was but an option which it might accept or not as it should choose. And, although the additional sum of money thus to be paid is not large, it is the amount which the parties have agreed upon and made one of the substantive terms of their contract. It is not therefore to be disregarded by the court in determining the construction to be given to the instrument, but this provision furnishes additional ground for holding that the instrument is to be construed as a lease, and as creating a bailment to the defendant without any right of property in the machinery, and an obligation upon it to pay for its use according to the terms of the instrument. As none of the allegations of the complaint are denied, the plaintiff was entitled to judgment as prayed for, unless the facts set forth in the defendant's answer constitute a defense to its cause of action, or establish a liability to the defendant on the part of the plaintiff; and in this connection it is to be observed that the sufficiency of each of the separate defenses as well as of the counterclaim is to be determined without reference to matters elsewhere set forth in the answer, unless connected therewith by direct reference.

2. In the first defense contained in its answer the defendant admits that it entered into and executed the instrument set forth in the complaint, and took possession of the machinery therein described, but it alleges that it executed the instrument and took such possession under a warranty by the plaintiff that the machinery had a certain capacity which it did not in fact have; that its agreement "to take and pay for" said machinery was in consideration of said warranty, and not otherwise; that the said machinery was not fit or proper "for the purposes for which it purchased it," and has always been useless to it; "that upon ascertaining these facts" it immediately offered to return the machinery to the plaintiff, but the plaintiff refused to take it back. The admission that it executed the instrument described in the complaint, without also alleging that the instrument does not correctly represent the nature of the transaction or the terms of the agreement between it and the plaintiff, is unavailing for giving any different construction to the instrument than in accordance with the meaning to be attributed to its language. And although the defendant has alleged that its agreement "to take and pay for" the machinery was in consideration of a warranty by the plaintiff, and that the machinery was not suitable for the purposes "for which it purchased it," these allegations are merely by way of recital, and there is no direct averment that the defendant in any way "agreed to take and pay for" the machinery, or that it ever "purchased" it. An averment by way of recital of a fact which is essential to a cause of action, or an averment from which such fact may be merely inferred, will not supply the absence of a direct averment of the fact. Neither is there any averment that the defendant at any time informed the plaintiff of the purpose for which it desired to obtain or use the machinery.

The allegation that "upon ascertaining these facts" it offered to return the machinery to the plaintiff is defective in failing to state the time at which it ascertained the facts and made the offer; and the demurrer of the plaintiff for uncertainty in this respect was properly sustained by the court. The plaintiff had the right to be informed upon the record whether such offer was before or after the date at which, by the terms of the instrument, the payments for its use matured, or whether it was before or after the defendant had had the use of the machinery during the period for which it was leased. A breach of the warranty would not be a defense to the plaintiff's claim for the rent if the defendant had had the continual use of the machinery until the end of the term for which it hired it, unless it should show that by reason of the breach of such warranty it had sustained some damage, and there is no averment herein of any pecuniary loss.

3. In the second defense contained in its answer the defendant sets forth an agreement upon the part of plaintiff to sell to it at an agreed price certain machinery which the plaintiff warranted to have a certain capacity and to be fit for the purposes for which it stated to the plaintiff that it desired to obtain the machinery; that it agreed to purchase the said machinery upon the condition that it had the capacity warranted by the plaintiff; that the machinery did not possess that capacity, and was not fit for its purposes; "that upon ascertaining these facts" it offered to return the machinery to the plaintiff, but that the latter refused to take it back. The defense here pleaded is the breach of a contract for the sale of certain personal property, while the cause of action set forth in the complaint is the breach of a contract to pay for the use of certain personal property, and, in the absence of any allegation that the two transactions had some connection or some relation to each other, a breach of one of the contracts is not available as a defense to an action for a breach of the other. Upon the face of the pleading it appears that the purchase of the machinery therein alleged was a transaction between the plaintiff and the defendant independent of and in no wise connected with the transaction set forth in the complaint; and, although the property specified has the same description as that described in the complaint, it is not alleged that it is the same property which is alleged in the complaint to have been hired by the defendant, and which, by its failure to deny this allegation, it admits that it did hire, and there is no presumption that it is the same. Proof of all the facts herein alleged would not establish a defense to the cause of action set forth in the complaint unless the defendant should also show the identity of the two transactions; and without the averment of such identity the pleading does not set forth a defense.

4. In its counterclaim the defendant makes the same allegations as in its second defense, except that it does not allege that it offered to return or has returned the machinery to the plaintiff; and in addition to the matters set forth in said defense it alleges that it "did purchase the machines and pay therefor the sum of $958.28," and that "it has sustained damages by reason of the premises to the amount of $1,265.72," for which it asks judgment against the plaintiff. A counterclaim must be (1) a cause of action in favor of the defendant arising out of the transaction set forth as the foundation of the plaintiff's claim or connected with the subject of the action; or (2) if the plaintiff's right arises upon contract the counterclaim must also be a cause of action arising upon contract. Code Civ. Proc. § 438. There is no allegation in the counterclaim herein that the property which the defendant claims to have purchased from the plaintiff is the same as that covered by the lease set forth in the complaint, or that the purchase was in any way connected with the subject of the action, or with the transaction upon which the plaintiff's cause of action is based, and it is therefore unavailable as a counterclaim within the provisions of subdivision 1 of section 438. A counterclaim under subdivision 2 of the section must set forth facts sufficient to constitute a cause of action in favor of the defendant and against the plaintiff, and is subject to the same grounds of demurrer as would be an original complaint. In an action for the recovery of damages, the claimant must allege facts in his complaint which will show that he is entitled thereto.

For the breach of an obligation arising upon contract the party aggrieved is in general entitled to only compensation for the loss or injury proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. Civ. Code, § 3300. "The general damages which are implied from a breach of contract, and which need not be pleaded, must not be confused with special damages, which will not be presumed from the mere breach, but which may have accrued by reason of injuries following from it. Such special damages, if they have accrued, must be pleaded in order that the defendant may have notice of and be prepared to contest them." Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529. Mr. Chitty says: "When the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it"—quoted in Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107.

Aside from the payment to the plaintiff of the purchase price of the machinery, the counterclaim herein does not set forth any fact from which the law would imply that the defendant has sustained any pecuniary damage; and there is no presumption that the machinery is of less value than was paid for it. Neither does it follow, because the machinery is useless to the defendant or not suitable for its purposes, that such value has been diminished; and the defendant cannot therefore, without returning or offering to return it, hold the plaintiff liable to refund the amount which it paid for it.

The measure of damages which is prescribed by section 3314, Civil Code, for a breach of a warranty of the fitness of an article of personal property for a particular purpose, is not to be confounded with the mode of pleading in an action to recover the damages for such breach. In such action the claimant must set forth in his complaint the facts which the section prescribes as the basis for measuring the damages. The "excess of value" which the property would have had, and the "loss incurred" in an effort to use the property which was received, are facts which must be alleged, or the complaint will fail to show that the claimant is entitled to the recovery of such damages. The counterclaim herein does not allege that there was any difference in value between the machinery which the defendant received and machinery of the capacity and quality which the plaintiff warranted it to have; and the allegations that it does not have the capacity warranted by the plaintiff, or that it is "useless to the defendant," or not suited "for the purposes of the defendant," taken in connection with the admission that the defendant still retains its possession, fall far short of showing that the defendant has sustained any pecuniary damage. Neither is there any allegation that the defendant has incurred any expense or sustained any loss or damage by reason of an attempt to use the machinery, or that it has ever used the machinery, or even made any attempt to use it; and it is perfectly consistent with the allegations therein that it has made no effort to use it, and that its defects were disclosed upon a mere inspection of its condition as soon as it was received.

By reason of the allegations of a breach of the plaintiff's contract of warranty the counterclaim sets forth a cause of action for nominal damages, and is good as against a general demurrer; but, as there is no presumption that such breach would ordinarily or in any likelihood result in the amount of damages which the defendant seeks to recover, such damages are special, and the plaintiff was entitled to be informed of the facts out of which they arose, so that it may be prepared, if it so desires, to controvert their existence. The averment that the defendant "has sustained damages by reason of the premises to the amount of $1,265" is its conclusion from facts which were within its knowledge, but which it has not set forth so that it may be seen whether his conclusion is properly drawn, or so that the plaintiff may have an opportunity to controvert them; nor is any fact stated from which the court can determine that such special damage was the result of the breach of the warranty.

In Acheson v. Western U. Tel. Co., 96 Cal. 641, 31 Pac. 583, the complaint, after setting forth facts constituting the plaintiff's right of action, alleged that by reason thereof he was damaged in the sum of $684; and upon the default of the defendant judgment for that amount was rendered against it. Upon an appeal therefrom the Supreme Court reversed the judgment, saying: "The gist of the action is for the recovery of special damages, and there is no allegation of special damage. Nominal damages only were recoverable upon the complaint. No damage, unless nominal, necessarily resulted from the alleged breach of contract." For the breach of a covenant against incumbrances, when it is not alleged that the plaintiff has paid the alleged incumbrance, only nominal damages can be recovered. De Forest v. Leete, 16 Johns. (N. Y.) 122. In Manufacturers' Co. v. Gray, 111 N. C. 93, 15 S. E. 940, which was an action to recover the purchase price of certain real estate, and the defense was the breach of a warranty of the title, and a counterclaim for expense incurred for improvements upon the property, it was held that the latter could not be maintained for the reason that such expenses had not been specially pleaded. See, also, 1 Sutherland on Damages, 754; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Hooper v. Armstrong, 69 Ala. 343; Richardson v. Jones, 1 Nev. 408; Warner v. Bacon, 8 Gray (Mass.) 397, 69 Am. Dec. 253; Stevenson v. Smith, 28 Cal. 103, 87 Am. Dec. 107; Nunan v. San Francisco, 38 Cal. 689; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618.

A pleading is defective whenever evidence cannot be received in its support, and, as there is no allegation in the counterclaim herein of facts under which any evidence of substantial damage would be admissible, the special demurrer of the plaintiff thereto for not setting forth in what manner, or by what facts, the defendant had been damaged in the amount claimed was properly sustained by the court. As was said in Philip v. Durkee, 108 Cal. 300, 41 Pac. 407: "Considered as an action for damages for a breach of the contract, it does state a cause of action, but as such it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage."

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

4 Cal. App. 484

McINTOSH v. ROBB. (Civ. 299.)

(Court of Appeal, Second District, California. Nov. 27, 1906. Rehearing Denied by Supreme Court Jan. 24, 1907.)

1. MINES AND MINERALS — LEASES — FORFEITURE.

Where a mining lease mentioned no specific term but the lessee covenanted to pay a royalty semi-annually, and that the payments should begin on or before six months from the date of the lease, the lessee's delay of 1½ years to operate under the lease, and failure to pay any of the installments during that time, entitled the lessor to a cancellation.

2. ABATEMENT—ANOTHER ACTION PENDING—DISMISSAL OF OTHER ACTION.

Where plaintiff filed with the court a written direction to the clerk to dismiss the action, the fact that the clerk failed to perform his duty to enter a dismissal in his judgment book did not render another action by plaintiff for the same cause obnoxious to a plea of another action pending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 111–117.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by D. McIntosh against H. W. Robb. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

F. P. Willard, for appellant. Luce, Sloane & Luce, for respondent.

GRAY, P. J. This is an action for the rescission, cancellation, and setting aside of a mining lease. The plaintiff had judgment, and the defendant appeals therefrom, and also from an order denying his motion for a new trial.

No specific term is mentioned in the contract, a cancellation of which is sought herein, but said contract is entitled a "mining lease," and it is stated that the same is made "for the purpose—mining minerals or gems, and in consideration of the said demise the said lessee does covenant and agree with the said lessor, his heirs or assigns, to pay and deliver a royalty in amount and conditioned as follows: 10 per cent. of the net proceeds of any, and all, mining operations upon said property from date of this lease and until such a time as the sum of all the separate payments of royalty shall equal fifteen hundred dollars, at which time royalty shall be fully paid up and free to said lessee for a period of fifteen years from date of this lease, provided that payments shall not exceed six in number and shall be semi-annual and shall begin on or before six months from date of this lease," etc. The evidence showed, and it is found by the court, that, by virtue of said contract, the defendant entered upon and took possession of the premises for the period of one month after the date of the lease, the 3d day of December, 1903, and did during that month mine, work, and prospect on said lands to the extent of making a cut in the hillside thereon, about 8 feet in width and 10 or 12 feet in length and 7 or 8 feet deep at the deepest part; that he performed no other work of mining or development upon said property of any amount or value; that thereafter said defendant entirely failed and refused to further enter upon and carry on the work of mining for minerals or gems on said premises, or to do any work of mining or development thereon; that said defendant has at all times failed and refused to pay to plaintiff any royalty or rental for said premises or to perform any of the conditions or to pay any of the considerations provided for in said contract or otherwise. It is further found that on the 6th day of September, 1905, said plaintiff gave notice to said defendant of his rescission of said contract and agreement, and terminated the same by serving upon and delivering to said defendant a written notice of said rescission, as set forth in the complaint, terminating said agreement or lease and requiring said defendant to quit and deliver up to plaintiff said premises.

It appears that for about a year and a half following the first month after the execution of this contract there was an entire failure on the part of the defendant to do anything under the contract, and during all that time he failed to comply with the agreement to pay royalty in direct violation of that portion of the agreement which provides that payments shall not exceed six in number, shall be semi-annual, and shall begin on or before six months from the date of the lease. In contracts of this character there is an implied covenant for diligent search and operation, and, under such a contract, the lessee is bound to proceed with his mining operations with reasonable diligence. As is said in Conrad v. Morehead, 89 N. C. 31, of a similar lease: "It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." See Maxwell v. Todd (N. C.) 16 S. E. 926. As further showing that the lessee was under an implied obligation through the terms of his contract to proceed with his mining operations with reasonable diligence, we cite the case of Ray v. Gas Co. (Pa.) 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922, and quote therefrom: "The clear purpose of the lessor was to have his land operated for oil or gas, and the condition was inserted for his benefit. While the obligation on part of the lessee to operate is not expressed in so many words, it arises by necessary implication. * * * If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express agreement to farm, that the lessee was under no obligation to cultivate the land."

We are of opinion that the delay of a year and a half to operate under the lease, and the failure to pay any of the six-months installments during that time, as provided in the contract, was such a decided failure on the part of the lessee to comply with his contract as warranted the plaintiff in rescinding the same, giving notice of the termination thereof and having the same canceled, and we see no error in the court in granting the plaintiff such relief on the case presented to it. We deem this failure to pay as agreed, and failure to mine for minerals for this long period, as a failure of the consideration upon the faith of which the contract was entered into on the part of the plaintiff, and fully warranted the plaintiff in bringing the contract to an end.

The answer of defendant also sets up as a defense a plea of another action pending, involving the same matters contained in this action. The record of that action was placed in evidence, wherein it appears that on the 3d day of November a demurrer to the plaintiff's complaint in that action was sustained and 10 days allowed to file an amended complaint, and that thereafter, on November 13, 1905, plaintiff's time for filing amended complaint was extended by the order of the court 10 days, to November 23, 1905. On November 22, 1905, before the plaintiff's time to amend his complaint had expired, the plaintiff filed with the court a written order and direction, addressed to the clerk of said court, and directed said clerk as follows: "You will enter the dismissal of the above-entitled action." This was signed by the attorneys for the plaintiff in that case. This formal order and direction to the clerk on the part of the plaintiff, we understand, operated as a dismissal of that action and left the plaintiff to commence a new action at his option. An action so dismissed cannot be pleaded as an action pending, nor does it in any manner interfere with or operate as a defense in a new action. The failure of the clerk to perform his ministerial duties by entering the dismissal and causing a proper judgment of dismissal to be entered in his judgment book should not and cannot be allowed to affect the substantial rights of the parties. "In other words, if plaintiff at that time had the right to dismiss his action and had taken all the proper steps to that end, that right could not be impaired or lost by the refusal of the clerk to perform a plain duty." Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

The judgment and order are affirmed.

I concur: ALLEN, J.

I concur in the judgment: SMITH, J.

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4 Cal. App. 515

BAILEY v. BROWN. (Civ. 247.)

(Court of Appeal, Third District, California. Dec. 3, 1906.)

1. APPEAL—REVIEW—THEORY IN SUSTAINING NONSUIT.

Though a trial judge places his judgment of nonsuit upon insufficient grounds, it will be sustained if it can be supported on any other ground, whether raised by motion or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3406.]

2. BREACH OF MARRIAGE PROMISE—PLEADINGS—VARIANCE.

In an action for breach of a marriage promise, there was a fatal variance between plaintiff's allegation that defendant promised to marry her upon her request at any time and proof that the marriage was not to occur until her mother's death, and therefore a nonsuit was properly allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 25.]

3. PLEADINGS—VARIANCE—EVIDENCE ADMITTED WITHOUT OBJECTION.

Unless plaintiff obtains leave to so amend his complaint as to conform to the proof, an objection on the ground of variance may properly be raised by motion for a nonsuit, though defendant had not objected to the admission of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1438, 1439; vol. 46, Trial, § 364.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Flora C. Bailey against John I. Brown. From a judgment for defendant, plaintiff appeals. Affirmed.

A. J. Thatcher and Weldon & Held, for appellant. McNab & Hirsch and Thomas, Pemberton & Thomas, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover damages for the alleged breach of defendant's agreement to marry her. Upon the conclusion of plaintiff's evidence the court granted defendant's motion for a nonsuit. The appeal is from the judgment on bill of exceptions.

The grounds of the motion for nonsuit were: (1) That the contract testified to is at fatal variance with that alleged in the complaint; (2) that the contract is void as against public policy; and (3) that there is no breach of the contract shown. The court granted the motion on the ground that the contract testified to was "against public policy and in restraint of marriage." No other ground was mentioned in the order made by the court. It is well settled, however, that a nonsuit must be sustained if it might have been properly granted upon any ground. The trial judge may or may not place his judgment upon sufficient grounds. His action will be upheld if it can be justified on any ground, whether made a ground of the motion or not. Miller v. Wade, 87 Cal. 410, 412, 25 Pac. 487; Davey v. So. Pac. Co., 116 Cal. 325, 48 Pac. 117. The complaint avers that "on request the defendant promised to marry the plaintiff, and that the said promise has been from time to time renewed." It appeared from plaintiff's testimony in chief that the question of marriage between her and defendant was first "talked about" by them in 1896, but it is not shown to have taken any definite form until January 5, 1899. Plaintiff testified: "At that time we were talking about some one being engaged to be married, and he said to me, 'let you and me get engaged to be married,' and I said, 'All right, I am willing.'" On cross-examination she stated the matter more definitely. She testified: "The time agreed upon that we were to be married was after my mother's death. That arrangement was not made at the time of our engagement on January 5, 1899; it was subsequent. My mother is still living. * * * After our engagement it was understood that we should not be married until after my mother's death, and that has always been the understanding since that time. * * * I made no immediate plans or preparations for our marriage, which was owing to the fact that we had agreed not to be married until after my mother's death. * * * I said we were to be married when my mother should die." It was admitted by the pleadings that defendant had married another woman shortly before the action was commenced.

It seems clear enough from the complaint that the contract was that defendant agreed to marry plaintiff upon her request at any time. But the contract as testified to was that he agreed to marry her after and not before the death of her mother, who is still living. According to the complaint the marriage was to take place at plaintiff's option and without further condition. Under the contract proven, the marriage was not to take place until the happening of an important event over which neither party had any control, and which might not happen for many years. Indeed, it might not happen at all for plaintiff's mother might outlive one or both the parties to the action. There is an essential difference here between allegation and proof in which case the rule is that defendant is entitled to a nonsuit on the ground of variance. Owen v. Meade, 104 Cal. 179, 37 Pac. 923, and cases there cited. The rule is sometimes thus stated: That the plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may appear from the proofs. Shenandoah M. Co. v. Morgan, 106 Cal. 409, 417, 39 Pac. 802; Davis v. Pac. Tel. Co., 127 Cal. 312, 321, 59 Pac. 698. Unless plaintiff obtained leave to so amend his complaint as to conform to the proofs, the defendant may have his nonsuit, though the testimony was admitted without objection. Tomlinson v. Monroe, 41 Cal. 94; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458.

There was not only a variance between the proof and the allegation, but a failure to prove the cause of action alleged. It may be said that the point is not now available to defendant for the reason that he has by his marriage made it impossible for him to perform the contract as proven. We think, however, that it was till incumbent upon plaintiff to make her complaint conform to the proofs by amendment, upon leave of the court or suffer the consequences by nonsuit. In any view of the case and whatever the effect of defendant's marriage the allegata and probata must correspond. Owen v. Meade, supra.

We express no opinion upon the question as to whether the contract was in restraint of marriage and against public policy. The question is, so far as we have discovered, res integra in this state and, as the judgment may rest upon the point just disposed of, we prefer to leave it open.

Several errors are assigned in the exclusion or admission of evidence, and error also as to permitting defendant to amend his answer. There was no evidence excluded which reflected any light upon the contract or which affected the question of variance above discussed. The rulings, even if erroneous, were harmless in view of that question. The amendment of defendant's answer was within the discretion of the court.

The judgment and order are affirmed.

BUCKLES, J. I concur in the judgment sustaining the nonsuit.

McLAUGHLIN, J. (concurring). I concur in the order affirming the judgment. In my opinion the evidence clearly demonstrates that the plaintiff could not recover even if a complaint was filed containing the most elaborate averments in consonance with the proof. According to plaintiff's testimony the defendant only agreed to marry her upon the death of her mother, who is still in the land of the living. This event might not occur during the lifetime of either of the contracting parties. The contingency upon which the fulfillment of the promise rests is so far beyond the control of the parties, and is so uncertain, that no valid contract could exist. How can it be said that either of these parties are bound by a promise which neither might ever be called upon to fulfill? How could a contract to marry exist when the promisor might never be under a present obligation to marry the promisee, or vice versa? If this good mother should live to a very ripe old age, as mothers sometimes do, no human could tell what might happen. Either of the parties might be waiting for the other, harp in hand, beyond this vale of tears, or both might pine away and die before this promise of future connubial bliss could ripen into a cause of action enforceable in earthly courts. Then, too, age creeps on all apace, and, if the contingency which could make this promise quick with life, as a legal obligation, performable presently, was delayed through many weary years, waning desire and ripened judgment might prompt the parties to acknowledge the wisdom of that rule of public policy which forbids long-continued restraint upon marriage, and frowns upon a contract tantamount to an indefinite postponement thereof. And, if the roseate dreams of youth survived the blasting frosts of age, decrepitude, mental or physical incapacity, infirmities due to weight of years might be urged as defenses not now available to this defendant.

Counsel for appellant, whose ability cannot be questioned, and whose industry has always afforded welcome aid to this court in the consideration of questions by them presented, have cited cases from other jurisdictions supporting a doctrine at utter variance with the views above expressed. But I am unwilling that a rule so repugnant to my reason and so fraught with uncertainty and temptation, should find implied sanction in a decision here rendered. In one of these cases it was said that such a contract was not a restraint upon marriage because the restraint was terminable at the will of the parties. This reasoning does not commend itself to my judgment. To say that restraint might be ended by mutual consent of the parties is to admit the existence of such restraint while such consent is withheld. To say that parties may obviate an objection based on rules of public policy is to admit that some new promise or agreement is necessary to legalize a compact between them. In the case at bar could either of the parties compel the other to give that consent essential to terminate the restraint imposed by their original agreement? Could either of them demand the fulfillment of the mutual promise before the stated contingency happened? These questions must be answered in the negative. Any contract, not wholly denounced by rules of law, may be made enforceable and legal by consent of the parties, no matter how absolutely impotent it might be as originally drawn or made. Parties to a verbal agreement falling within the statute of frauds might consent to reduce their agreement to writing. Parties to a lease of premises for an immoral purpose might consent to remove the taint of immorality, or parties to a fraudulent agreement might consent to waive or remove the taint of fraud. But the legality or enforceability of a contract does not depend upon what the parties thereto might have done or may still do, but upon what they did do at the time the agreement was made. The fact that an invalid contract may be made valid by consent of the parties does not prevent either of the parties from withholding such consent, nor does it prevent either of them from urging such invalidity when the other sues to recover damages for the breach of a contract which is nudum pactum. God alone can tell whether a promise to marry upon the death of a third party will become potent as a personal contractual duty during the lifetime of either of the parties to it. He alone can say whether such a promise will restrain or postpone marriage for one or many years. If a promise to marry was expressly made performable only after the lapse of 10 or 20 years, few courts would be found willing to lend legal sanction to an agreement so at variance with public policy. And what finite being can say that a promise of the character here under consideration would become performable even within 20 years? Human laws deal only with finite knowledge and finite things. They do not attempt to probe the secrets of the infinite, nor make the solution of infinite problems a test of human contractual rights. Hence a promise to assume marital relations with another cannot be made contingent upon the infinite will concerning the span of a third life, without creating uncertainty which the finite mind can neither unravel nor dispel.

Waiving these considerations, however, and assuming that the compact here proven amounted to a contract untainted by uncertainty and uncondemned by public policy, I am still unable to see how a cause of action could be stated. True, the promisor still lives and is married to another, but, according to this record, plaintiff is still blessed with the care, love, and companionship of her mother. The wife of defendant's present choice may precede that mother to the bourne "whence no traveler returns," or divorce, though suspended for one year by our beneficent laws, may sever the existing nuptial tie, and render respondent free to embark on the matrimonial sea for another voyage before the plaintiff can call upon him to take his place by her side. He may, when the oft-mentioned contingency happens, be willing and even anxious to claim the plaintiff as his bride, and, if so, how could she complain? He did not agree to abstain from matrimony until her mother obligingly stepped from the stage of human action, nor did he promise to refrain from loving and cherishing another during the interval which might elapse before his promise could become a present obligation, for the breach of which he could be mulcted in damages. He might feel the need of wifely counsel and comfort during the years and years which might pass away before the plaintiff would be bereft of her parent. True, inconveniences, many and annoying, might result from a marriage ad interim. Adult sons and daughters, fruits of his union with another, might tearfully protest against the fulfillment of his ancient trothplight, but if he should be free of hand, faithful of heart, and ready to abide the promise of his verile youth when plaintiff's mother dies, the plaintiff must needs be content. She can only call upon him to perform his promise when the time arrives, and meantime she must forego compensation in ducats for the breach of a promise he has not yet broken. Her mother still lives, and she must wait until a daughter's filial love and care no longer avails to stay the hand of the destroyer. If, in the fullness of time, this should happen, during the lifetime of both plaintiff and defendant, she might at least be able to prove a breach of this promise, which, in my opinion, was void ab initio, and is void in toto.

4 Cal. App. 460

HERSBERGER v. PACIFIC LUMBER CO.

(Civ. 253.)

(Court of Appeal, Third District, California. Nov. 23, 1906. Rehearing Denied Dec. 22, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

While plaintiff was working around a chute used for the conveyance of waste, he was injured by a piece of edging being forced through a hole in the chute. In an action for the injuries the court instructed that, while the servant assumes all the ordinary risks, he does not assume the risk from defective premises or machinery if the defect was either known to the master or could have been discovered by a reasonable inspection, unless the servant also knew the dangers, and a servant will be held to have known of such defect only when he had actual knowledge thereof, or when the defect was obvious, or when he was put upon inquiry which it was gross negligence for him to neglect, and the burden of showing such knowledge rests on defendant, and also instructed that the servant is not required to use any degree of care to discover defects; it is not his duty to inquire into the safety of the machinery or place of work, but he has a right to rely upon the master to furnish him a reasonably safe place to work and reasonably safe machinery, and may assume that the master has done his duty in that respect. *Held* that, considering the instructions together and applying them to the facts, they amounted to a correct statement of the law.

2. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

An instruction that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, and that, in determining upon which side the preponderance of evidence is, the jury may consider the opportunities of the several witnesses as to the matters about which they testify, their conduct while testifying, their interest in the result, the probability of the truth of their several statements, and that from all such circumstances the jury may determine upon which side is the weight of the evidence, was not erroneous, as it was not argumentative, and the court was not limited to the circumstances enumerated in Code Civ. Proc. §§ 1847, 2061, in relation to the effect of evidence and to presumptions concerning testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 550.]

3. DAMAGES—INSTRUCTIONS.

Civ. Code, § 3333, provides that, in an action for personal injuries, plaintiff shall be entitled to receive the amount which will compensate him for all the detriment proximately caused thereby. In an action for injuries the court instructed that plaintiff was entitled to recover for all damages which he had suffered up to the time of trial, and for all damages that it was reasonably probable he would sustain in the future; that in estimating the damages all the consequences of the injury, future as well as past, should be considered, and that, if the injuries were permanent, such fact must also be considered, and that, if the jury found for plaintiff, such sum should be awarded as in "your best judgment will fairly and fully compensate him for any injuries received by reason of the negligence of the defendant." *Held*, that the instruction as a whole was not erroneous on the ground that the quoted clause was equivalent to a suggestion that the jury might award damages according to any feeling they might have, or on the ground that it suggested anything than that they must exercise their judgment from all the evidence.

4. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—INSTRUCTIONS.

In a sawmill a chute was used for the conveyance of waste and edgings, and it was plaintiff's duty, by means of an iron bar, to stir up the edgings in the chute so that they would slide down, and while engaged in his duties plaintiff was injured by a piece of edging being forced through a hole in the chute. *Held*, that a requested instruction that, if plaintiff was looking into the chute "at the place where he placed the bar * * * and was thereby injured by reason of any edgings coming out of the hole," the verdict must be for defendant, was properly refused as not announcing any principle of law, as stating a fact, and ignoring any negligence on the part of defendant in not providing a safe place to work, and making plaintiff liable if he looked at his work while doing it.

5. SAME.

A requested instruction that, if plaintiff was using the bar in a "careless and negligent manner, being on the wrong side thereof," and while so using the same received the injury, the verdict must be for defendant, was properly refused, as it would make no difference how negligently plaintiff might have been using the bar if the negligence did not contribute to his injury, and as to whether he was on the wrong side of the bar being a question for the jury when inquiring into the cause of the injury.

6. SAME.

In an action for injuries to a servant an instruction that, if the injuries to plaintiff were caused proximately or exclusively by his own negligence or the negligence of any fellow employés, defendant was not liable, was as favorable to defendant on the question of contributory negligence as he was entitled to.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by Nathaniel Hersberger against the Pacific Lumber Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Gillett & Cutler, for appellant. Mahan & Mahan and Coonan & Kehoe, for respondent.

BUCKLES, J. This is an action to recover damages for personal injuries. The case was tried by a jury, which found for the plaintiff in the sum of $7,000, and judgment was entered for plaintiff for that sum.

The appeal is from the judgment and from the order denying defendant's motion for a new trial. The plaintiff was in the employ of defendant in its lumber mill in Humboldt county, and was hurt in the eye by a piece of timber in the course of his employment. The complaint alleges that at the time of said injury defendant maintained and operated in connection with his lumber mill a certain machine known as a "hog," which was used for grinding and cutting up edgings and waste pieces of lumber into small pieces to be conveyed to the furnaces in said mill to be burned. That such waste pieces of lumber were conveyed to said "hog" from the main floor of said mill by means of a chute about eight feet wide at the lower end and had sloping sides so that said waste pieces of lumber would slide down said chute and into said "hog." Said chute was inclined at an angle of 45 degrees. It is further alleged that the sides, bottom, and end of said chute were constructed of planks about two inches thick, and that said chute was partially covered on the inside with sheet iron or boiler iron so as to prevent the edgings and other pieces of waste lumber from coming into contact with the planking of said chute, thereby preventing said planking from becoming worn and damaged, and also to prevent said waste pieces from protruding through sides or end of said chute; that on December 17, 1902, the day of the accident, and for a long time prior thereto defendant maintained said chute in an unsafe, defective, and dangerous condition in this: That the planks on the end or face thereof were so negligently and carelessly fastened that one of said planks became and was loose and dropped down at one end, thereby leaving a crack or hole in the end or face of said chute about three inches wide, through which edgings and other pieces of waste lumber could pass, thereby rendering said chute defective, dangerous, and unsafe; that on said day and for 10 days prior thereto, plaintiff was and had been employed by defendant to attend said "hog," and that on said day plaintiff was engaged in attending said "hog" in pursuance of said employment; that, in order to perform his duties, it was necessary for him to stand near said "hog" and directly in front of the end or face of said chute and very close to the end thereof, and with the aid of an iron bar stir up the edgings and other pieces of lumber that might be thrown into said chute so that they would slide down said chute and into said "hog," and in order to perform said work it was necessary for plaintiff to stand very close to the end of said chute; that on said day while plaintiff was in the performance of his duties a piece of edging about six feet long was violently forced through said hole or crack in the end or face of said chute and struck plaintiff in the left eye, and so impaired it that it had to be and was removed.

The appeal is here on a bill of exceptions containing the evidence, but, as it is admitted that there is a conflict in the evidence on all the material issues raised by the pleadings, and no errors in the admission of evidence being pointed out, we will not consider the evidence at all. The answer denies specifically all the allegations of the complaint, and alleges that the injury suffered by plaintiff was caused by one of the ordinary risks of the employment in which he was engaged, and which he assumed and of which he had full knowledge, and that the injury suffered by plaintiff was proximately and directly caused by reason of his own carelessness and negligence. Error is assigned by appellant in giving so much of instruction 8 as we place in italics. The whole instruction reads as follows: "The defendant also alleges that the injury suffered by plaintiff was caused by one of the ordinary risks of the employment in which plaintiff was engaged and which he assumed, and of which he had full knowledge, but I charge you that, while the servant assumes all the ordinary risks of the business in which he is employed, yet he does not assume the risk from defective premises, machinery, or structures furnished him by the master, if the defect was either known to the master, or could have been discovered by him by a reasonably careful inspection to discover defects, unless the servant also knew the dangers and risks arising therefrom; and *I charge you that a servant will be held to have known of such defect only when he had actual knowledge thereof, or when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross negligence for him to neglect.* And I charge you that the burden of showing such knowledge on the part of the plaintiff rests on defendant." This instruction was given and upheld in Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687, but appellant insists the doctrine thus laid down was overruled in Thompson v. Cal. Const. Co. (Cal. Sup.) 82 Pac. 368. In that case a like instruction was given, and, upon a motion for a new trial being made, the lower court granted the motion upon the sole ground that it had made an error in giving the following instruction: "It is the duty of the employer to furnish an employé with a reasonably safe place in which to do any work the employer shall require of the employé, and to keep that place reasonably safe, and the employé has the right to assume that the employer has performed that duty, and the employé is not required to use any degree of care or diligence to discover danger to which he shall be exposed by reason of the failure of his employer to do his duty, and the employé shall be held to have assumed the risk only when he knew, and will be held to have known only when the danger was so obvious that he must have known or simply neglected to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect."

I do not think instruction 8 in the case at bar is subject to the criticism made in Thompson v. Cal. Const. Co., supra. The following instruction 9 might be. The objection is taken to the italicized part and it reads as follows: "*I instruct you that the servant is not required to use any degree of care or diligence to discover defects.* It is not his duty to inquire into the safety of the machinery or structures or place of work furnished him by the master with or upon which to do work. The servant has a right to rely upon the master to furnish him a reasonably safe place to work, and reasonably safe machinery and structures to work with, because it is the master's duty to do so, and the servant may justly assume that the master has done his duty and furnished him such reasonably safe place, machinery and structure." This instruction or that part objected to would be error standing alone. But with the words of instruction 9 ringing in their ears how could it be possible, under these words, the "servant is not required to use any degree of care or diligence to discover defects," to understand that, if the danger was one that he could not help seeing and the plaintiff did see and yet kept on at work with such danger staring him in the face, and under such circumstances he would not assume the risk himself? Besides, the court in Thompson v. Cal. Const. Co., supra, says: "We express no opinion upon the question whether or not this part of the instruction was correct as applies to this particular case." The court then cites sections 1970 and 1971, Civ. Code, which it says is declarative of the law upon this subject, and these sections read as follows:

"Sec. 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

"Sec. 1971. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care."

Applying the instruction to this case there was a hole three inches wide in the end or face of said chute through which edgings and other pieces of lumber could pass, rendering the chute dangerous and unsafe for any person to work around, and it was while the chute was in this condition and plaintiff working around and about it and in front of the end or face very close to the end of the chute, that a piece of edging or lumber about six feet long was forced through said hole and struck him in the eye. It would seem to us that, under instructions 8 and 9, reading them together, as the court must have done, the jury must have understood that, if the plaintiff could have observed this three-inch hole while standing where and as close to it as he was required to to perform his labor and without hunting around to find it, and kept on at work, he would be contributing to the negligence and likewise to the injury, and thus, under said instructions, would not be entitled to recover, and the burden of proving this knowledge on the part of the plaintiff was upon the defendant. Thus considering the two instructions, we do not think that there was any reversible error in them.

The following instruction is assigned as error: "The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved in the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence." It is claimed that this instruction is argumentative. It does not appear so to us. The court has simply told the jury the common-sense circumstances known to every intelligent juror, by which the statements made by witnesses may be weighed. The court is not limited to the circumstances enumerated in sections 1847 and 2061 of the Code of Civil Procedure. People v. Miles, 143 Cal. 640, 77 Pac. 666. This instruction is general and not applied to any particular witness, and is, therefore, not subject to the criticism made in People v. Hertz, 105 Cal. 663, 39 Pac. 32; People v. Shattuck, 109 Cal. 681, 42 Pac. 315; and People v. Van Ewan, 111 Cal. 149, 43 Pac. 520. In the case of People v. O'Brien, 130 Cal. 1, 62 Pac. 297, a criminal case, the lower court, after having instructed the jury as to admissibility of circumstantial evidence or presumptive evidence, further instructed them as follows: "When direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case." The Supreme Court held this language to be clearly erroneous. The instruction "in its explicit statement it purported merely to state a very common, though not always commendable, tendency of the human mind to act on probabilities and without satisfactory evidence; but it implied that the jury were at liberty to pursue this course. But the law requires the jury to be satisfied or convinced of the guilt of the accused before convicting, and hence permits them to act only on evidence sufficient to produce belief or conviction, or, as expressed in the Code, on 'that degree of proof which produces conviction in an unprejudiced mind.'" But this is not a criminal case where the liability of the defendant must be established beyond a reasonable doubt. We think the reasoning of the Supreme Court in People v. O'Brien has no application to a civil action. In a civil case "the weight of the evidence or preponderance of the probabilities is sufficient to establish a fact." Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

The portions of instruction numbered 12 which we italicize are assigned as error by appellant. The instruction is as follows: "In this action the plaintiff, if he has shown himself entitled to recover, *is entitled to recover for all damages which he has suffered up to the time of the trial, and for all damages that it is reasonably probable that he will sustain in the future, not exceeding the sum claimed in the complaint.* In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury. The plaintiff, if you find him entitled to recover, should be awarded compensation for all expenses actually paid or incurred for doctor's bills, not exceeding the amount claimed therefor in the complaint. If you find that plaintiff is entitled to recover, and believe from the evidence that the injuries sustained are permanent in their character, this must also be taken into consideration in your estimate of damages, and, if you find for the plaintiff in this action, such sum should be awarded as in your *best judgment will fairly and fully compensate him for any injuries received by reason of the alleged negligence and carelessness of the defendant not exceeding in amount the sum claimed in the complaint.*" The mere reading of the whole instruction is sufficient to show that there is no error in it. It seems to us well established that "in actions for negligence, the law does not attempt to fix any precise rules for ascertaining what is a just compensation, but, from the necessity of the case, leaves the assessment of the damages to the good sense and judgment of the jury, whose province it is to make the assessment." Lee v. Southern Pac. R. R. Co., 101 Cal. 118, 35 Pac. 572; Howland v. Oakland C. St. Ry. Co., 110 Cal. 523, 42 Pac. 983. It is true the Code (section 3333, Civ. Code) provides the rule of law governing damages in cases of this kind to be "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." When the jury was told they might award plaintiff such sum as in their "best judgment will fairly and fully compensate him for any injuries received by reason of the alleged negligence and carelessness of the defendant, not exceeding in amount the sum claimed in the complaint" there was no suggestion that they might award damages according to any feeling they might have, nor did the court suggest to the jury anything else than that they must exercise their judgment from all the evidence in the case as to what the proper amount of damages should be. Therefore, Fries v. American Lead Pencil Company, 141 Cal. 610, 75 Pac. 164, relied upon by appellant, is not a case in point here. The instruction read as a whole is not objectionable and fairly states the law.

The court refused to give the following instructions asked by defendant: "No. 22. I further instruct you that, if you find from the evidence that the plaintiff was looking into the chute at the place where he placed the bar to fill it, when clogged, and was thereby injured by reason of any edging or other substance coming out of that hole, then your verdict must be for the defendant." This was not given "because given in substance in defendant's instruction No. 13. The thirteenth instruction is as follows: "I charge you that, if you find from the evidence that plaintiff sustained his injuries from any other cause than that alleged in his complaint, you must find a verdict for defendant." This the court gave and is as fair to the defendant as it could ask. The instruction asked and not given was properly refused because not announcing any principle of law. In addition to this and that the court thought it was given in substance in instruction No. 13 there is the further objection to it that it states a fact, to wit, that "where he placed the bar to fill it when clogged," which should be left to the jury. Further, it totally ignores any negligence on the part of defendant in not providing a safe place for his servant to work, and makes plaintiff liable if he looks at his work while performing it and while so looking is hurt. The instruction was properly refused.

Refusing to give defendant's instruction No. 23 is assigned as error. It reads as follows: "I also charge you that, if you find from the evidence that plaintiff was using said bar in a careless and negligent manner, being on the wrong side thereof, and while so using the same received the injury of which he complains, then you must return a verdict for the defendant." This instruction is not law. It would make no difference how negligently the plaintiff might have been using the bar at the time he was hurt if such negligence in no wise contributed to his hurt, and as to whether he was on the wrong side of the bar is a question for the jury when inquiring into the cause of the injury. The instruction announces no rule of law in a case of personal injury by the master to his servant. But the ground was fully covered in instruction No. 5, which was given and goes as far as the law will allow. Instruction No. 5 reads as follows: "If the injuries to plaintiff were caused proximately or exclusively by his own negligence or by the negligence of any of his fellow employés, the defendant is not liable."

When all the instructions given are read together and considered as a whole, we are satisfied they express the law, and could not have been prejudicial to the defendant.

Judgment and order affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

4 Cal. App. 460

HERSBERGER v. PACIFIC LUMBER CO.

(S. F. 3,849.)

(Supreme Court of California. Jan. 23, 1907.)

In Bank. Application for rehearing. Denied.

For opinion in District Court of Appeal, see 88 Pac. 587.

PER CURIAM. In denying a rehearing in this case the court desires to state more clearly a fact not so fully brought out in the opinion in the District Court of Appeal. The machine at which the plaintiff was injured was in the basement of the mill where there was very little light, and there is a decided preponderance of evidence that, standing in the position which he must occupy in operating the machine, the defendant could not see the defect which was the cause of his injury. In other words, there was not merely a conflict in the evidence, there was a preponderance of evidence to the effect that the defect in the machine was a latent defect, not obvious, and only discoverable by a careful inspection.

4 Cal. App. 509

GAREL v. PAGE et al. (Civ. 324.)

(Court of Appeal, Second District, California. Dec. 3, 1906.)

1. Appeal—Filing Transcript—Extension of Time—Motion to Dismiss.
An order extending the time for the filing of a transcript on appeal cannot be attacked on a motion to dismiss the appeal.

2. Same.
An application for an extension of time for the filing of a transcript on appeal will ordinarily be granted where no delay in the hearing can result therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2737–2740.]

Appeal from Superior Court; Kings County.

Action by Mary A. Garel against Elias C. Page and others. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Denied.

E. T. Cosper, for appellants. T. E. Clark, for respondent.

SMITH, J. Motion to dismiss appeal. The transcript was filed within the time allowed by the order of the court extending the time, and this order cannot be attached on a motion to dismiss, nor, were it otherwise, have we any reason to be dissatisfied with it. It has always been the practice of this court to be liberal in extending the time for filing transcripts or briefs in cases where no delay in the hearing of the case can result.

The motion is denied.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 532

BERGER et al. v. JUSTICE et al. (Civ. 294.)

(Court of Appeal, Second District, California. Dec. 5, 1906.)

Mandamus—Public Officers—Discretion.

Petitioners requested a board of supervisors to fix the rate for the use of water for irrigation in addition to that established by former ordinance of the board, the proceeds of the additional rate to be used in replacement of worn-out pipe. The board denied the petition without prejudice, the order reciting that such replacement constituted reconstruction for which the law made no provision. *Held*, that the action of the board amounted to a refusal to add to the established rate, and to re-establish such rate until the future action of the board, which was a clear exercise of judgment concerning a matter within the board's discretion, which could not be controlled by mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 134.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by P. S. Berger and another to obtain a writ of mandate against William Justice and others, forming the board of supervisors of San Diego county. From an order sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

A. Haines, Haines & Haines, for appellants. Cassius Carter, Dist. Atty., and L. A. Wright, for respondents.

GRAY, P. J. This action is brought to obtain a writ of mandate directing the board of supervisors of the county of San Diego to act upon the merits of a petition asking said board to fix a rate for the use of water for irrigation, in addition to that established by a former ordinance of the board, adopted November 16, 1897, and already in force; the proceeds of the additional rate to be used only in the repayment of the cost of the necessary replacement by new pipe of worn-out pipe in the water system of the Sweetwater Water Company, a corporation, which had devoted its system to the sale and distribution of water. The court below sustained a demurrer to the petition for the writ of mandate, and the plaintiffs in said petition appeal from the judgment which followed.

It appears from the petition that the plaintiffs herein are inhabitants and taxpayers of said county, and are consumers of water for irrigation under said system, and are owners of irrigation easements thereunder annexed to the land owned by them; that the Sweetwater Water Company, a corporation, is engaged in the business of collecting and impounding the water to be distributed, and holds the title to the water system. The petition to the board of supervisors was made by the corporation and by some 25 persons who describe themselves as irrigators in said county under the said system. Upon the hearing of the petition, the board refused and declined to act upon the same, and embodied their action in the following resolution entered upon their record: "On motion of Supervisor Griffin, seconded by Supervisor Justice, it is ordered that the petition in this matter be denied without prejudice, on the ground that the petition asks for replacement of old worn-out pipe with new pipe, it appearing that such replacement constitutes reconstruction for which the law makes no provision." While the foregoing order may be said to be, in one sense, a refusal to act, yet it is equally true that the effect of it was to fix the former water rate as the established, continuing rate for which water should in the future be furnished, and in this sense it was an affirmative exercise of the jurisdiction of the board of supervisors under the statute, and not a mere refusal to act. The ground upon which they base their action is entirely immaterial. They refused to add to the established rate, and by this act re-established the rate at its former figure, where it is to remain until some future action may be taken on their part changing the same. This, in our judgment, is a clear exercise of their jurisdiction in the premises, and the action taken is a matter within their jurisdiction. The power of the board of supervisors in the premises being judicial, the courts cannot, on an application for a writ of mandate, direct or control the affirmative action of the board of supervisors taken within their said jurisdiction. The only thing the appellants are complaining of is that the board did not add to the original rate an amount sufficient to cover the cost of replacement of old worn-out pipe with new pipe. Whether they should do this or not was a matter clearly within their discretion under the statute. They have refused, and, on an application for a writ of mandate, the courts have no power to control their discretion. Such is not the office of the writ of mandate. The writ issues only to "compel the performance of an act which the law specially enjoins as a duty resulting from an office." Code Civ. Proc. § 1085. The only act enjoined by law upon the board of supervisors is to fix the rate. They had already fixed the rate, and in a more recent proceeding, in effect, ordered that the rate should remain as so formerly fixed.

For these reasons, we think the demurrer to the petition was properly sustained. The judgment is therefore affirmed.

We concur: ALLEN, J.; SMITH, J.

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4 Cal. App. 537

HATTON et al. v. GREGG. (Civ. 313.)

(Court of Appeal, First District, California. Dec. 7, 1906.)

1. Trial—View by Court.
Knowledge gained by the court by a view of the premises is independent evidence, to be taken into consideration by the court in determining the issues.

2. Waters and Water Courses—Accretion—Evidence—Sufficiency.
On an issue as to whether lands had been formed by imperceptible degrees on the bank of a river by the accumulation of material and by the recession of the river, evidence considered, and *held* to sustain a finding that such was the case.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Kate H. Hatton and others against J. W. Gregg. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Dougherty & Lacey, for appellant. J. H. Andresen and Zabala & Wyatt, for respondents.

HALL, J. This is an appeal from a judgment quieting the title of plaintiffs to a 10-acre tract of land.

The court, after finding plaintiffs to be the owners of the tract of land in controversy, and which is fully described by metes and bounds in finding 4, proceeds as follows: "That the plaintiffs, at the time of the commencement of this action, and long prior thereto, were the owners in fee of a large tract of land on the right bank of the Carmel river known as the 'West half of the Rancho Canada de la Segunda,' *and from natural causes the lands particularly described in this finding have been formed by imperceptible degrees upon said bank by the accumulation of material and by the recession of the said Carmel river*, and by this means, alone, the plaintiffs have become, and are, the owners of the lands described in this finding." (The italics are ours.) So much of the above finding as is italicized is attacked by the defendant as not being supported by the evidence, and in this connection he very correctly states in his brief that: "If this finding is justified by the evidence, the judgment should be affirmed, otherwise, it must be reversed, and a consideration of this question is the only point involved in this appeal."

The bill of exceptions is short, and, so far as it bears upon this question, is as follows: "Plaintiffs proved by competent evidence that at the time of the commencement of this action they and their predecessors in interest were, and ever since February 4, 1859, had been, the owners and in the possession of a large tract of land in Monterey county, Cal., known as the 'West half of the Rancho Canada de la Segunda,' and that the center of the Carmel river as it existed February 4, 1859, constituted the southern boundary of said rancho on said date. That at the time of the commencement of this action said Carmel river, which each year changes its course to some extent, had its course and channel south of where it was on said February 4, 1859, and that the land described in finding 4 is the land lying between the center of the channel of said river, as it existed February 4, 1859, and the center of said channel as it existed at the time of the commencement of this action, and is 10 acres in extent, and the same is formed of a loose sandy loam, bottom land, a sediment of the nature and formation of Ollason Island, and susceptible to the action of water. That said Carmel river is and always has been an unnavigable mountain stream, having an abrupt descent to the ocean, and during the summer months carrying very little water and is sometimes entirely dry, while during the winter months each year it is a torrential stream, carrying a large volume of water, and changes its channel to some extent. * * * The court went upon and viewed the lands and premises described in the complaint by consent of the parties upon request made by the attorneys for defendant in the following words, to wit: 'Mr. Lacey: Will your honor care to take the time to go over and look over that country? The Court: I am willing to do it. Mr. Lacey: The surveyors are prepared to go with you, and we will provide conveyances for you from Monterey. * * *' And the court then and there, accompanied by the said surveyors representing the respective parties, viewed the topography of the country generally, the land in dispute, its character, formation, and growth. The foregoing was all the evidence offered or received as to the issues involved in this case."

It is now urged that the court cannot predicate any finding of fact upon a view of the premises, or upon information gained from such view, and that, in this case, if we disregard such view of the premises, there is no evidence in the record to support the finding attacked. It must be confessed that the rule contended for by appellant as to the effect of a view of the premises is followed by the courts in some of the states (Chute v. State, 19 Minn. 271 [Gil. 230]; Sasse v. State, 68 Wis. 530, 32 N. W. 849; Harrison v. Iowa M. R. Co., 36 Iowa, 623; Machader v. Williams, 54 Ohio St. 344, 43 N. E. 324; Neff v. Reed, 98 Ind. 341), and was at one time the rule in this state (Wright v. Carpenter, 49 Cal. 607). In this last-mentioned case the question at issue was as to whether or not certain land was on the 28th day of September, 1850, swamp and overflowed lands. The jury, under the order of the court, had viewed the lands, and the court in its instructions told the jury that they were at liberty, and it was their duty, to give such examination made by them its due and proper weight in assisting them to determine the character of the lands on the 28th day of September, 1850, and that, if they found from the evidence of the witnesses and from their examination of the lands in controversy that it was such, on the 28th day of September, 1850, that it was rendered unfit for cultivation by reason of its overflow, it would be overflowed lands within the meaning of the act of that date. The court said: "These instructions are erroneous in so far as they authorized the jury to take into consideration the result of their own examination of the land in determining its character as swamp and overflowed, or otherwise. In authorizing the court to send the jury to view the premises in litigation it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but solely to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial." The opinion continues with more to the same purpose, but we have quoted this much at length in order to make clear the effect of the subsequent case of People v. Milner, 122 Cal. 171, 54 Pac. 833. In People v. Milner, supra, the court, after discussing at length the case of Wright v. Carpenter, supra, and the cases of People v. Green, 53 Cal. 60, and People v. Bush, 68 Cal. 623, 10 Pac. 169, which likewise treat of the character and effect of information received from a view of the premises, said: "It must be concluded, therefore, that the doctrine of Wright v. Carpenter, supra, has been set aside by the later utterances of this court." Absolutely the only doctrine laid down by Wright v. Carpenter, supra, is that knowledge obtained by an examination of the premises is not independent evidence that can be taken into consideration in determining the issues of the case. The language of the court in Wright v. Carpenter, supra, is: "These instructions are erroneous in so far as they authorized the jury to take into consideration the result of their own examination of the land in determining its character as swamp and overflowed, or otherwise." The doctrine that information obtained from a view of the premises is not independent evidence that can be taken into consideration in determining the issues of the case having been set aside, it follows, as night follows day, that such information is independent evidence that can be taken into consideration in determining the issues of the case. If, in a case where the question at issue was as to whether or not a certain parcel of land was swamp and overflowed land, and all the witnesses examined on behalf of the plaintiff should so testify, and the court, without the examination of any witness on behalf of defendant, but with the consent of the parties, should visit and view the premises, and should there see that the land was rolling hill land, supporting a growth of oaks and other vegetation only grown on upland, it is difficult to reconcile with common sense a rule that would not permit the court to find the facts to be in accordance with what it saw with its own eyes. Both upon reason and the authority of People v. Milner, supra, we are constrained to hold that the knowledge gained by the court from a view of the premises is independent evidence to be taken into consideration by the court in determining the issues of the case.

It is next urged that, even if it be conceded that a view of the premises furnishes independent evidence, yet, from the nature of things, the court could not, from such examination, find that the land in dispute had been formed from natural causes, by imperceptible degrees, by the accumulation of materials, or by the recession of the bank of Carmel river. We are unable to agree with this contention. The record shows that uncontradicted evidence was given to the effect that between February, 1859, and October 18, 1902, the channel of the Carmel river had moved south to such an extent that the land in dispute, containing 10 acres, now lay between the channel as it existed in February, 1859, and as it existed October 18, 1902; that said land was formed of loose, sandy loam, bottom land, a sediment of the nature of Ollason Island; that said Carmel river is, and always has been, an unnavigable mountain stream, having an abrupt descent to the ocean, and during the summer months carries very little water and is sometimes entirely dry, while during the winter months of each year it is a torrential stream, carrying a large volume of water, and changes its channel to some extent. It is thus apparent that, during a period of practically 40 years, the change has been sufficient to form or expose a strip of land containing 10 acres only. The statement that, "during the winter months of each year, it is a torrential stream, carrying a large volume of water and changes its channel to some extent," suggests the idea that the change each year is but little; at any rate that it is not great. The fact that the land is a loose, sandy loam, and is a sediment, and that the channel of the river has changed each year to some extent, so that in 43 years a strip of land containing 10 acres has been formed along the original boundary of plaintiffs' land, suggest at least the probability that the channel of the river has been gradually changed by the slow, gradual, and imperceptible deposit of sedimentary matter by the natural action of the river and the waters thereof. Especially is this so in the absence of any word of evidence that there had been any sudden change in the channel of the river, or in the land bordering thereon.

Now, with these undisputed facts in evidence, the court could, upon a view of the premises, not only verify the evidence as to the character of the land in dispute as to being a sedimentary, sandy loam, but could observe the slope of the land from the original boundary of plaintiffs' land to the river, and the character and relative age of the brush or other vegetation upon the land, and any other characteristics tending to throw light upon the manner of its formation. From such facts, in connection with the length of time, 43 years, that it has taken the river to change its channel to the extent that it has, and that it has changed its channel to some extent each year, the court might reasonably conclude that the land in dispute has been formed by natural causes, by imperceptible degrees, by the accumulation of materials, and by the recession of the river.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 542

HATTON et al. v. GREGG. (Civ. 314.)

(Court of Appeal, First District, California. Dec. 7, 1906.)

1. INJUNCTION—ACTION—ISSUES—PROOF.
In a suit to restrain defendant from cutting down trees on plaintiffs' land, a defense that, defendant being an owner of land bordering on the same stream as that on which plaintiffs' land bordered, but opposite to, and below, plaintiffs, he had the right to cut down the trees to prevent obstructions to the flow of the stream, was unavailable to defendant where the answer merely denied plaintiffs' ownership of the lands claimed by plaintiffs and the destruction of the trees.

2. SAME—WASTE—DESTRUCTION OF TREES.
Where one cut down trees on the land of another, and threatened to continue to do so, an injunction would lie to restrain such injury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 105.]

3. APPEAL — HARMLESS ERROR — FAILURE TO MAKE FINDINGS.
The failure to find on an issue, the finding upon which might have the effect of making erroneous a judgment fully supported by the findings made, is not ground for reversal unless it be shown that evidence was submitted in relation to the issue, sufficient to authorize such a finding as would have the effect to make erroneous the judgment rendered.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4239.]

4. INJUNCTION—ACTION—ISSUES—PROOF.
In an action to restrain defendant from cutting down trees on plaintiffs' land, the defense of an easement was not available to defendant where not pleaded.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Kate H. Hatton and others, minors, by Kate H. Hatton, their guardian, against J. M. Gregg. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Dougherty & Lacey, for appellant. J. H. Andresen and Zabala & Wyatt, for respondents.

HALL, J. This is an appeal by defendant from a judgment enjoining defendant from destroying plaintiffs' fences on certain described lands of plaintiffs, and also from cutting down, digging up, removing, or destroying any willow trees, brush, or undergrowth standing or growing on plaintiffs' said lands. The lands of plaintiffs involved in this action include the same land in controversy in the action between the same parties and numbered 313, and the appeal in which we have this day determined. The two actions were tried together, and the same point as to the effect of a view of the premises by the judge of the trial court is made in this action as was made in the action No. 313, and for the same reason we hold the point untenable. Other points are also made by the appellant upon this appeal.

The complaint, among other things, alleges that defendant, at various times in the months of August and September 1902, cut down, dug up, and destroyed willow trees and brush standing and growing on the lands of plaintiffs bordering on the bank of Carmel river, and threatens to continue so to do. This allegation is followed by others to the effect that the destruction of said trees and brush will weaken the northerly bank of said river, and tend to cause it to be washed away and destroyed, and, if it should be washed away, the waters of said river would immediately flow onto and over about 200 acres of plaintiffs' land. The court found in accord with these allegations of plaintiffs' complaint.

The principal contention of defendant, other than the one in regard to the effect of the view of the premises by the court, is that no injunction should have been granted against defendant for the reason that, being an owner of land bordering on the same stream opposite to and below the lands of plaintiffs, he had the right to cut down the trees and brush growing along the stream upon the land of plaintiffs to remove and prevent obstructions to the flow of the stream. It is a complete answer to such contention that no such defense was pleaded by the defendant in his answer to the complaint of plaintiffs. Defendant contented himself with denying the ownership by plaintiffs of the lands claimed by plaintiffs, and the destruction by defendant of the trees and brush, and certain other allegations of the complaint. There is not one word in his answer to suggest the idea that he did cut down the trees and brush, or that the removal or cutting down of the trees was necessary, or was done for the purpose of removing or preventing any obstructions to the flow of the stream, or that he claimed the right so to do for such purpose. If it be conceded for the purposes of this case that a riparian owner has the right to go upon the land of an upper or opposite riparian owner, and cut down trees and brush naturally growing thereon along the bank of the stream to prevent the collection of drift wood, which would obstruct the channel of the stream, and ultimately divert the water therefrom to the damage of such riparian owner, the facts giving such right constitute affirmative matter, which must be pleaded by a defendant sued for cutting down the trees upon plaintiffs' land (section 437, Code Civ. Proc.).

Appellant attacks certain findings of the court, as not supported by the evidence, that defendant had dug up or destroyed any trees, and had enlarged the channel of the stream, and that what defendant did would cause said channel to carry a larger volume of water than usually carried by it, and that the acts performed by defendant would in any manner injure and weaken the bank of the stream and tend to cause it to be washed away and destroyed. Without discussing the sufficiency of the evidence to sustain each of the findings thus attacked, it is sufficient to say that it was proved, found by the court, and admitted by defendant that he had cut down the trees and brush along the banks of the stream found by the court to be a part of the lands of plaintiffs, and, unless restrained by the order of court, would continue so to do. This finding justifies, we think, the judgment of the court as regards the cutting down and destruction of the trees and brush, and renders any error, if there be any, as to any of the other findings attacked immaterial. An entry upon land, and digging up and removing fruit trees growing upon it, is waste and an injury to the inheritance, and are acts which a court of equity may enjoin. Silva v. Garcia, 65 Cal. 591, 4 Pac. 628. In Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544, it was said that "the cutting, destroying, and removing of growing timber on the premises in controversy constituted, without other matter, sufficient ground for the issuance of the writ." To the same effect are United States v. Guglard (C. C.) 79 Fed. 23, and Hicks v. Michael, 15 Cal. 107. A threatened injury to real property in the nature of waste may be restrained. More v. Massini et al., 32 Cal. 590. If the evidence sustains the finding of the trial court upon findings that fully support the judgment, it is immaterial whether other findings objected to are sustained by the evidence or not. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Clavey, Adm'r, etc., v. Lord, 87 Cal. 413, 25 Pac. 493. The cutting down of the trees and brush growing upon the lands of plaintiffs was waste and an injury to the freehold, and as the defendant threatened to continue so to do the court properly restrained him from so doing.

As the defendant pleaded the statute of limitations, and the court made no findings thereon, it is urged that this was error. But it is well settled that the failure to find upon an issue, the finding upon which might have the effect of making erroneous a judgment fully supported by the findings made, is not ground for reversal, unless it be shown that evidence was submitted in relation to the issue sufficient to authorize such a finding as would have the effect to make erroneous the judgment rendered. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Wise v. Burton, 73 Cal. 174, 14 Pac. 683. In this case it was proved without contradiction that the acts upon which the action was predicated were committed within three months before the action was commenced. It is true that defendant introduced evidence that, for the five years immediately preceding the year 1902 (the year of the trespass and action), he had each year gone upon the lands found by the court to belong to plaintiffs, and cut the trees and brush growing thereon, but, if he intended thereby to prove the right to an easement upon the lands of plaintiffs, he had pleaded no such right, nor the appropriate section of the statute. He pleaded subdivision 2 of section 338, and section 343, Code Civ. Proc., and in the state of the pleadings the only effect of his evidence was to show that on previous occasions he had committed similar acts of waste upon the lands of plaintiffs. The court did not err to the prejudice of appellant in failing to find upon the plea of the statute of limitations.

It is urged that the judgment is erroneous in that it allows plaintiffs costs in the sum of $50.95, although nothing is said as to costs either in the findings of fact or conclusions of law. Costs are incident to the judgment, and in equity cases, such as this, may be allowed to the one party or the other in the discretion of the court. In this case the decree allowing costs to the plaintiffs appears to have been signed by the judge of the court in open court. In such a case we know of no rule requiring the court, either in its findings of facts or conclusions of law, to make an award of costs.

The judgment is affirmed.

We concur; HARRISON, P. J.; COOPER, J.

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4 Cal. App. 553

SHANKS & MARCH v. MICHAEL.

(Civ. 297.)

(Court of Appeal, Second District, California. Dec. 10, 1906.)

1. Brokers — Exchange of Property — Commissions—Right to Recover.

Where defendant contracted to pay brokers one-half commissions for making an exchange of defendant's property for that of another, in order to entitle plaintiffs to recover they were bound to prove either that an actual exchange had been consummated, or a valid agreement made therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 104.]

2. Husband and Wife — Agency of Husband.

Where an agreement for the exchange of property belonging to a married woman was not signed by her and she was not shown to have ever given any authority in that behalf to her husband, who affixed her signature to the contract, the fact that she saw the instrument before and after it was signed and expressed herself as satisfied therewith was not equivalent to an execution by her, nor an authority warranting its execution in her behalf.

3. Same—Written Authority—Ratification.

Authority could not be conferred by a married woman on her husband to enter into a contract for the exchange of her property, except by an instrument in writing as provided by Civ. Code, § 2309, nor could the husband's contract, executed in his wife's name without authority, be ratified except in the same manner as provided by section 2310.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 524, 732, 734.]

4. Exchange of Property—Unilateral Contract—Enforcement.

Where a contract for the exchange of property belonging to a married woman was signed on her behalf by her husband without authority, the agreement was unilateral and unenforceable by either party in the absence of a tender of conveyance by her.

5. Brokers — Exchange of Property — Performance of Commission.

Commissions to a broker are earned by his finding a sufficient purchaser ready to enter into a valid contract for the purchase on the terms fixed by the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 75.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Shanks & March against W. T. Michael. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

J. Vincent Hannon, for appellant. John W. Kemp and Kemp & Collier, for respondents.

ALLEN, J. Action by the plaintiffs to recover of defendant broker's commissions upon a written agreement. Findings and judgment for plaintiffs, from which judgment, and an order denying a new trial, defendant, W. T. Michael, appeals.

The complaint avers that on June 19, 1905, the defendant entered into an agreement with the plaintiffs whereby said defendant agreed to pay plaintiffs, as their commission for making an exchange of certain properties, one-half the usual commission, and that it was agreed that the usual commission for making such sales was $650. Judgment was asked for $325. The answer denies that any exchange of properties between defendant and the other party was ever made or effected, or any services rendered by plaintiffs in effecting an exchange of defendant's property; admits the execution of a contract to pay commissions, but alleges that it was executed upon the condition that an exchange should be consummated upon certain conditions, and avers that it was not consummated, owing to the inability of the other parties to meet the terms and conditions of the exchange. Upon the trial the court found all of the allegations of the complaint to be true, and that it was not true that the agreement to pay the $325 was dependent upon the consummation of the exchange, nor that the exchange was not consummated because of the inability of the other contracting party to meet the terms and conditions of the contract. The contract to pay these commissions reads as follows:

"Los Angeles, Cal., June 19th, 1905. I hereby agree to pay Shanks & March one-half the usual commission paid on the sale of Real Estate in Los Angeles as full compensation for negotiating deal with Ina E. Van Norman. Usual commission being understood to be 5 per cent on first $1000 and 2½ per cent on values above one thousand. W. T. Michael.

"We agree to accept the above rate as full compensation for our services in the above transaction. Shanks & March."

It will be noted that the complaint alleges that the agreement to pay was for commissions for making the exchange of defendant's property with one Van Norman, and the agreement also purports to pay one-half of the usual commission paid on the sale of real estate. It follows, therefore, that to entitle plaintiffs to recover under their complaint an actual exchange should have been consummated, or a valid agreement therefor made. In the latter event, plaintiffs would have been entitled to the commission even had the parties thereafter rescinded the agreement, or either party made default in compliance with its terms. It is conceded that no actual transfer was consummated, and the record shows that no valid agreement for an exchange was ever made. Plaintiffs, who drew the contract claimed to be an agreement of sale, as well as the defendant who signed the same, represented the property sought to be exchanged for defendant's property as the estate of one Ina E. Van Norman, wife of L. E. Van Norman, and, nothing to the contrary appearing, it will be accepted that Mrs. Van Norman owned the property. This agreement for the exchange of Mrs. Van Norman's property was not signed by her, neither is it shown that she ever gave any authority in that regard to her husband, who affixed her signature thereto. It does appear, however, that she was satisfied with the exchange, and saw the instrument before it was signed and afterwards, and expressed herself as satisfied therewith. But this is not the equivalent of an execution by her, nor an authority warranting its execution in her behalf. She was not present when it was signed, nor was her name subscribed at her request, as in Bowen v. Aubrey, 22 Cal. 566. The authority to enter into such a contract could only be in writing (Civ. Code, § 2309), or could be ratified only in the manner that would have been necessary to confer an original authority (Civ. Code, § 2310). There is nothing in the record tending to show any acts of Mrs. Van Norman which would estop her to deny the execution of the instrument were she so inclined. The agreement, therefore, was unilateral, and, in the absence of a tender of conveyance by Mrs. Van Norman, was unenforceable by either party. Hay v. Mason, 141 Cal. 722, 75 Pac. 300. The procurement by a broker of an oral agreement to exchange land not thereafter consummated is not the negotiation of an exchange, and, in the absence of a special contract, will not entitle such broker to a commission. We find no contract here other than the one alleged to have been executed upon the making of an actual exchange, which allegation is borne out by the language of the agreement itself. We find no evidence in the record tending to sustain the finding that the exchange of property was effected, or that services were rendered in effecting an exchange of properties. The commission of a broker is earned by finding a sufficient purchaser ready to enter into a valid contract for the purchase upon the terms fixed by the owner. Dolan v. Scanlan, 57 Cal. 266. Mrs. Van Norman is not shown to have been willing to make such valid contract, nor, in fact, is it shown that any opportunity was presented to her by plaintiffs so to do. Plaintiffs having performed no services in effecting an exchange, and no other consideration for the promise appearing, there was an entire absence of consideration for the agreement sued on.

Entertaining these views, it is unnecessary to pass upon the other questions presented by appellant, some of which possess merit.

The judgment and order are reversed, and cause remanded.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 565

DINGWALL v. AMALGAMATED ASS'N OF STREET RAILWAY EMPLOYÉS OF AMERICA et al. (Civ. 295.)

(Court of Appeal, First District, California. Dec. 11, 1906.)

1. ASSOCIATIONS — BY-LAWS, CONSTITUTION AND RULES—EFFECT.

The constitution, rules, and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, governing the rights and duties of the members as between themselves and in their relation to the association with reference to all matters affecting its internal government and the management of its affairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Associations, § 4.]

2. BENEFICIAL ASSOCIATIONS—MEMBERSHIP.

Membership in a social or beneficial association organized for the amelioration or improvement of the conditions under which its members obtain their livelihood is in itself a personal right, the enjoyment of which the holder is entitled to protect against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, §§ 8-21.]

3. SAME—EXPULSION—BY-LAWS.

The constitution of a beneficial association provided that the giving out of information concerning the business transacted by a local division contrary to the order of the division should entail a fine, suspension, or expulsion, and that any member who divulged the quarterly password for any purpose other than to enter meetings should be expelled. Another provision declared that the president should have power to fine any member who in any way disturbed a meeting while in session, and for "all other offenses" the executive board should have power to impose a fine not exceeding $15. *Held*, that the association had no power to expel a member for holding secret meetings and conspiring against the welfare of the association and its president in particular.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, § 13.]

4. SAME — EXPULSION — PROCEEDINGS — DEFAULT.

Where a beneficial association had no jurisdiction to expel a member for alleged conspiracy against it, the member's failure to appear at the hearing appointed to try him on such charge did not confer on the association authority to enter a judgment of expulsion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, § 16.]

5. SAME—APPEAL—AFFIRMANCE.

Where a beneficial association had no power to expel a member for conspiracy against it, the affirmance of an order of expulsion on an appeal taken to a higher tribunal within the society did not validate the order of expulsion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, § 16.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Application for writ of mandate by George Dingwall to compel the Amalgamated Association of Street Railway Employés of America and others to restore petitioner to membership. From a judgment granting the writ, defendants appeal. Affirmed.

H. W. Hutton, for appellants. Weil & Lippitt and A. A. Sanderson, for respondent.

HARRISON, P. J. Appeal from a judgment granting plaintiff's application for a writ of mandate, commanding the appellants to restore him to membership.

The Amalagamated Association of Street Railway Employés of America is a voluntary unincorporated association of men employed by various street railway companies in the United States, associated together "to organize division associations, and place the occupation of street railway employés upon a high plane of efficiency, intelligence, and skill; to encourage the formation in division associations of sick benefit funds; to establish schools for imparting a practical knowledge of modern and improved methods and systems of transportation and trade matters generally; to encourage settlement of disputes between employés and employers by arbitration; to secure employment and adequate pay for work; to reduce the hours of daily labor; and by all legal and proper means to elevate the moral, intellectual and social condition of its members."

The appellant herein, Division No. 205 of said Amalgamated Association, is a subordinate or local division thereof, composed of about 2,700 men employed by the various street railway companies of San Francisco. The respondent was elected a member of the appellant August 12, 1901, and by virtue thereof became a member of the parent association. He continued to remain such member until December 16, 1902, when he was expelled therefrom in the manner hereinafter stated. June 19, 1902, he was elected secretary-treasurer of the appellant, and acted as such officer until his said expulsion. December 8, 1902, certain members of the appellant presented to its executive board charges in writing against the respondent, charging him and four other members "with violating their obligations, with holding secret meetings together, and therein conspiring against the welfare of the Union and R. Cornelius, its president, in particular." Upon receiving these charges the executive board ordered a trial of the respondent to be had thereon at 8 o'clock p. m. on December 13th, and a copy of the charges was duly served upon him. Prior to that time he requested that he be represented at the trial by counsel, and that a shorthand reporter be admitted to take testimony, but such requests were denied by the board upon the ground that to grant them would be in violation of its rules, and he thereupon refused to appear at the trial. The executive board, however, proceeded with the trial in his absence, and afterwards reported to the appellant that it found the respondent guilty of the charges against him, and recommended that he be expelled from the organization. On December 16th, at a meeting of the appellant, the report was presented, approved, and a resolution for his expulsion adopted, and since that time the respondent has been denied the privileges of membership in the appellant. After such expulsion he took an appeal as provided in the constitution and rules of the association, and prior to the commencement of this action had exhausted all the remedies provided thereby. His appeal was denied, and the order of expulsion affirmed.

The constitution and general laws of the Amalgamated Association of Street Railway Employés of America, by which the appellant is governed in exercising control over its members, contain the following provisions for the expulsion of a member, and no others, viz.:

"Sec. 69. All business of the local division must be strictly private from persons outside of the association, unless publication be authorized by the local division, and persons giving out information contrary to the Local Division shall be fined, suspended or expelled.

"Sec. 70. Any member who divulges the quarterly password for any purpose other than to enter the meetings shall be expelled."

The appellant has also enacted the following by-law:

"Sec. 62. The President shall have power to fine any member who in any way disturbs a meeting while in session, but for all other offenses the executive board shall have the power to impose a fine according to their judgment. Such fine not to exceed fifteen dollars ($15), and no member shall be entitled to his working card until all dues, assessments and fines are paid."

The record also shows that there are certain other provisions in the by-laws for the impeachment and removal from his office of any officer who may be guilty of an infringement of the provisions of the constitution and by-laws, but as the proceeding herein was against the respondent in his capacity as a member, and not for any official delinquency, these provisions have no application.

The appellant has assigned many errors on the part of the superior court at the trial herein, and the parties to the appeal have discussed in their briefs many questions arising thereon, but from the conclusion which we have reached upon one proposition, which underlies the entire proceeding, it becomes unnecessary to consider the other questions.

The constitution and rules and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of such constitution and by-laws. Membership in a social or beneficial association is in itself a personal right, especially when the purposes of the association include the amelioration or improvement of the condition under which the members obtain their livelihood, and the holder of such right is entitled to be protected in its enjoyment against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed. The right of a member to retain his membership is subject to the terms and conditions contained in the constitution or articles of association, and such by-laws or rules of conduct as may be adopted under these provisions, and, whenever it is sought to deprive him of his membership, he has the right to insist upon a strict observance of the proceeding therefor which may have been prescribed in such articles or rules.

Under the provisions of sections 69 and 70 of the constitution of the appellant above set forth, its right to expel a member is provided for certain offenses, none of which is included in the charges which were presented against the respondent herein, and by section 62 of the by-laws, a right is given to the president to fine a member for disturbing a meeting while in session. But for "all other offenses" the appellant has declared, in section 62, that the executive board shall have the power to impose a fine "according to their judgment" not to exceed $15. The parties to the association having by agreement thus limited and declared the penalty to be imposed for all offenses, it was not within the power of the appellant to impose a different penalty for the offense with which the respondent was charged. See Allnutt v. Subsidiary High Court, 62 Mich. 110, 28 N. W. 802; Meurer v. Association, 95 Mich. 451, 54 N. W. 954. By enumerating certain offenses for which the penalty of expulsion may be imposed, the right to inflict such penalty for any other offense is impliedly excluded, and the further provision that for "all other offenses" the penalty shall be a fine not to exceed $15 is a positive declaration that the only penalty which could be imposed upon respondent for the offenses with which he is charged is such pecuniary fine.

The failure of the respondent to appear at the hearing on December 13th did not confer upon the appellant any further authority than was given by its constitution and rules. The charges served upon him contained no proposition for expulsion, and as he had the right to assume that the only penalty would be a fine within the limits prescribed by the above by-law, he may have been willing to submit his case to the determination of the executive board upon such proof as might be presented in support of the charges.

The affirmance of the order of expulsion upon the appeal taken therefrom by him did not validate the order. If provision was made by the association for any review of the proceeding, it was incumbent upon him to exhaust his remedies within the association before making application to the courts, but, as the order of expulsion was void, by reason of a want of jurisdiction in the appellant to make it, its affirmance did not give it any vitality.

The action of the appellant in expelling the respondent from its membership was therefore without authority, and the order of the superior court directing that he be reinstated in his membership was correct.

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 535

Ex parte RICE. (Cr. 48.)

(Court of Appeal, Second District, California. Dec. 6, 1906.)

HABEAS CORPUS—GROUNDS FOR RELIEF—LOCALITY OF OFFENSE.

Where a complaint charges the violation of a city ordinance and shows that the court has jurisdiction of the subject-matter, a writ of habeas corpus will not be granted to one arrested thereon, merely because it is alleged that the place where the offense was committed was not within the limits of such city, as that question cannot be decided on application for a writ of habeas corpus.

Application of Ed. Rice for a writ of habeas corpus. Petition dismissed.

George S. Hupp and H. Steiglitz, for petitioner. John E. Daly, and Carl Monk, for respondent.

GRAY, P. J. The petitioner, Rice, was arrested under a warrant from the recorder's court of the city of Long Beach, in the county of Los Angeles, state of California, which warrant was based upon a complaint charging that the defendant did commit a misdemeanor, in that he "did then and there willfully and unlawfully commence and proceed with the erection or construction of a building within the limits of the city of Long Beach without first procuring a permit so to do, thereby violating ordinance 181, section 3, of the said city of Long Beach, all of which is contrary to the forms of the ordinances adopted and approved," etc.

It is contended by the petitioner, and some evidence was offered on the hearing of the petition to show, that the house alleged to have been constructed contrary to the ordinance and without a permit so to do, was not within the limits of the city of Long Beach. This contention is based on the alleged ground that proceedings were taken, under the statute, by the city of San Pedro to incorporate, as a part of the city of San Pedro, the territory upon which the house in question is situated, and that such proceedings by the city of San Pedro were instituted at a time when said territory was not embraced within the limits of the city of Long Beach, and prior to any proceedings taken on the part of the city of Long Beach to include the said territory upon which said house is situated within the limits of the latter city. It appears that both the cities named are claiming jurisdiction of the alleged territory upon which the house in question is situated, and I am asked to decide to which one of the two cities this territory belongs.

I am of the opinion that it is not competent to decide this question upon an application for a writ of habeas corpus. The complaint charges that the crime was committed within the city of Long Beach. No point is made by the petitioner against the sufficiency of the complaint, or as to the insufficiency of the warrant based thereon. The complaint shows that the court has jurisdiction of the subject-matter of the action, in that it shows a violation of the penal ordinance within the territorial jurisdiction of the recorder's court. This gives to the court jurisdiction of the subject-matter of the action. The jurisdiction of the person of the defendant was obtained by his arrest under a warrant which is regular on its face. This is sufficient as against an application for a writ of habeas corpus. It appears, therefore, that the petitioner is legally held, and should not be discharged on an application for a writ of habeas corpus.

The petition is dismissed, and the petitioner is remanded to the custody of the city marshal.

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4 Cal. App. 556

GEAR v. FORD. (Civ. 269.)

(Court of Appeal, Third District, California. Dec. 10, 1906.)

1. Mines and Minerals—Quieting Title to Claim—Sufficiency of Evidence.

Evidence in an action to quiet title to a mining claim *held* sufficient to sustain a finding that there was not $100 worth of labor performed or improvements made upon the mine by defendant during 1903, and that she did not resume work upon the mine in 1904, nor cause mining or labor to be resumed, nor make improvements thereon prior to January 16, 1904.

2. Same—Relocation—Burden of Proof.

After a valid mining location is made, the locator need not keep actual possession of the claim, but his right of possession continues until he in fact abandons or forfeits it by failure to do the work required by law, and the burden to prove such forfeiture or abandonment is upon him asserting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 101.]

3. Same—Discretion as to Method of Work.

Where a mining locator does work in good faith for the purpose of developing a mine, in strict compliance with the statute, a court cannot substitute its own judgment as to the wisdom and expediency of the method employed in the development in place of the owner's.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 51–54.]

4. Same—Forfeitures—Burden of Proof.

A forfeiture of a mining location can only be established on clear and convincing proof of the locator's failure to perform the labor required by the statute, and the burden rests upon the party asserting such failure to prove it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 101.]

5. Same—Question for Jury.

Whether a prior location was forfeited as against an adverse location, and whether work was done for the purpose of developing the claim, or was adapted to that purpose, are questions of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 108.]

6. Same—Work Constituting Labor—Service of Watchman.

Where the original locator of a mining claim suspended work from 1900 until 1904, when an adverse location was made, money expended by her in employing watchmen for the premises was not a compliance with U. S. Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring not less than $100 worth of work to be performed or improvements made during each year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 54.]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Mrs. Mildred D. Gear against Mrs. M. A. Ford. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Street, for appellant. H. L. Gear and Geo. D. Gear, for respondent.

CHIPMAN, P. J. Action to quiet title to a quartz mining claim situated in the county of Mariposa. The claim was originally located in 1879, and in 1893 came into the ownership and possession of defendant by mesne conveyances. The cause was tried by the court and it found: "That during the year 1903, * * * there was not one hundred dollars' worth of labor performed or improvements made upon the mine by the defendant. That in 1904 defendant did not resume mining work upon said claim, or cause mining or labor to be resumed, or make improvements thereon prior to January 16, 1904," on which day the court found that the land was vacant public mineral land of the United States, subject to location, and that on said day plaintiff entered upon the land and located the same as required by law. No question arises as to the validity of this latter location if the land was subject thereto. Judgment passed for plaintiff, from which, and from the order denying her motion for a new trial, defendant appeals.

The question of abandonment of the mine by defendant is not raised by pleading or by evidence. The sole question presented by defendant is that the evidence is insufficient to justify the finding as to the work done by her on the mine in 1903, and the resumption of work in January, 1904.

The evidence was that subsequent to February, 1898, no work was done in the way of substantial improvement or development of the mine, except that some work of the value of about $45 was done by parties having a bond on the mine in 1900. Considerable money had been expended in development work up to 1898. At that time a shaft had been sunk and a house erected over it; there were nearby two small houses or cabins—a one-room and a two-room house used for dwellings; the house over the shaft contained an old threshing engine used for power, which cost, when placed there, $300, a hoisting apparatus, pumping gear, some mining tools and blacksmith's forge. But these tools and the forge, all the three-inch pipe and suction hose, the mortar, mine bell, and the belting had been taken away prior to 1903; the hoisting apparatus and pumping gear had been dismanteled and all that remained in use of the hoisting apparatus was the windlass and the rope and bucket used by the man left in charge to draw water from the partly-filled shaft for his personal use. The buildings were cheaply constructed, of not much value, and in 1903 had become quite dilapidated, though with slight repairs would have furnished shelter for workmen.

One Corey was sent to the mine at defendant's instance by her brother in 1894. Corey testified: "I was looking after the property there for the owners of the property, Mrs. Ford, or whoever had charge of it. I never did any mining there except prospecting with a pan, pick, and shovel around in the various places upon the mine outside of the mine, and anywhere on the ranch." It appeared that defendant bought the mine as part of a 600-acre ranch on which were some live stock, gardens, and orchards, the land mostly being suitable only for pasture. The gardens were partly on the mine and partly outside its boundaries, as were also the orchards. Corey remained there until the latter part of June, 1903. He was a tinsmith by trade, in poor health, and was not familiar with quartz mining. He testified: "It [his health] was not good. I was able to do work about the house getting my food and getting my meals and getting my wood and other work that had to be done appertaining to housekeeping, but I couldn't do much else. I would state that I did work in the garden, such as making ditches and getting water to irrigate, and that sort of work, but that was all I was able to do. That was all I did do in 1903." He was taken to the county hospital sick in the latter part of June. He testified: "The last work done on that mine by miners, according to my recollection, was about five years ago. That work was done by a company. Mr. Woodside * * * I can't recollect the names of all the partners. * * * I can't tell the nature of the work they did at that time because they were working underground. I didn't go underground at all. I didn't have any agreement with Mrs. Ford or Mr. Woodside as to what compensation I was to receive when I went on that property. Mr. Woodside said they wanted a man there to look after property around there, see that it wasn't lugged off. My principal work was done in the two, orchard and garden. * * * According to my understanding all of the upper garden, excepting one orange tree, was on the claim. The other garden was off the claim 100 yards more or less distant. I didn't perform any mining work in 1903 on that mine." He was paid for his work no stated compensation, but testified that he was paid "in cash, produce, and stores. I didn't receive in one year for the work or labor done on that mine, for either Mr. Woodside or Mrs. Ford, or both of them, as much as $75 in money, labor, clothes, or anything else." On cross-examination he testified: "While I was looking after that property I did prospecting—I did not know the boundaries of the claim. I would say that I did not do very much prospecting. * * * I prospected wherever I thought there was a chance of getting gold on the mine or off the mine or off the ranch. There is a quartz lead running through that section where I was living, but is not on the mine. It is on the hill outside of the mine, but no quartz lead cropping out on the mine that I know of. I wasn't prospecting for any vein. I was prospecting for surface gold. The most prospecting I did was in the creeks and gulches. I was prospecting mostly for placer gold. I sometimes took a pan out from off the mine and different places." He was asked if from January 1st to the time he left in June, 1903, his duties were the same as they had been, and answered: "Yes, sir; the orchard, the garden, and so forth. I done the most of the work on the garden irrigating and the ditches to carry water. I was still looking after the property that was in the engine house and at the hoist. I had the key to the building—I looked at them—I was there. I was looking after the property to see that no one stole it." Again he said: "I didn't do any mining or prospecting from the 1st of January, 1903, up to the last of June, 1903. I wasn't well. All I could do was to look after the irrigation. I looked after the buildings and improvements, and I lived on the mine." It appeared from the testimony of Mrs. Ford that she paid Corey $18 in cash, and his store bill, $36; in all $54 for his labor in 1903 to the end of June.

Mr. Woodside (defendant's brother) placed one Varian in charge of the property when Corey left, and gave him the key to the engine house. Varian lived about a half a mile distant from the mine, and for the month of July, 1903, looked after the property, but did no work on it. He testified that he was not there every day and sometimes he "sent the boy." For his services for the month he was paid $10. He then put one Gabriel Ferola in charge. He testified: "I told Gabriel to mine there, and stay there until he got further orders from Mr. Woodside or Mrs. Ford. I told him to look after everything that was on the mine." Varian retained the keys to such buildings as were under lock, and the others were fastened up.

Gabriel lived on the Prouty place, a mile and a half away from the mine. No agreement was made as to his compensation, but he testified that he went back and forth daily, except Sundays and holidays, to and from the mine in discharge of his duties, except also two or three days when he worked for a neighbor, until January 17, 1904, and then for the first time Varian delivered to him the keys to the buildings. This was the day after plaintiff's relocation of the mine. He testified that defendant paid him in April, 1904, $80 for eight months' work to January 1st, at the rate of $10 per month. He testified that he prospected on the mine with pick and shovel and pan, taking out in eight months $30 or $40; that he worked to see if he "could find a vein in some lead or something"; that Varian told him to prospect wherever he wanted to, and whatever gold he got to keep it, and to look after the buildings. He testified: "I didn't work all the time around the mine. I worked in the gulches and other places where there was water"; that most of the time he "got the rock or dirt right from the creek in front of the mine"; he "didn't get it away from the mine, from some other places"; that sometimes he "watered the trees so they would not be dry." Again he testified: "I did not do any other kind of mining than placer mining or crevicing. I can't do it. I am not able." It was testified to by several witnesses that Gabriel told them on January 16, 1904, "that he did not work on the mine, and that no one else ever did any work there for three years." This he denied. He testified that the work done by him after January 1st to January 16th was similar to the work he had done in 1903. Nothing in the way of resumptive work was done by defendant except by Gabriel Ferola.

There was considerable testimony given by persons who were familiar with the property, or who were mining experts, to the effect that in January, 1904, the mine showed no evidence of having been prosecuted or worked or improved in any way, either in or about the old workings or elsewhere, and that the buildings had not been repaired or improved for several years. The evidence showed that the buildings had become dilapidated, the foundations insecure from decay, that the engine was badly rusted, and that the little remaining personal property was of small value and not of a character likely to be stolen or carried away, and could readily have been removed to a place of safety. There was some evidence that the buildings might have been destroyed had a forest fire reached them, and that a watchman, if present, could have prevented it had such danger threatened. No such fire occurred, however. There was considerable testimony which has not been adverted to tending to support the findings, although not entirely without conflict. But we think sufficient has been pointed out to justify the conclusions of the court when the evidence is viewed in the light of settled rules of law and when applied to the United States mining statutes subject to those rules.

The following are some of the principles above adverted to: After a valid location has been made, the locator need not keep actual possession of the claim. His right of possession would continue until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time, and the burden of proving such forfeiture or abandonment is on him who would attack this right. Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708. If the work was actually done in good faith for the purpose of developing the mine, the strict compliance with the requisites of the statute is established, and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of the owner. Mann v. Budlong, 129 Cal. 577, 62 Pac. 120; Wright v. Killian, 132 Cal. 56, 64 Pac. 98. The courts are reluctant to enforce forfeitures, deeming this class of penalties odious in law, and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests upon the party asserting it. Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036.

Whether a prior location was forfeited, as against another adverse location, and whether work was done for the purpose of working the claim in controversy, or was adapted to that purpose, are questions of fact. Taylor v. Middleton, 67 Cal. 656, 8 Pac. 436; Altoona Q. M. Company v. Integral Q. M. Company, 114 Cal. 100–107, 45 Pac. 1047. The claim of defendant in her briefs is not that there was any failure on the part of the plaintiff to submit evidence bearing directly upon the question of forfeiture, but that the court drew wrong conclusions from the evidence. In support of her contention defendant places much reliance on the claim that the time and money expended for the watchman Corey, Varian, and Ferola as watchmen irrespective of any mining done by them, must be considered as falling within the purview of section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], requiring that "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." Upon this feature of the case we are cited to Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, and Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17. As the services of these men as watchmen have much to do with the point strenuously urged by defendant, the cases just cited should be examined in this sequence. The opinions in both of these cases were written by Mr. Justice Temple. The first-mentioned case was a bank decision, and in the second rehearing was denied. Taken together they come as near furnishing a guide to a right conclusion in the present case as may be found in our Reports. The importance of the question in the present instance calls for a full statement of what was said in the cases cited.

In the Altoona Case "the jury were told that it [work upon a mine in order to hold it] might consist in digging, etc., 'or, if the mine lie idle, it may consist of the services of a watchman or custodian in looking after the property and taking care of the same.'" Speaking of this the court said: "To constitute a general rule this would require some qualifications. If this sort of care was necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case work were resumed, we see no reason why it would not constitute work upon the mine as much as the erection of such structures in the first instance would. But if there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine within the sense of the statute. As applied to the facts of this case the instruction was not injurious, for it was not disputed that there were reduction works, houses, and barns, as well as tunnels and pits to be looked after."

Hough v. Hunt was a contest for a mining claim. Plaintiffs had been in possession several years of a quartz mining claim and had expended about $1,100 in developing the mine. They sunk a shaft upon the supposed lode some 25 feet, put up a winze, etc., and built a shed over their shaft. In 1898, according to the findings of the court, they performed only $25 worth of work towards working and developing the mine, and early in January, 1899, defendants entered upon the mine and relocated it as vacant ground. No claim was made that the mine had been abandoned, the sole claim being that plaintiffs had forfeited their rights by failure to do the requisite amount of work in 1898. The contention that the finding was not supported by the evidence, said the court, "depends entirely upon the fact that plaintiffs owned a house within the boundaries of the location and employed some one to live in it and paid such person $45 per month. It is claimed that such person at least took care of the property on the mine. It is not shown that he was employed to do anything of the kind, but, if that had been shown, the conclusion of the trial court is eminently sound, that such watching was not required and was not work on the mine. The cases must be rare in which it can justly be said that such money is expended in prospecting or working the mine. There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structures will be required when work is resumed, and that the parties do intend to resume work, in which money expended to preserve such structures will be on the same basis as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law and to hold the property without any intent to make use of such structures within a reasonable period, such expenditure could not be said to have been made in work upon the mine. Much less could the mine owner bring picks, shovels, and things of that kind, upon the mine, and have some one watch them to prevent their being stolen, and have such cost of watching considered as work upon the mine."

In the case here the suspension of actual development work took place in 1898. The little work done in 1900 was hardly sufficient to break the continuity of this suspension. But, assuming that work was suspended in 1900, it could hardly be said to be "temporary" in the sense that word is used in the above opinion. Nor can it be said that the suspension was with the intention of renewing work within a reasonable time, or that there was any intention to use the buildings, for the purposes for which they were constructed, within a reasonable time, for they were never after 1900 so used and the claim was relocated four years afterwards.

Defendant does not claim, nor could she in view of the evidence, that the requisite work was done in the year 1903, without classing the work of watching the buildings and their contents as the work contemplated by the statute. The testimony is sufficient to show that the compensation paid the watchmen was for looking after the property. In our opinion the court drew correct conclusions from the evidence, and that the finding as to work and labor performed in 1903 is amply supported. The work of Ferola in January, 1904, was the same as in the latter part of 1903, and was not, in our opinion, such work as constituted "labor performed or improvements made" on the mine, and we think that the court correctly found that work was not resumed or improvements on the mine made by defendant in 1904, prior to plaintiff's location. Witness Packer, a mining engineer, and deputy United States surveyor, went to the mine with plaintiff and some other persons early on the morning of January 16, 1904, to assist in locating the mine. About an hour after their arrival Ferola came to the mine. Packer testified: "I asked him where he was going. He said he was going over the claim. I asked him if he was working on the claim. He said 'No.' I asked him what he was doing and he said he came over there to look and see if it was being jumped or not. Went back every day. I asked him if any assessment work had been done upon the claim to his knowledge. He said 'No'—that none had been done. I asked him several times, and Mrs. Gear also asked him in my presence, in Miss Miller's presence, if any work had been done or not, or improvements had been made. He stated positively that there had not. He spoke intelligent English. I was fully able to comprehend everything that he said. I spoke with him in broken Spanish also. I speak Spanish slightly. He told me he was there representing the interests of Mrs. Ford." Ferola was to some extent discredited, and the court may have disbelieved, as it had the right to do, some of his statements tending to show that he was prospecting and working on the mine some of the time he was there.

The written opinion of the court, appended to defendant's brief, shows that the learned judge gave the case very careful study before deciding it. He said: "I have examined the testimony in this case with great care, and am forced to the conclusion that defendant has failed to comply with the law, and that, when plaintiff made her location, the ground was open to relocation."

In this view of the evidence we concur.

The judgment and order are affirmed.

I concur: BUCKLES, J.

I concur in the judgment: McLAUGHLIN, J.

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4 Cal. App. 571

WELSH et al. v. KOCH et al. (Civ. 307.)

(Court of Appeal, First District, California. Dec. 11, 1906. Rehearing Denied by Supreme Court Feb. 4, 1907.)

1. JUDGMENTS—ERRORS—REVIEW—DIRECT AND COLLATERAL ATTACK.

A party to an action against whom errors have been committed in the proceedings and trial of the action may have such errors corrected on motion for a new trial or on appeal, but, if they are not so reached, they cannot be taken advantage of either by a direct or collateral attack on the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 804, 944, 945.]

2. INFANTS—ACTIONS.

A minor has no further time than an adult within which to take the necessary steps for the correction of errors in proceedings or a judgment against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 317.]

3. JUDGMENTS—ERRONEOUS FINDINGS—ATTACK.

A judgment, after the lapse of time for a motion for a new trial and appeal, is not subject to attack in any form on the ground that the facts stated in the findings, and on which the judgment is based, are not true.

4. INFANTS—GUARDIAN AD LITEM—APPOINTMENT—PRESUMPTION OF SERVICE.

The appointment of a guardian ad litem for minor defendants will be presumed to have been based on a showing that the minors had been duly served with process, which order will, therefore, be sustained until reversed on a motion for a new trial or on appeal.

5. SAME—MISCONDUCT OF GUARDIAN.

The alleged misconduct of a guardian ad litem in failing to adduce evidence to sustain the title of his minors to certain property in controversy, which he knew existed and could have been produced on the trial, is unavailable in an action to set aside a judgment against the minors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 314, 316.]

6. SAME—JURISDICTION—GUARDIAN AD LITEM—APPOINTMENT.

In an action against certain minors, the jurisdiction of the court over them became complete on the service of summons on them, which jurisdiction could be devested only by some proceeding that dismissed them from the action, and hence the fact that a guardian ad litem was prematurely appointed was not a jurisdictional defect.

7. JUDGMENTS—COLLATERAL ATTACK—JURISDICTION.

Whenever a judgment of a court of record is collaterally attacked, it will be presumed that the court acquired jurisdiction of the defendant, unless the judgment roll shows the contrary on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933, 934.]

8. SAME—FRAUD.

A defendant against whom judgment has been rendered may maintain a suit in equity directly attacking the judgment for fraud of the plaintiff extrinsic the record action, but the fraud, laches, or blunders of the defendant or his attorneys will not afford the defendant any basis of relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 836-840.]

9. APPEAL—PRESUMPTIONS—PROCESS—SERVICE—PROOF.

Where the affidavit of service of summons is defective, it will be presumed in support of a judgment based thereon that the court received other evidence which established that service was properly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3693–3698.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by John Welsh and others against A. J. Koch and others. From a judgment in favor of defendants after the sustaining of demurrers to the complaint, plaintiffs appeal. Affirmed.

D. D. Richardson and Will M. Beggs, for appellants. F. J. Hambly and J. B. Kerwin, for respondents.

COOPER, J. The complaint in this case attempts to allege a cause of action against a great number of defendants. It contains allegations as to several separate causes of action, and covers transactions of many years' standing. It is a lengthy document, covering 162 folios of the transcript, and concludes with a prayer, asking: (1) That plaintiffs are the owners in fee simple of the real estate described in the complaint, and that defendants have no right or title thereto. (2) That the several judgments set forth in the complaint be declared void, and that each of defendants be barred and enjoined forever from asserting any claim under them. (3) That the plaintiffs' respective rights and interests in and to the real estate be ascertained and declared, and that they recover possession of the same. (4) That defendants and each of them be declared trustees of the real estate and compelled to convey it to plaintiffs. (5) That each defendant be required to set forth the portion of land held by him, and render an account of the rents, issues, and profits thereof. (6) For costs of suit. (7) For such further relief as may seem meet and proper. It thus attempts to state a cause of action in the one complaint to quiet plaintiffs' title to all the property described in the complaint as against all the defendants; a cause of action to recover possession of all the real estate, and to determine the respective rights of the plaintiffs thereto; a cause of action against each defendant for an accounting; a cause of action against each defendant as a trustee of the real estate held by him; a cause of action to set aside and annul four different judgments rendered in four different actions. The complaint was demurred to by the different defendants, the main grounds of demurrer being that the complaint does not state facts sufficient to constitute a cause of action; that it is ambiguous, uncertain, and unintelligible, for the reason that it cannot be ascertained therefrom whether it is an action for the recovery of real property, or an action to vacate and annul certain judgments, or an action to set aside conveyances of real estate, or an action for the recovery of damages for the wrongful detention of real estate, or an action to quiet title to real estate, or an action for an accounting for rents, issues, and profits, or an action to establish a trust in real estate. The different causes of action as attempted to be stated were also demurred to upon substantially the same grounds. The court sustained the demurrers, and allowed the plaintiffs 10 days to amend, and, upon their declining to do so, judgment was entered against them. This appeal is from the judgment.

We are of opinion that the judgment should be affirmed. The learned judge of the court below rendered a written opinion, which discusses the matter fully, and which we hereby adopt. It is as follows:

"The complaint combines several causes of action, to wit, four to annul four judgments affecting the real property claimed by plaintiffs, and one to quiet the title of plaintiffs to those premises. The judgments were against Peter and John Welsh, the infant sons of Garrett and Mary A. Welsh, one of them being in favor of Garrett, two in favor of Mary, and one in favor of a purchaser from Garrett. One of them covered all the premises, and the others covered only parcels of the premises. The allegation of the complaint to the effect that in 1880 Peter and John were, ever since have been, and still are, the owners, etc., of the premises, is a palpable mistake, as Peter is alleged to have died before the commencement of the action, but as that allegation can readily be amended the mistake may be overlooked in passing upon the demurrer.

"For the purpose of deraigning the title of the plaintiff to the premises, the complaint alleges that in 1880 Garrett Welsh was the owner of the premises; that he conveyed the same to McGirr; that McGirr in the same month conveyed the same to Peter and John Welsh. The allegation of the death of Peter, and the descent of his title to two of the plaintiffs, together with the above conveyances, make out a prima facie title to the premises in the plaintiffs. But if the judgments above referred to are valid, they divested Peter and John of all the title, if any, that passed to them by virtue of the deed of conveyance executed to them by McGirr. The plaintiffs, therefore, assuming that the defendants will rely upon those judgments, proceed to attack them, and procure their annulment. All those judgments were rendered in actions to quiet the respective plaintiff's title to the premises or portions thereof, and Peter and John were the defendants in each case, and the title of the plaintiff in each case was by the judgment quieted. The first in point of time was in favor of Mary A. Welsh, No. 7,303, rendered in November, 1885, for a portion of the premises. The second was in favor of Garrett Welsh, No. 7,413, rendered in April, 1886, for all the premises. The third was in favor of Pfaukutchen, No. 8,091, rendered in October, 1888, for a portion of the premises. And the fourth was in favor of Mary A. Scully (formerly Welsh), No. 9,747, rendered in May, 1893, for two portions of the premises.

"There is no room for doubt, or even question, that, under the rules of procedure in force in this state, a party to an action against whom errors have been committed in the proceedings and trial of the action, may have such errors corrected on motion for a new trial or on appeal, and it is equally well settled that such errors cannot be corrected except in one of those modes of procedure, and, if not thus reached and corrected, they are beyond the reach of any attack, either direct or collateral.

"A minor has no further time than an adult within which to take the necessary steps for the correction of errors in the proceeding or the judgment, for the statute has not made infancy an exception.

"The times within which the direct attack upon the judgment, by motion for new trial or appeal or the like proceeding, may be made, having been prescribed by law, the judgment is not subject to attack after the the lapse of that time, either directly or collaterally, on the ground of error. The statute not having made any saving or exception in that regard on the ground of the infancy of a party, or his failure to discover an alleged error, those facts will not extend the time within which the attack must be made. It necessarily results that when the times for the making of the attack in the modes above mentioned have expired the parties to the action, and their privies, are as absolutely bound by the judgment as they would be had the alleged errors not occurred.

"The grounds upon which these plaintiffs attack the judgment of Garrett Welsh v. Peter and John Welsh, No. 7,413, other than the grounds that the court did not acquire jurisdiction of Peter and John Welsh, are as follows: That it was not true that Garrett Welsh was the owner of the premises at the commencement of the action, as alleged in the complaint therein; that Peter and John were then in truth the owners of the premises; that the court appointed a guardian ad litem for Peter and John Welsh when it did not appear that the summons had been served upon them within the state of California; that the guardian ad litem knew and could have proven that Peter and John were the owners of the premises, but neglected to offer evidence in proof of that fact, and stipulated that the facts in that case, No. 7,413, were the same as those which had been found in the action of Mary A. Welsh v. Peter and John Welsh, No. 7,303, when, in truth, the facts so found were not true, and were known to the guardian ad litem to be not true; that Peter and John had a good defense to action No. 7,413, but by the misconduct of the guardian ad litem he did not make the defense in their behalf. Some other grounds are averred, but they need not be particularly mentioned.

"This complaint alleges that the court in No. 7,413, both found and adjudged that Garrett was, and Peter and John were not, the owners of the premises, and accordingly adjudged that the title of Garrett be quieted as against the claims of Peter and John. It is obvious, without argument, that those facts were material facts in the case; that the principal issues in the cause rested upon them; and that, having been found in favor of Garrett, they could not be questioned or disturbed except upon a motion for a new trial, or upon appeal, based upon a bill of exceptions or statement, or some appropriate mode in the action itself, whereby the sufficiency of the evidence to sustain the finding of those facts was directly questioned. Doubtless cases are finally determined in which the best interests of minor defendants would be subserved by giving them their day in court after attaining their majority, and this may be one of such cases, but our courts have repeatedly and uniformly held that such a term in a judgment or decree against minors is unnecessary. Minors and adults alike have the benefits of, and are bound by, final judgments to which they are parties.

"It follows that judgments, after the lapse of time for motion for new trial and appeal, are not subject to attack in any form on the ground that the facts stated in the findings, and upon which the judgment is based, are not true. Were not this principle true, the judgment, instead of being a final determination of the matters in issue in a cause, would be the beginning of troubles.

"The appointment of the guardian ad litem was based, presumptively, upon the showing to the court that Peter and John were minors, and had been duly served with process, but, if in truth the showing in that regard was not sufficient, then, beyond the possibility of doubt, the order could have been attacked in the court below, or on appeal in that case, and, if found erroneous, would have been reserved. The order remains valid until reversed, and, if erroneous, it cannot be reversed in any other mode, and therefore is not subject to attack, either direct or collateral. This does not involve the question of jurisdiction of the defendant in the cause.

"The alleged misconduct of the guardian ad litem, in failing to adduce evidence to sustain the title of the minors, which he knew existed and could have been produced on the trial, if it be available as a ground for the reversal of the judgment, could have been presented to the court below, or on appeal. The matter has no relation to the jurisdiction of the court, either of the subject-matter of the action, or of the parties, nor has it any relation to the question as to the power of the court to render judgment in the action, quieting the title of Garrett Welsh to the premises, and the matter, therefore, is merely a matter of error, and as such could be taken advantage of only in the action itself by motion for a new trial, or on appeal.

"It will be observed, also, that the complaint does not allege that Garrett Welsh colluded with the guardian ad litem, or caused or procured the alleged misconduct on his part. The misconduct or neglect of a guardian ad litem is no different in legal quality and effect from like misconduct of counsel of either party to the action. Had the action been brought by Peter and John against Garrett to quiet their title against him, and had the misconduct or neglect of their attorneys resulted in a judgment for Garrett, we do not think that it would be claimed that, after the time for a motion for a new trial and for an appeal had expired, they could procure a judgment which would, in effect, amount to a reversal of the prior judgment. A successful attack upon a judgment upon such grounds as above has all the effects of a reversal, without granting a new trial of the action. Can it be successfully asserted that Garrett Welsh and his privies ought to lose the benefit of his judgment because the person representing Peter and John more than 15 years ago failed to make the defense to the action that he might have made? If that kind of attack upon the judgment can now be made, why may not Garrett George, the minor plaintiff in this action, at the expiration of 15 years from the entry of the judgment herein, attack it on the like ground, that his guardian ad litem had neglected or perhaps badly managed his case? At the utmost, such matter is a mere error or irregularity, to be corrected in the action, or motion for new trial, or on appeal. Had the guardian ad litem presented to the court in that case all the evidence in existence to prove the title of Peter and John, and had the court found, contrary to the evidence, that they did not hold the title, it would not be contended that the judgment, based upon that erroneous finding, could be attacked for that error more than 15 years after the judgment became final.

"It is alleged that, in Mary A. Welsh v. Peter and John Welsh, No. 7,303, the guardian ad litem, having been appointed on the day succeding the service of the summons upon them, was void, and that, therefore, the court did not acquire jurisdiction of them. The appointment may have been premature, and therefore irregular and erroneous—and upon that point we express no opinion—but the jurisdiction of the court over them became complete upon the service of the summons upon them, and could not have been divested except by some proceeding that dismissed them from the action. The attack upon that ground, whether it be considered as direct or as collateral, cannot be sustained.

"The complaint alleges that the judgment in Mary A. Scully v. Peter and John Welsh is void, and the attack seems to be based solely upon the ground of misconduct on the part of the guardian ad litem of Peter and John. But we have above held that an attack upon the judgment on that ground, at this time, and in the manner attempted by this complaint, cannot be sustained.

"The judgments in the cases of Garrett Welsh v. Peter and John Welsh, No. 7,413, and in Pfaukutchen v. Peter and John Welsh, No. 8,091, are attacked on the ground of the want of evidence of the service of the summons upon the defendants. In respect to action No. 7,413, the complaint recites the affidavit of the service of the summons, and the affidavit does not state that Peter or John were served within this state. The complaint alleged 'that it nowhere appears in the said cause by any sort of evidence' that Peter and John were served in this state. In respect to action No. 8,091, the complaint recites the affidavit of service of the summons, and that does not state that Peter and John were served within the state, and the complaint contains also an allegation similar to the one last above mentioned. When an action is brought in a court of record, the first inquiry made by the court is whether it has jurisdiction of the subject-matter of the action, and this question is decided either expressly or by necessary implication, the decision being in favor of its jurisdiction if the court proceeds with the trial of the action. The next question for decision is whether the court has acquired jurisdiction of the defendant, and in that regard the decision is made or stated expressly, as is sometimes, but not always, done, or it is based upon necessary implication, for the court will not proceed to the trial of the action unless its conclusion is that it has acquired jurisdiction of the defendant, in some of the accredited modes, such as the service of the summons upon the defendant, or his appearance in the action. The determination by the court of that question is as conclusive as of any other issue or question in the action. Hence comes the presumption, whenever the judgment of a court of record is attacked, either collaterally or, as in this case, that the judgment speaks the truth, and, if it be against the defendant, that the court had acquired jurisdiction of him unless the record—the judgment roll—shows to the contrary upon its face. Another principle to be noted in this connection is that in the attack, whether it be direct or collateral, the burden of proof is upon the attacking party. Reference is not here made to a motion for a new trial or an appeal, and we have left out of view in this discussion judgments showing upon their face that the court did not acquire jurisdiction of the defendants.

"It requires no citation of principles or authorities to prove that in a proper case the defendant may, by suit in equity, attack directly the judgment on the ground of fraud, or of the want of jurisdiction of the defendant. When the action is based upon fraud the fraud must be extrinsic the record action, and must be the fraud of the plaintiff. The frauds, laches, or blunders of the defendant or his attorneys will not afford the defendant any basis of relief. When the attack is based upon the alleged want of jurisdiction of the judgment defendant, the facts upon which the attack is made must be the extrinsic record, the obvious and controlling reasons being the presumption that the court decided that it had jurisdiction of the defendant, and the verity accorded to the record. We are not speaking of records that show upon their face that the court did not have jurisdiction of the defendant.

"The complaint alleges that, in the action of Garrett Welsh v. Peter and John Welsh, No. 7,413, the only evidence in the record of the service of the summons upon the defendants was an affidavit of service that fails to show that the service was made within this state. It is neither alleged that they were not served, nor that they were not served within this state. The presumption, in the absence from the record of anything in the nature of return of the summons, is that the defendants were duly summoned. In view of the presumptions above mentioned that attend such adjudgment, those allegations of the complaint cannot be dignified with the name of an attack upon the judgment. These remarks apply also to the attempted attack upon the Pfaukutchen judgment, No. 8,091.

"Brief reference may be made to some authorities in this state upon the matters just considered. In Drake v. Duvenick, 45 Cal. 461, the attack upon the judgment in question was collateral, but the ruling of the court is applicable here. The affidavit of service of the summons was, as here, defective. It did not show that a copy of the summons was delivered to the judgment defendant. The court, in overruling the objection to the judgment on that ground, stated that, as the court must have found from the return or other evidence that a copy of the summons was delivered to him, the presumption we have mentioned, 'will come to the aid of the judgment, and that, if the court, in rendering the judgment, erred in its conclusion in that respect, the error should have been taken advantage of by motion or by an appeal.'

"Eichhoff v. Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110, was an action in equity to set aside a judgment of divorce, the complaint alleging that the defendant had neither been served with the summons nor had appeared in the action, and that the judgment had been procured by the fraudulent practices of the plaintiff. Mr. Justice Temple in discussing the cause, with his usual clear, logical power, held that in such a case the attack, though not collateral, was always indirect; that the question to be determined was whether the judgment was procured by fraud or mistake; that the burden of proof of want of service of the summons was upon the plaintiff in the action in equity, although there was not in the record a return or proof of service; and that the plaintiff was not entitled to a recovery in the action in equity.

"In this case there is no averment of the want of service, and the affidavit of service does show service upon the defendants in the actions in question, but does not state that they were served within the state. That case is much stronger for the plaintiff than this.

"The demurrer of Hemerlin, Skoden and wife, Turel, and Madronio, for whom Mr. Yoell appears, is sustained. Leave to plaintiff to file amended complaint within 10 days.

"Rhodes, J."

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 581

FISHER v. BARTHOLOMEW. (Civ. 334.)

(Court of Appeal, First District, California. Dec. 11, 1906.)

1. HOMESTEAD — HUSBAND AND WIFE — SURVIVORSHIP.

Under Code Civ. Proc. § 1474, providing that, where a homestead is selected by the husband or wife during coverture and recorded, it vests on the death of either absolutely in the survivor, a husband surviving his wife, who died seised of real estate as her separate property after having during the marriage declared that the same was a homestead, acquires title thereto by operation of law, and no order of court is necessary to perfect his title.

2. SAME.

The title acquired by a husband surviving his wife who died seised of real estate and who had during the marriage declared that the same was a homestead is not affected by an order of the probate court, made in the administration of the wife's estate, authorizing the sale of the premises.

3. JUDGMENT—COLLATERAL ATTACK.

An order of the probate court directing the sale of the real estate of a deceased wife leaving her husband surviving is not a conclusive adjudication that the premises had not been legally declared during the marriage to be the homestead of the wife and her husband, and a grantee of the husband may, in a suit to quiet title, brought by the purchaser at the sale ordered by the probate court, collaterally attack the order.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Charles W. Fisher against E. I. Bartholomew. From a judgment for defendant, plaintiff appeals. Affirmed.

E. E. Cothran, for appellant. A. H. Jarman, for respondent.

HALL, J. This is an appeal upon the judgment roll from a judgment in favor of defendant in an action brought by plaintiff to quiet title to a piece of real estate in the possession of defendant, and situated in the city of San José.

From the record it apears that the property in dispute had been the separate property of one Nancy J. Packard, and at her death was the homestead of said Nancy J. and her husband, B. F. M. Packard, by virtue of a declaration made by her in due form, but was subject to the lien of a mortgage given to plaintiff by said Nancy J. and said B. F. M. Packard to secure a promissory note executed by the said Packards to plaintiff. Plaintiff deraigns his title through a sale made by the administratrix of the estate of said Nancy J. Packard, deceased, to plaintiff, under the order of the probate court, to pay the debts of said deceased, consisting of the duly allowed claim of plaintiff, founded upon said note and mortgage. The probate proceedings were regular in form, but it nowhere appears in any of such proceedings that the property sold, which was all the property appraised in said estate, was a homestead. Defendant deraigns title to the premises through mesne conveyances from B. F. M. Packard, the surviving husband of Nancy J. Packard, deceased.

The court below held that the title derived from the surviving husband prevailed as against the title derived from the probate sale, and we think this correct. Upon the death of either spouse the homestead selected from the community property, or from the separate property of the party making the declaration, or joining therein, vests absolutely in the survivor. Code Civ. Proc., § 1474. The survivor in such case takes his title by operation of law, and no order of court is necessary to perfect his title. In re Ackerman, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep. 116; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Estate of Fath, 132 Cal. 609, 64 Pac. 995; Vandall v. Teague, 142 Cal. 471, 76 Pac. 35; Saddlemire v. Stockton Savings & Loan Society, 144 Cal. 650, 79 Pac. 381. Neither can his title thus acquired be affected by subsequent orders of the probate court. In re Ackerman, supra; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375; Estate of Young, 123 Cal. 337, 55 Pac. 1011; Estate of Fath, supra; Saddlemire v. Stockton S. & L. Society, supra. The order of the probate court, authorizing the sale of the premises, only operated upon the title then remaining in the estate of the decedent, which was nothing. Vandall v. Teague, supra.

If there was any question as to the validity of the homestead the purchaser at the probate sale would be in a position to litigate such question as against the claimant under the homestead, but no such question is raised in this case. The homestead is conceded to have been valid.

Appellant's contention virtually is that the order for the sale of the premises is a judicial determination that no valid homestead existed upon the property, and cannot be collaterally attacked. A like contention was made as to the force and effect of an order setting apart a probate homestead to the widow and the minor children of the decedent in Saddlemire v. Stockton Sav. & Loan Society, supra, and the court sustained the validity of the title of the surviving widow to the homestead selected by the husband, which vested in her at his death as against any title in the minor children derived from the order of the probate court setting apart the premises as a homestead for the use of the family of the deceased, although the petition to set apart the premises was filed by the widow, and prayed the court to set aside the premises for the use of the family of deceased, and named the widow and minor children as constituting such family.

The case of Ions v. Harbison, 112 Cal. 260, 44 Pac. 572, relied on by appellants, though in a part of its facts like the case at bar, in very essential matters is quite different. In Ions v. Harbison, the surviving husband was the administrator, and petitioned for the sale of the homestead premises without disclosing its homestead character, and, under the order thus obtained, sold the property to defendants, received the money, and applied the same to the payment of the note and mortgage on the premises, executed by himself and wife, and the funeral expenses and costs of administration incurred by himself. Upon this state of facts it was held that he and his grantee, with full notice of the facts, were estopped from questioning the title of the purchaser at the probate sale. No such facts exist in the case at bar. The fact found by the court that the surviving husband "neglected and refused" to administer upon the estate of his deceased wife does not estop him from claiming the homestead that vested in him on her death. There being no estate save the homestead, there was no estate requiring administration. In fairness to appellant it must be said that there is some language in the case just referred to, concerning the effect of the order of sale, which seems to support the contention of appellant, but we think a careful examination of the case shows that the real point of the decision is that, under the facts of the case, the surviving husband and his grantee with notice were estopped from questioning the title conveyed by the husband as administrator. At any rate the later cases herein cited establish the principle that must govern this case.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

4 Cal. App. 589

LUTY v. CRESTA. (Civ. 317.)

(Court of Appeal, First District, California. Dec. 17, 1906.)

1. DEEDS—IDENTITY OF GRANTEE—SUFFICIENCY OF EVIDENCE.

Where the grantor of a deed had a sister and a daughter bearing the same name evidence *held* sufficient to sustain a finding that the conveyance was made to the sister and not to the daughter.

2. EVIDENCE — SECONDARY — PRELIMINARY PROOF.

Where a ledger had been destroyed, it was proper, as preliminary to proof of its contents, to ask a witness who had kept it whether or not it contained an account with a certain person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 600, 601.]

3. APPEAL—WAIVER OF OBJECTION—ADMISSION OF TESTIMONY.

Where a witness was asked whether or not a ledger contained an account with a certain person and after answering affirmatively he volunteered a statement as to the nature of the account without objection from the adverse party and no motion was made to strike the testimony out and the witness was not cross-examined in reference thereto, its admission could not be complained of on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1283-1289.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Helen M. Luty against Manuel Cresta. From a judgment for defendant, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. A. D. Splivalo and Albert C. Aiken, for respondent.

COOPER, J. This is an action in ejectment to recover the premises described in the complaint, and damages for the withholding thereof. Findings were filed, upon which judgment was entered for defendant. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

In the year 1873 the "Abbey Homestead Association," a corporation, being the owner in fee of the premises, made a deed conveying the same to F. E. Luty, the father of the plaintiff, who died before the controversy in this case arose. In June, 1887, said F. E. Luty conveyed the property to Helen M. Luty. In October, 1899, Helen M. Luty conveyed the property to defendant, who thereupon went into possession, and was in such possession at the time of the commencement of this action. These deeds were all duly recorded, and show the title to be of record in the defendant. The contest in this case arises out of the fact that there are two persons bearing the name of Helen M. Luty, one the daughter of F. E. Luty, deceased, and who is the plaintiff here, and the other a sister. The sole issue before the court, and the one on which the case depended, was as to the identity of the Helen M. Luty named as grantee in the deed of F. E. Luty. The court found "that said Frederick E. Luty, in the year 1887, by deed of grant conveyed the premises described in the complaint to his said sister Helen M. Luty, the predecessor and grantor of said Cresta; * * * that said plaintiff's only and sole claim to said property arises in her contention that she is the grantee named in the said deed from Frederick E. Luty to Helen M. Luty, but said claim or contention is untrue and false and without foundation; * * * that said deed by Frederick E. Luty was made and actually and personally delivered to Helen M. Luty, sister of said Frederick E. Luty." The above-quoted findings are supported by the evidence. Helen M. Luty, the sister of deceased, testified that her brother, John S. Luty, was one of the officers and promoters of the "Abbey Homestead Association," which owned a large tract of land, of which the premises in controversy were a part; that, in consideration of his services, a portion of the Abbey Homestead property, of which the premises in controversy are a part, was awarded to said John S. Luty by the company; that by direction of John S. Luty the property so awarded to him was deeded to said F. E. Luty, who agreed with John S. Luty to hold the title subject to his directions; that John S. Luty died in the year 1886, having before his death requested F. E. Luty to convey to her the premises in controversy; that the deed, after being executed, was delivered to her in June, 1887, and placed of record; that she afterwards received the rents and paid the taxes on the property. The witness Annie H. Theller testified that she is well acquainted with Helen M. Luty, the sister of deceased, F. E. Luty, and that she knew F. E. Luty in his lifetime; that the sister lived with witness a part of the time, and was living with her in 1887; that shortly after the deed was recorded it was left in her possession by the sister for safekeeping; that she put it in her safe and kept it in her possession for a number of years until the sister, Helen M. Luty, went east, when witness delivered it to her.

Error is claimed because of the ruling of the court in overruling the plaintiff's objection to a question asked of defendant's witness Gardiner. The witness had testified that he was the book-keeper of F. E. Luty, deceased, in his lifetime, and was such up to the time of his death; that the ledger is made up from the daybook. It was then conceded that the ledger had been lost or destroyed, but it appeared that the daybook was at hand. Plaintiff's counsel then asked the witness the following question: "Q. Mr. Gardiner, did you keep the daybook and ledger for Mr. Luty? A. Yes, sir; I made the entries in them myself and personally made up the books, except a small portion, which was made by Mr. Luty himself. I am well acquainted with the contents of these books. Q. Was there any account in said ledger with the plaintiff Helen Maud Luty?" To which question objection was made because incompetent, and not the best evidence. The court overruled the objection, and the witness answered: "A. No, sir; there was no account with his daughter." The record then states: "The same question was asked the witness as to any account with Helen M. Luty, F. E. Luty's sister. Same objection and same ruling." The witness then, in answer to the question, stated that the ledger and daybook contained accounts with the sister, and proceeded, apparently without objection, to state that the books contained items charged against the sister for taxes on the land in controversy, and credits for rents received. The record then states: "At this point plaintiff's counsel requested the witness to step down and examine the daybook, which was in court pursuant to notice of defendant's attorney to produce the same on the trial of the case. Thereupon said witness stepped down and proceeded to examine said daybook to find the items he had testified to as being in the ledger, and he was not recalled."

It appears from this that the only objection was to the question as to whether there was any account in the ledger with the sister, Helen M. Luty. The witness could have answered this question "Yes" or "No." In the form in which the question was asked and the objection made, it was not objectionable. The ledger had been destroyed, and it was proper as preliminary to the proof of its contents, to show that it contained an account with the sister. The witness appears to have volunteered the answer as to what the account contained. No objection was made to it and no motion was made to strike out any part of the answer. The daybook was present from which the ledger had been made up, and, although plaintiff's counsel requested the witness to examine the daybook, which he did, no questions were asked concerning it. It evidently verified the testimony just given by the witness, but, if it were otherwise, the plaintiff's counsel had the right to cross-examine the witness fully with the daybook before them. As they did not take the trouble to ask to have the testimony stricken out, or to cross-examine the witness as to it, the plaintiff will not now be heard to insist upon a reversal of the case. Counsel should make objections clearly and specifically, and endeavor to overcome obstacles in the lower court, so as to present each question raised upon its merits. In this case the great probability is that the court below would not have allowed the witness to testify to the contents of the daybook, the book being present, if the proper objection had been made and the court's attention called to it.

We have examined other alleged errors, but we do not find anyone of them of sufficient importance to justify a discussion of its merits.

The judgment and order are affirmed.

We concur: HARRISON, P. J; HALL, J.

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4 Cal. App. 598

KEVANE v. MILLER. (Civ. 271.)

(Court of Appeal, Third District, California. Dec. 17, 1906.)

1. APPEAL — FINDINGS — CONFLICTING EVIDENCE—REVIEW.

When there is a substantial conflict in the evidence. the findings of the trial court will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

2. SAME.

A conflict in the evidence on an issue of fact exists whenever there is such a substantial and material variance in the evidence as will sustain the determination of the trial court, regardless which way it may find therefrom.

3. PRINCIPAL AND AGENT—ACTS OF AGENT—UNFAITHFULNESS—EVIDENCE.

In an action to recover money alleged to be due from defendant to plaintiff by reason of the fact that defendant, while acting as plaintiff's special agent for the purchase of certain stocks, bought the stocks for $1,500, and demanded and received from plaintiff $2,900 as the alleged purchase price, evidence *held* to sustain a finding that defendant purchased the stock as plaintiff's agent, and not on his own account for resale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 185.]

4. SAME—GRATUITOUS AGENCY.

Where defendant agreed, without compensation, to purchase certain corporate stock for plaintiff as his agent, defendant was not entitled to purchase the stock for himself and then resell it to plaintiff at a higher price, on the misrepresentation that the price so charged was the price paid.

5. APPEAL—RULINGS ON EVIDENCE—ARGUMENT.

Where the only argument made on appeal to support the alleged erroneous rulings on evidence was the statement that the rulings were erroneous and prejudicial, the Supreme Court will not prosecute an independent inquiry to discover reasons for or against the correctness of the rulings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Daniel Kevane against H. W. Miller. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. T. Hatfield and W. F. Cowan, for appellant. Copeland & Harris and A. A. De Linge, for respondent.

McLAUGHLIN, J. This is an action to recover the sum of $1,400 alleged to be due from appellant to respondent by reason of the fact that the former, while acting as the special agent of the latter for the purchase of certain corporate stock, purchased the same for $1,500 and demanded and received from his principal the sum of $2,900 in payment for said stock. The appellant in his answer denied that he acted as the agent of respondent in the transaction, but the court found against him on the issue thus presented, and this appeal is from the judgment thereupon entered against him.

The principal point urged by appellant as ground for reversal is that the evidence is insufficient to support the finding that he acted as the agent of respondent in the purchase of the stock. It is a well-settled rule of appellate practice that, when there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed. And it is equally well settled that such conflict exists whenever there is "such a substantial and material variance in the evidence adduced upon both sides of a litigated question of fact as will sustain the determination of the lower court, no matter which way it may find therefrom." Raymond v. Glover, 144 Cal. 552, 78 Pac. 3. A careful examination of the evidence in this record leaves no room for doubt as to the sufficiency of the evidence to support the findings assailed. The testimony of respondent certainly affords such support, and the trial court unquestionably had the right to give his evidence full credit, even if it had been flatly contradicted by the testimony of every other witness in the case. There was, however, no such contradiction. On the contrary, the evidence of appellant himself lends strong corroboration to the testimony of his adversary in many important particulars. Both agree that the appellant at the outset was authorized by respondent to purchase the stock for $1,500. Although he agreed to make an effort to purchase the stock for that sum, he did not communicate this offer to the owner of the stock, but later informed the respondent that it could not be purchased for less than $2,900. The latter thereupon authorized appellant to purchase the stock for that price, saying he would pay $50 down and the balance within 60 days. According to the testimony of appellant and the owner of the stock this offer was communicated to the latter, who says, that he then remarked that he was "not in the time business." Nothing further was said at that time, but about 10 o'clock that same morning the appellant and the owner reached an agreement whereby the former purchased the stock for $1,500, paying $100 down and the balance within 15 days thereafter. Immediately after this agreement had been reached, the appellant wrote respondent that he had purchased and was the owner of the stock, which he offered to respondent for the exact sum the latter had authorized him to pay when informed that it could not be purchased for less. The terms of payment the amounts being excepted, were identical with the terms secured from the owner by appellant, as a sequence flowing from the negotiations opened in respondent's behalf. This fact is significant when considered in connection with the peculiar circumstance that the offer accepted by appellant was not only far more advantageous than the offer that morning made by him as respondent's agent, but was for the identical amount named in the preliminary authorization when, in response to appellant's suggestion, respondent authorized him to purchase the stock for $1,500.

These pertinent and suggestive facts have an important bearing on the question presented for solution when viewed in the light of the conduct of the parties from the outset. When appellant suggested that respondent could purchase the stock for $1,500, the latter at once authorized appellant to purchase it for him at that price. When informed by appellant that the stock could not be purchased for the sum first mentioned, the respondent authorized the payment of the sum then named by the former as the price demanded by the owner. From this it is clearly apparent that the appellant assumed to act for respondent in negotiating for the purchase of this stock for the least sum possible, and that the latter acted upon the representations made to him as to what that sum was. The law regards form less than substance, and it would be sacrificing substance for shadow to say that, under these circumstances, the appellant could purchase the stock for the identical sum mentioned in the preliminary authorization, and, by merely repudiating his agency, exact from his principal the larger sum named by him as the minimum price for which the stock could be obtained. He had been expressly authorized by respondent to pay the sum of $1,500 for this stock, and, having voluntarily undertaken to represent the respondent in negotiations for the purchase of the same, he could not buy it in for that sum, and then take advantage of his own representations and conduct to his own profit and the detriment of his principal. His relations to respondent, thereby created, could not be changed by the letter written after the purchase had been consummated. If, under the law, the relation of principal and agent existed, such relation could not be changed, modified or terminated by his mere declaration that he had purchased and was the owner of the stock. If, in that letter he had made a full and complete disclosure of all the material facts, including the price he had paid for the stock, and respondent, with full knowledge, thus imparted, had proceeded to purchase the stock for the price demanded, the latter would not be entitled to recover the surplus because, in that event, his acquiescence would entail a waiver of his rights as a principal, and be equivalent to an admission that appellant had purchased the stock in his individual, instead of his representative, capacity. But no such disclosure was made. On the contrary, the amount paid for the stock was carefully concealed, and any man in respondent's situation, reading the letter in the light of what had transpired, would naturally believe that the writer had purchased the stock pursuant to the agreement and for the sum named in the latest authorization which was identical with the amount demanded in the letter. Moreover, any effect certain declarations in this letter might have as evidence bearing on the existence of the agency is neutralized by other statements therein, and by the conduct of appellant thereafter. In that very letter he states terms calculated to lull supicion and at the same time take advantage of respondent's desire to purchase the stock and his expressed willingness to pay the designated price. He knew what price to fix, because the respondent had accepted and acted upon his report following the first authorization to purchase the stock. The terms stated in the letter would, if accepted, enable him to reap the far-famed Teuton's 1 per cent. by merely paying the owner money received from the respondent. He was apparently willing to use the knowledge obtained under the guise of agency to his own advantage that he might secure profits, which, in our opinion, the law will not permit him to retain. No amount of adroitness in framing the letter could countervail the concealment of material facts which it was his duty to disclose. Then, too, his conduct when confronted with respondent's demand that the new stock certificates be issued to him amounted to an admission that he had acted as the latter's agent throughout the entire transaction. True, there is some conflict in the evidence as to what transpired at that time, but actions frequently speak louder than words, and his equivocal response to this demand when natural impulses would impel him to speak frankly and pointedly, gives peculiar potency to the undisputed fact that the stock certificates were issued to respondent and not to him.

It is contended in appellant's behalf that because the service was voluntary and gratuitous, no duty or obligation to respondent rested upon him. With this contention we cannot agree. Appellant having undertaken this agency was bound to exercise good faith, and at least slight care and diligence, in executing what he had voluntarily undertaken to do. Herrick v. Hodges, 13 Cal. 434; Samonset v. Mesnager, 108 Cal. 358, 41 Pac. 337; Civ. Code, § 1975. While he coud not be compelled to enter upon the performance of the service, nor be mulcted in damages for his failure to do so, when he did enter upon such performance he was, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. An agent for hire is bound to exercise a greater degree of care and diligence than an agent acting gratuitously, but the latter has no greater license to indulge in misrepresentations, concealment, or other breaches of good faith than the former. It is a maxim of jurisprudence that no person will be permitted to take advantage of his own wrong, and this general rule is subject to no exception favoring those who voluntarily and gratuitously undertake the performance of service for another. No man can be compelled to don the yoke of special, unremunerated duty to another, but when that yoke is voluntarily assumed, the wearer will not be permitted to lay down his burden when profit to himself furnishes an inducement, and that profit results from detriment suffered by the other party. The primary object of human law is to curb human selfishness manifested in the various forms of passion, and the numerous guises avarice and greed may assume. Its most wholesome rules frown upon deceit, chicanery, bad faith, and other forms of fraud, actual and constructive, and are designed to compel the exercise of good faith, candor, honesty, and fairness in dealings between men. It would be a reproach to a system having these objects in view to say that the rules referred to do not apply to one who has officiously and voluntarily undertaken and entered upon the performance of gratuitous service for another. The law governing the confidential relation of principal and agent is subject to no such reproach, for, as has been well said, "the main difference between an agency by contract and a gratuitous agency lies in the fact that the former may be enforced while it remains unacted upon by either party, while the latter can be enforced only when it has been acted upon by the agent, and he has, by his acts, involved the interests and rights of his principal." Huffcutt on Agency, § 29; Clark & Skyles on Agency, pp. 109, 964 et seq.; Am. & Eng. Ency. of Law, vol. 1, pp. 1060, 1070, 1071, 1072; Pomeroy on Eq. Jur. § 959; Civ. Code, § 3517. While our Code only requires slight care and diligence in ordinary cases of gratuitous agency, it in no way modifies the rule above announced touching the exercise of good faith. Civ. Code, § 1975. In fact, it lays down a rule far more burdensome in cases where the agent is intrusted with the performance at his own request, and we are by no means certain that appellant's conduct at the inception of the agency here disclosed did not bring him within this rule. Civ. Code, §§ 1975, 1976.

Our attention has been invited to certain rulings of the trial court in the admission and exclusion of offered evidence, but the only argument vouchsafed is the curt statement that these rulings were erroneous and prejudicial. The Supreme Court long since announced that under such circumstances it did not feel "called upon to prosecute an independent inquiry in order to find out reasons for or against the correctness of the rulings," and this court has repeatedly signified its intention to follow the rule thus announced. People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833; Humphrey v. Pope, (Cal. App.) 82 Pac. 223. We would be justified, therefore, in ignoring the assignments of error, but have elected to examine them with the result that no error prejudicial to appellant was discovered.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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4 Cal. App. 593

McCLELLAN et al. v. WEAVER et al.

(Civ. 232.)

(Court of Appeal, Third District, California. Dec. 17, 1906.)

1. Wills—Construction of Will—Review.

Under Civ. Code, § 1318, declaring that the intention of a testator must be ascertained from the words of his will taking into view the circumstances under which it was made, the appellate court in a suit for the construction of a will must, where the record is silent as to extraneous circumstances, interpret the will unaided by any extraneous circumstances.

2. Same—Construction Against Intestacy.

A construction of a will favorable to testacy obtains where the language used reasonably admits of such construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

3. Same—Invalidity of Will.

Where a will, notwithstanding the invalidity of a trust attempted to be created, disposed of the property to devisees in such a manner as to require the same to be upheld, the next of kin of the testator could not urge the invalidity of the trust as a ground for adjudging that the testator died intestate, so as to enable them to take the property as intestate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 992, 993.]

4. Same—Construction—Estates Acquired.

A testator gave the residue of his estate to a devisee in trust "for herself and her son * * * and her daughters," and on her death to the son and daughters equally, the devisee to hold the residue for life, and provided that the devisee should have the residue distributed to her on final distribution to hold for life, and that her son and daughters should have the remainder distributed to them subject to the life estate in the devisee. *Held*, that the testator gave to the devisee a beneficial interest for life in the residue, and on the trust failing because of indefiniteness the residue passed to her discharged of all burdens, save such interest as passed to her children as remaindermen.

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Sarah Ann McClellan and others against Agnes Weaver and others for the construction of the will of J. D. Byers, deceased. From a judgment for plaintiffs, defendants appeal. Affirmed.

N. J. Barry, H. D. Burroughs, and R. R. Seyer, for appellants. Garroutte & Goodwin and J. E. Pardee, for respondents.

CHIPMAN, P. J. This action was commenced under the provisions of section 1664 of the Code of Civil Procedure, plaintiffs' purpose being to have the court ascertain and declare the rights of all persons in and to the estate of one J. D. Byers, deceased, who died testate, and to obtain from the court a judgment that plaintiffs are entitled to have distributed to them all the residue of said estate after the payment of the debts thereof, the expenses of administration and the specific legacies mentioned in the will of the said Byers. The defendants are nephews and nieces, the next of kin of deceased. They deny testacy, and allege that the provisions of said will, under which plaintiffs claim, are illegal and void, and that defendants, as heirs at law and next of kin of deceased, are entitled to distribution. Deceased died March 23, 1902, at Lassen county, where said estate is situated. J. A. Forkner was duly appointed executor of the will in question. No final account has been filed and no portion of the estate has been distributed. There were several specific bequests to some of the defendants and others which the decree recognizes, and as to which no question arises. The controversy springs from the following paragraph of the will: "Twelfth: I give and devise all the rest, residue and remainder of my estate both real and personal and wheresoever situated to Sarah Ann McClellan in trust during her life for herself, her son James H. B. McClellan and her daughters Ella Forkner and Ida Andrews, and upon the death of said Sarah Ann McClellan all of said rest, residue and remainder to go to said James H. B. McClellan, Ella Forkner and Ida Andrews, to be divided amongst them equally share and share alike." The will gave the executor power to carry on the business of deceased pending administration the same as it was conducted and carried on during his lifetime, and requested the probate court to give the "executor such time as was reasonably necessary" to pay the specific legacies out of the personal estate and the profits of the said business. It was also provided by the thirteenth paragraph as follows: "And it is my will that pending the administration of my estate my said executor pay to said Sarah Ann McClellan such sum monthly as in the judgment of said executor is necessary for her support and the conditions of my estate will permit." The fourteenth paragraph is as follows: "Any legatee herein named contesting this will shall forfeit all rights hereunder and the bequest made to him or her shall pass to my residuary legatees." After making disposition of the specific bequests in accordance with the will, the court found: "Seventh: That Sarah Ann McClellan is entitled to all the rest, residue, and remainder of said estate both real and personal, and wheresoever situate, to have, hold, and enjoy the same during the term of her natural life, and upon her death all of said rest, residue, and remainder of said estate to go to said James H. B. McClellan, Ella Forkner, and Ida Andrews, to be divided amongst them equally share and share alike; and that the said Sarah Ann McClellan is entitled to have all the rest, residue, and remainder of said estate distributed to her upon final distribution, to have, hold, and enjoy the same during the term of her natural life; and the said James H. B. McClellan, Ella Forkner, and Ida Andrews have the right to have all of said rest, residue, and remainder distributed to them subject to the life estate in the same distributed to said Sarah Ann McClellan." Judgment was entered accordingly. Defendants appeal from that portion of the judgment disposing of the residue of said estate, on the judgment roll alone.

Defendants contend that the trust attempted to be created by the will is void for uncertainty, and that it is not for any one of the purposes allowed by section 857 of the Civil Code, and that defendants are, therefore, entitled to distribution of the residue of said estate as heirs at law of deceased. The Civil Code prescribes certain rules for the construction of wills. The will is to be construed according to the intention of the testator, and, where his intention cannot have effect to its full extent, it must have effect as far as possible. Section 1317. "The testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declaration." Id. § 1318. Respondents state in their brief some facts and circumstances in aid of the construction of the will as claimed by them. But the record is silent as to these alleged facts and circumstances. We do not even know from the record what relation by consanguinity or otherwise the residuary legatees bore to the testator or to any of the other legatees. The will must, therefore, be its own interpreter unaided by any extraneous circumstances. It is a cardinal rule that a liberal construction should be given to testamentary dispositions of property (In re Heywood's Estate [Cal. Sup.] 82 Pac. 755); and it is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction (Estate of Dunphy, 147 Cal. 95, 81 Pac. 315).

It does not concern defendants whether the trial court correctly determined the relative rights of plaintiffs to the residue if they are entitled thereto. It is immaterial so far as concerns defendants whether or not a valid trust was created if, notwithstanding its invalidity, there was such disposition of the property made to plaintiffs as should be upheld under settled principles of testamentary construction. It may be conceded that, while the testator had in mind making Mrs. McClellan a trustee of the residue of the estate for some purposes, he failed to define the objects or purposes of the trust with certainty and definiteness, and so failed to create a valid trust. But, notwithstanding his failure in this respect, he did not fail to make perfectly clear his intention that the residue should go to Mrs. McClellan and her children. "Where his intention cannot have effect to its full extent, it must have effect as far as possible." Civ. Code, § 1317. Mr. Perry states the rule as follows: "If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which failed, the donee will take in trust for the donor or his heirs, but, if it appear, from the whole instrument, that some beneficial interest was intended for the donee, or that he was intended to take beneficially in case the particular purpose fails, no trust will result, but he will take the estate discharged of burdens." Perry on Trusts, § 159. See, also, the principle stated to same effect, Am. & Eng. Ency. of Law, vol. 15, p. 1131. It seems to us entirely clear that the testator devised the residue of his property to Mrs. McClellan with the intention that she should enjoy it, at least to some extent, during her life, and that at her death the said residue should go to her children in equal shares. Whether these children could claim a portion of the incomes during the life of their mother is a question not involved and is not decided. As already said, this question does not concern defendants, and these children are not appealing.

The main intention of the testator obviously was the creation of a beneficial interest in the residue of his estate in Mrs. McClellan during her life, with the remainder over to her children. We can but conjecture his entire purpose in seeking to make the devise in trust. His principal object in that regard may have been to forbid the disposition of the corpus of the property by Mrs. McClellan. But whatever this purpose, he clearly devised to her a beneficial interest "during her life," and, the trust failing, that interest passed to her, as Mr. Perry expresses it, "discharged of all burdens," save such interest as passed also to her children as remaindermen.

This seems to us so clearly shown by an examination of all the provisions of the will that we see no necessity for further citation of authorities or for going into any extended analysis of the will.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

150 Cal. 124

MARTIN et al. v. SOUTHERN PAC. CO.

(S. F. 3,566.)

(Supreme Court of California. Dec. 27, 1906.)

1. Railroads — Accidents at Crossings — Contributory Negligence—Question for Jury.

Whether plaintiff, who was injured by a train while driving over a railroad crossing, was guilty of contributory negligence in failing to look down the track for a train as he approached the crossing, *held* under the evidence to be a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1169–1186.]

2. Same.

Where a person who was injured by a train while driving over a railroad crossing can at a convenient point near the track discover the approach of the train by the exercise of his senses of hearing and sight, and thereby avoid the danger in which he has placed himself, his failure to do so is contributory negligence, precluding recovery, notwithstanding the employés operating the train may have been negligent in failing to give the statutory signals or warnings of its approach at the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1043–1056.]

3. New Trial — Statement of Grounds — Bill of Exceptions.

A statement, entitled a statement on motion for a new trial, which was also a bill of exceptions and regularly settled and allowed as such, was sufficient to authorize the granting of a new trial, since both statement of facts and bill of exceptions may be incorporated in the same paper.

4. Appeal — Decisions Reviewable — Nonsuit—Specification of Errors.

The granting of a nonsuit may be reviewed on appeal as error of law, if excepted to and specified as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3316–3330; vol. 2, Appeal and Error, §§ 1582–1595.]

5. New Trial—Motions for Notice of Intention—Specification of Errors—Sufficiency.

In a notice of intention to move for a new trial embodied in a bill of exceptions, a specification of error that the motion would be made on account of errors in law occurring in the trial and excepted to by plaintiffs was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 256, 257, 278.]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Susan A. Martin and others against the Southern Pacific Company. From a judgment from an order granting plaintiffs a new trial after judgment of nonsuit, defendant appeals. Affirmed.

A. A. Moore, for appellant. W. W. Foote and Vogelsang & Brown, for respondents.

LORIGAN, J. This action was brought by plaintiffs, the wife and minor children of Joseph Martin, to recover damages for his death, claimed to have been caused by the negligence of defendant in the operation of its railroad. This appeal is taken by the defendant from the order granting plaintiffs a new trial after a judgment of nonsuit had been entered against them upon the trial of the action in the court below.

The accident resulting in the death of Martin occurred at a crossing next to the town of Irvington, in Alameda county, on September 6, 1894. The railroad track at this point runs north and south and is intersected by a road known as the "Mission Road," running east and west. The Mission Road is 66 feet wide. The right of way of the defendant is 60 feet wide; the main line of track being located in the middle of it, and the rails being a fraction over 27 feet from the east and west lines of the right of way. On the corner formed by the intersection of the easterly line of the right of way and the northerly line of the Mission Road is located what is known as "Vollmer's Warehouse," which extends about 100 feet northerly along the right of way, and easterly about 150 feet on the Mission Road. Further north of Vollmers, and also on the edge of the right of way, is located another warehouse. In front of these warehouses, and between them and the main-line track, was a switch or siding which extended some 500 feet north of the crossing. The platforms of said warehouses, which were 4½ feet in height, extended westerly so as to reach the floors of box cars stationed on the switch; the platform to the north being much wider than the Vollmer platform in order to meet the curve of the switch as it joined the main track. The distance from the corner of Vollmer's warehouse to the nearest rail of this side track was 29 feet 4 inches, and from the center of the near rail of said side track to the nearest rail of the main track the distance was 12 feet 11 inches. At the time of the accident there were several freight box cars of defendant—the evidence is uncertain as to the number—standing on said siding; one of these extending some distance into the Mission Road. These box cars were from 34 to 40 feet long, extended 2 feet beyond the rails of the side track, and stood next the platform in front of Vollmer's warehouse.

The deceased was a farmer and teamster, a man of good hearing and eyesight, who had been accustomed for several years to drive teams on the road over this crossing where he was fatally injured. On the afternoon of the day of the accident he was driving a team of heavy horses harnessed to an empty open-geared lumber wagon, and was sitting astride on the reach near the center, at least 11 feet from the front end of the wagon pole. The reach of the wagon stood 2½ feet from the ground, and the deceased was a man about 5 feet 9 inches in height. He had driven from the town of Mission San Jose downgrade toward Irvington and this railroad crossing westerly on the Mission Road at a slow trot. When some 250 feet from defendant's right of way, the evidence shows that his view of defendant's track was practically obscured by trees and buildings, including the warehouses mentioned above. As deceased came down about the corner or close to the corner of Vollmer's warehouse on the defendant's right of way (the exact spot seems to have been indicated by a witness on some diagram used on the trial, which diagram is not in the record), he stopped his team and sat in the attitude of one listening. How long he so remained does not appear. It does appear, however, that, though he stopped to listen, he did not look or attempt to look either at this point or at any other time after he started toward the crossing, although there was evidence that through the space between the warehouse and the box cars on the switch, something over 7 feet, an observation might be had by a person standing in the Mission Road along defendant's track for some 2,000 feet northerly in the direction of Niles. After stopping to listen, deceased started his team into a walk towards the crossing, going very slowly up a raise in the road approaching it. As he cleared the box car, which was extending into the Mission Road on the siding, he looked down the track, discovered the train, immediately whipped up his team which was on the main track at the time, and endeavored to clear it. The train, however, struck the hind wheel of the wagon, threw him from it, and in the fall he sustained injuries which caused his death. The train which collided with the wagon of deceased was a special freight train, and there was evidence in the case tending to show that no bell or whistle or other signal was given of the approach of the train towards the crossing, and that it approached it on a descending grade at the rate of from 35 to 40 miles an hour.

With this statement of the general features of the evidence, we approach the merits of the appeal, calling attention to other items of evidence as we proceed. The only question in the case is whether, upon the evidence, the court was warranted in holding, as a matter of law, that the decedent was guilty of contributory negligence in approaching the crossing. While originally so holding, upon the motion for a nonsuit, the trial court was satisfied upon a more particular consideration of the evidence, upon the motion for a new trial, that the question of deceased's contributory negligence was properly for the jury, and we think this conclusion was correct. In granting the nonsuit, as it appears from the grounds of defendant's motion therefor, the court was of the opinion that the evidence showed that while defendant, when near the crossing, listened for an approaching train, he was guilty of contributory negligence in failing to look northerly along the track when he reached the corner of Vollmer's warehouse on defendant's right of way, from which point, as we have said, there was evidence that the track could have been seen for 2,000 feet. And the court must have assumed in this connection that the testimony showed that, had the deceased so looked at this point, he would have discovered the approaching train.

There can be no question but the law is well settled in this state that a traveler upon a highway approaching a crossing must take all reasonable precautions to ascertain whether a train is approaching. In this regard the imperative duty is cast upon him to listen carefully and to look carefully at the most available and convenient distance from the track from which an observation of it can be made, and, when the act of listening and looking may be reasonably effective, that, notwithstanding the employés operating a train may be guilty of negligence in failing to give the statutory signals or warnings of its approach to a crossing, still, if at a convenient point near the track a traveler could have discovered the approach of the train by the exercise of his senses of hearing and sight, and hence avoided the danger in which he placed himself, his failure to do so will constitute contributory negligence precluding a recovery from those who are equally negligent with himself. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 Pac. 926; Green v. Los Angeles Term. Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68. But it will be observed that, as far as the duty of the traveler upon the highway to look is concerned, contributory negligence on his part in failing to do so can only result from the fact that, if he looked from a point of observation near the crossing he could have seen the train approaching and have avoided it. It is only when, if he had made the observation, he could have seen the coming of the train, that he can be said to have been negligent in omitting to do so.

The trial court in granting the nonsuit necessarily assumed that the evidence showed that when deceased reached the corner of the warehouse the train was approaching along the 2,000 feet of track open to observation from that point, and that had he looked he would have seen it; but we think, as the lower court doubtless did on the motion for a new trial, in its review of the evidence, that whether the train at the time when deceased could have looked had reached a point where he could have seen it, had he done so, was, under the evidence, a question for the jury. The witness, Christensen, who made the observation as to the distance one could see up the track from the warehouse corner, testified: "That a man on the siding, or on the main track, or anywhere between or at the corner of the warehouse, can see a man afoot on the track coming towards Niles for a distance of at least 2,000 feet. He can see him until he gets over the little hill that runs down towards Mallard, where the grade would be higher than his head." The evidence of this witness simply fixed the fact that a view of the track from the warehouse corner might be had for the distance stated, but whether the train was anywhere within the field of observation of deceased had he looked from that point was a matter to which other evidence in the case was addressed. Ainsworth, one of the witnesses for the plaintiff and proprietor of a hotel near the crossing, was watching for the coming of the train. as a guest at his hotel wished to take it if it stopped. He testified that a train would ordinarily be in view a quarter of a mile below the switch (the switch was 500 feet long), where the track declines and runs down into Niles (doubtless the point called Mallard referred to in Christensen's testimony); that he saw deceased stop his team at the corner of the warehouse and listen; that the witness looked down the track at the same time to see if he could see a train or hear it coming, but did not see anything. The deceased started towards the crossing, walking his horses very slowly, and that his team was in the middle of the track when deceased looked, discovered the train, and then whipped the horses up in an effort to clear it. Another witness, Mrs. Brownell, who was in an upper story of the same hotel of which her husband with Ainsworth was proprietor, was watching for the train, as she did daily, because her little child was always anxious to see it pass. She saw the accident, and testified that she looked down the track and saw the train coming; that it was then half a mile away, and deceased was leisurely approaching the track, and his team was then about 10 feet from it; that this was the first she saw of him. She had not seen him stop to listen. Under this evidence, considered with all the other evidence in the case, it was for the jury to determine, as affecting the question of contributory negligence, whether, had the deceased looked down the track when he approached the corner of the warehouse, he could have seen the train then approaching. If the testimony of these witnesses was uncontradicted, and the jury was satisfied with the accuracy of their observations and their capacity to determine distances, it would warrant them in finding that at the time deceased reached the point when he could have looked the train was not in sight. According to Ainsworth, it was not observable at Mallard, a point 2,000 feet down the track from which it could be seen, and, according to the testimony of Mrs. Brownell, who was looking from an elevation, it was half a mile away. The testimony of these witnesses may be open to the criticism counsel for appellant subjects it to, but their credibility and the weight to be attached to their testimony were matters for the consideration of the jury. It is insisted by counsel that the truth of the testimony of these witnesses is mathematically impossible, as the train could not have covered the distance of 2,000 feet while the deceased was proceeding 27 feet from the corner to the nearest rail of the main track, or at most 30 feet to its center. But, if the testimony that the train was going 35 or 40 miles an hour was true, the train could have covered the distance of 2,000 feet in less time than a minute, while it would not be unreasonable for the jury to conclude that it would take more than that time for the deceased to proceed from the warehouse corner to the point of collision. In any event, whether he could or could not was a fact to be determined by the jury. We think, in view of the testimony referred to, that the case upon the question of the deceased's contributory negligence should have been originally allowed by the court to go to the jury, and, in subsequently reaching that conclusion by granting the motion of plaintiffs for a new trial, we do not think the lower court committed any error.

There is no merit in the point made by appellant that the lower court erred in granting the motion for a new trial because the motion was presented on a statement of the case and contained no specification of particulars in which the evidence was alleged to be insufficient to justify the decision of the court in granting a nonsuit, or any assignment of error. The statement, while entitled a statement on motion for a new trial, was also a bill of exceptions, and was regularly settled and allowed as such. Both the statement and the bill of exceptions may be incorporated in the same paper. Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381. The ruling granting the nonsuit and the exception of defendant to it appeared in the substantive part of the case. If excepted to, and specified as such, the granting of a nonsuit may be reviewed on appeal as error of law. Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218. In the notice of intention to move for a new trial embodied in their bill of exceptions, it was specified, among other grounds of the motion, that it would be made on account of errors in law occurring in the trial and excepted to by plaintiffs. This was all the specification of error that was necessary. Where a party proceeds upon a bill of exceptions, the specification of the particular errors upon which he relies is not necessary. It was said, in Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403, and since followed (except in the case of Miller v. Wade, 87 Cal. 410, 25 Pac. 487, subsequently overruled in Barfield v. S. S. Ir. Co., 111 Cal. 119, 43 Pac. 406), that: "No specification of the particular errors of law on which the appellant will rely is made in her bill. But while this is required in a statement of the case (Code Civ. Proc. § 659, subd. 3) it is not in a bill of exceptions. Code Civ. Proc. § 650. The point of respondent, therefore, is not tenable." See, also, Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111; Barfield v. S. S. Ir. Co., 111 Cal. 119, 43 Pac. 406; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84.

The order appealed from, granting the new trial, is therefore affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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150 Cal. 145

CALIFORNIA SHIPPING CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 3,783.)

(Supreme Court of California. Jan. 3, 1907.)

TAXATION—VESSELS—RESIDENCE OF OWNER.

Vessels engaged in foreign or interstate commerce, which had not by the manner of their use acquired an actual situs elsewhere, were properly assessed for taxation at the domicile or residence of their sole owner at the place where they were actually registered under the laws of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 436.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the California Shipping Company against the city and county of San Francisco. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Chas. E. Taylor (Wm. P. Hubbard, of counsel), for appellant. Franklin K. Lane, City Atty., Percy V. Long, City Atty., and W. I. Brobeck, Asst. City Atty., for respondent.

ANGELLOTTI, J. This is an action to recover taxes paid by plaintiff under protest, which had been assessed and levied by defendant for the fiscal year ending June 30, 1903, upon 17 vessels owned by plaintiff. A demurrer to the complaint was sustained, and plaintiff having failed to amend, judgment was given for defendant. Plaintiff appeals from such judgment.

The complaint shows that the plaintiff is a corporation, organized and existing under the laws of this state, and was on the 1st Monday of March, 1902, and ever since has been, the sole owner of all of said vessels. All of said vessels were registered, under the laws of the United States, at the port of San Francisco in this state. The allegation as to each of said vessels, relied upon to show that the same was not assessable in this state, is one to the effect that the vessel was not at 12 o'clock m. on the 1st Monday in March, 1902, or thereafter and prior to the filing of the complaint herein (December 18, 1902), actually within the waters of the state of California, but was at all said times without the waters of such state. As to some of said vessels, it was alleged that the same had never been actually within the waters of this state, while as to others the allegation was that they had not been within the waters since a date preceding said 1st Monday of March, 1902. As to none of said vessels were facts alleged showing that the same had acquired an actual situs outside of the state of California, or that it was not engaged solely in foreign or interstate commerce. Nor was there any allegation to the effect that the city and county of San Francisco was not the domicile or place of residence of the sole owner of all of these vessels. The complaint, then, presented the simple case of vessels which had not by the manner of their use acquired an actual situs elsewhere, but which were employed in foreign or interstate commerce, and assessed at the domicile or residence of their sole owner, at which place they were actually registered under the laws of the United States. That such assessment was proper is fully established by the authorities. See Olson v. City and County of San Francisco (Cal. Sup.) 82 Pac. 850, and cases therein cited. See, also, Ayer & Lord Tie Co. v. Kentucky, 26 Sup. Ct. 679, 50 L. Ed. 1082, and cases there cited.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.

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150 Cal. 180

BANZHAF et al. v. CHASE. (S. F. 3,949.)

(Supreme Court of California. Jan. 7, 1907.)

TRADE-MARKS — UNFAIR COMPETITION — INJUNCTION.

Without regard to whether plaintiffs have, or can have, a trade-mark in the words "Old Homestead," stamped on bread manufactured by them, the stamping into bread manufactured by defendant of the words "New Homestead," in letters and words of the same size, style, and arrangement, being for the purpose, and with the result of, appropriating plaintiffs' trade, will be enjoined, on the ground of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78–86.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John A. Banzhaf and others against Edward C. Chase. Judgment for plaintiffs. Defendant appeals. Affirmed.

Riordan & Lande and James P. Sweeney, for appellant. Alexander & Church, for respondents.

SHAW, J. The plaintiffs were engaged in the business of baking and selling bread in the city of San Francisco. Their bakery had become known as the "Old Homestead Bakery," and they had been for a long time making and selling a certain kind of bread which they had designated as "Old Homestead Bread," which had become well known by that name, and had acquired a reputation for its good quality, and by reason thereof it had an extensive sale in the city and county of San Francisco. The name "Old Homestead" was stamped upon each loaf of bread, the word "Old" being placed immediately over the word "Homestead." Because of its reputation under the designation aforesaid, the plaintiffs had enjoyed a good trade in this bread, and it had been a source of great profit to them. The defendant, with the intent to injure and destroy the business of the plaintiffs and to deceive the public and the buyers and consumers of plaintiffs' "Old Homestead" bread and to injure and defraud the plaintiffs, prepared and offered for sale an article of bread in loaves of a size similar to those of the plaintiffs, marked with the words "New Homestead" stamped into the loaves, with letters and words of the same style and size, and arranged in the same manner as the words "Old Homestead," in the loaves of bread made by the plaintiffs. This bread was put upon the market by the defendant, and was of a character to deceive the buyers of bread, and did mislead the previous purchasers and consumers of bread of plaintiffs' manufacture, and induced them to buy that of the defendant's instead of the plaintiffs', whereby the plaintiffs lost their trade, and were damaged in an amount which the court below found to be $765. This action was begun to enjoin the defendant from making bread in imitation of the plaintiffs' bread, and marking the same with the name "New Homestead," or "Homestead," or in any manner using the said words in connection with the sale of said bread to induce customers to buy the same, or from using any simulation of the plaintiffs' trade-mark aforesaid. The cause was tried by the court, findings were made in accordance with the allegations of the complaint, and judgment rendered accordingly. The defendant appeals from the judgment, and from an order denying his motion for new trial.

The contention of the defendant is that the words "Old Homestead" are merely descriptive of the kind and quality of the bread; that they are an affirmation that the bread "is like that made in the old homestead of childhood's recollection," and that it is equally pure and simple as home-made bread; that they do not indicate origin or ownership; and hence, that any person is at liberty to use them, and that they cannot be adopted as a trade-mark and the right to their use acquired as the property of any person. The words "Old Homestead," or "Homestead," may, and perhaps do, suggest that the bread on which they appear is asserted to be similar to that made in the ordinary old homestead. Whether this would indicate to any person that it is good bread or bad bread, would depend on the recollections or knowledge of the particular person concerning the kind of bread made in the homestead of his experience, whether it was that of his childhood or of his adult years. But we may concede that the words are descriptive in character and relate to quality, and hence that, under section 991 of the Civil Code, they cannot be appropriated by any person as his own, so as to give him a right to prevent their use by another to his injury, regardless of the motives or purposes of the other in so using it. The case of the plaintiffs does not depend on its right to the exclusive use of the words in question. It is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiff and benefit himself, simulates the plaintiffs' goods, deceives the plaintiffs' patrons into the belief that his bread is that made by the plaintiffs and thereby induces them to buy his own bread instead of the plaintiffs', thus, by fraud and deception, depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trade-mark. If the words in question constituted a trade-mark of the plaintiffs, as defined by law, and the defendant was using it to plaintiffs' injury, he would be restrained, although he were in entire ignorance of plaintiffs' prior use, or right, and were using it in good faith, with good motives, with no intent to injure any person, and no consciousness of such injury. But where one purposely imitates the goods, signs, or place of business of another, in order, by deceiving the other's patrons, to sell his own goods as the goods of the other, and thereby obtain for himself the profits which would otherwise go to the other, it is not necessary that the devices, words, or signs which are imitated shall constitute a trade-mark. The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-mark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trade-mark, but the fraudulent injury to, and appropriation of, another's trade.

This is well illustrated by the case of Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57. The plaintiff in that case was a corporation, and was engaged in business in a store upon which they had placed conspicuously the sign "Mechanical Store," which was probably more descriptive of character and quality than the words "Old Homestead" in the case at bar. It had constructed the building in which it conducted the business in a peculiarly conspicuous style of architecture, and in that building, and under that sign, it had, for a long time, conducted the business, had acquired a wide reputation, and by honest dealing had obtained an extensive and profitable custom and valuable good will. The defendant, for the fraudulent purpose of deceiving the public and the patrons of the plaintiff and appropriating to his own use the plaintiff's trade and profits, erected a building alongside that of plaintiff's, in the same style of architecture, so as to make it appear as a part of the plaintiff's store. He did not put up any sign whatever. In this adjoining building he kept for sale the same kind of goods as those dealt in by the plaintiff, and he did by these appearances deceive the public and prior patrons of the plaintiff, obtained their trade, and injured the plaintiff's business. It was held that this constituted an actionable wrong, regardless of the law of trade-marks, or the imitation or use of any words which the plaintiff might claim as a trade-mark, and that an injunction was properly granted to prevent its further continuance. The case of Dodge Stationery Company v. Dodge, 145 Cal. 380, 78 Pac. 879, was of the same character, and was decided upon the same principle. The plaintiff's case is, in its legal aspect, in all respects similar. It was said in the Weinstock Case: "The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader. * * * Upon what principle of law can a court of equity say, if you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law? Equity will not concern itself about the means by which fraud is done. It is the results arising from the means, it is the fraud itself, with which it deals. The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent." The same reasons apply with equal force to the case at bar and demonstrate conclusively that the plaintiffs are entitled to their injunction without regard to their ownership of any name as a trade-mark, and without inquiry into the question raised by the defendant, whether or not the plaintiffs' name was properly registered as a trade-mark, or whether or not that registration was prior to the registration of the defendant.

In view of these conclusions is is unnecessary to notice further the other points raised.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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150 Cal. 177

MEYER v. O'ROURKE. (S. F. 3,786.)

(Supreme Court of California. Jan. 7, 1907.)

1. QUIETING TITLE—ALLEGATION OF OWNERSHIP OF LAND—FINDINGS—DECREE.

An allegation that plaintiff was the owner and in possession of land was an allegation of ownership in fee simple, and hence a finding that the allegation was true was sufficient to support a decree in plaintiff's favor on the theory of his ownership in fee.

2. COSTS—PERSONS INDIVIDUALLY LIABLE—EXECUTORS.

Under Code Civ. Proc. §§ 1031, 1509, authorizing an award of costs against executors, etc., personally for mismanagement or bad faith in prosecuting or defending an action, it is not necessary that there be a finding of mismanagement or bad faith before costs may be awarded against them, since costs are but an incident of a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 380.]

3. APPEAL—RIGHT OF REVIEW—EXECUTORS—JUDGMENT AGAINST INDIVIDUAL CAPACITY.

One sued as an executor and against whom judgment for costs was rendered personally was not entitled to review the judgment where he failed to make himself a party to the litigation individually.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 911, 941.]

4. COSTS—PERSONS INDIVIDUALLY LIABLE—EXECUTORS.

In the absence of a specific statute authorizing the imposition of costs against executors, etc., under Code Civ. Proc. § 1022, providing for the allowance of costs to plaintiff on judgment in his favor, costs will be imposed upon an executor individually, leaving him the right to seek reimbursement from the estate should he be fairly entitled to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 380.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Fred H. Meyer against John F. O'Rourke, executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert P. Troy, for appellant. Vogelsang & Brown (Bertin A. Weyl, of counsel), for respondent.

HENSHAW, J. This was an action to quiet title, brought against John F. O'Rourke as executor of the last will of Patrick O'Rourke, deceased. The complaint alleged "that plaintiff now is, and for some time hitherto has been, the owner and in possession of that certain piece of land," describing it. The answer was denial, with an allegation "that the real property in said complaint described is owned in fee simple by the said estate of Patrick O'Rourke, deceased." After trial the court found that "each and all of the allegations of plaintiff's complaint are true and are sustained by the evidence." It is urged that the findings are insufficient to support the judgment, in that there is a failure to find upon the affirmative allegation of the answer that the estate of Patrick O'Rourke owned the property in fee simple. A complaint, which alleges that plaintiff is the owner and in possession of certain lands, and that defendant claims an estate or interest therein, but has none, states a cause of action. Rough v. Simmons, 65 Cal. 227, 3 Pac. 804. The ownership and right of possession, as unqualifiedly averred in the complaint, is an allegation of ownership in fee. Civ. Code, §§ 680, 761, 762. The finding of the court, therefore, that all the allegations of the complaint are true, is sufficient to support the decree which was given in plaintiff's favor.

But the principal contention on this appeal is against the award of costs. The court awarded the costs against John F. O'Rourke personally. The provisions of the Code of Civil Procedure bearing upon this are sections 1031 and 1509. Upon authority of former decisions of this court, construing and applying those sections, viz., Hicox v. Graham, 6 Cal. 167, and Stevens v. S. F. & N. P. R. R. Co., 103 Cal. 252, 37 Pac. 146, the order the court here made was within its discretion. Most of the matters presented against this award were urged in Stevens v. Railroad Co., supra, and must be taken to have been decided adversely to the present contention. The Stevens Case, however, having been tried before a jury, differs in that respect from the case at bar, which was tried by the court, and it is urged that there should have been a finding of the mismanagement and bad faith of the executor before costs could have been awarded against him personally. Costs, however, are but an incident of the judgment, and no finding was necessary. Appellant's argument against the constitutionality of section 1509 of the Code of Civil Procedure is the familiar one that he is a defendant in his representative capacity as executor; that an award of the costs against him personally would be to deprive him of property without due process of law, in that he was not a party to the action; and that the section is unconstitutional in not conferring upon him process of law, and allowing him an opportunity to be heard in his individual capacity. The contention, however, so far as this case is concerned, proves too much. He appeals in his representative capacity, and upon his appeal seeks to have himself, in his individual capacity, relieved from this imposition of costs. Upon this appeal, therefore, as the executor of an estate, charged with its preservation and conservation, he occupies a position in hostility to it, in endeavoring to have the burden of the costs of litigation removed from his individual shoulders and cast upon the estate which he represents. So far as the estate is concerned, which alone he represents upon this appeal, the estate is not an aggrieved party. So far as he individually is concerned, if weight is to be accorded to his objections as to the constitutionality of the section, he should have connected himself with the proceedings in the trial court after the imposition of costs upon him individually, and so, in his proper and undividual capacity as a party aggrieved, have come before this court for relief. It was perfectly proper for him in his individual capacity to have made appropriate motion in the court below, seeking relief, and connecting him with the litigation. McCarthy v. Speed, 94 N. W. 411.

Moreover, if the appellant's views as to the unconstitutionality of section 1509, Code of Civil Procedure, should be held valid, the same vice of want of notice inheres in section 1031, Code of Civil Procedure, with the result that we are left without a statute bearing upon the imposition of costs in case of the executor or administrator excepting the general provision of section 1022, Code of Civil Procedure. In such case the rule is well settled, and is, indeed, commended, that the costs should be imposed upon the executor individually, and not upon the estate, nor upon him in his representative capacity. There is left to him the right to seek an allowance from the estate in a proper case. If, however, the litigation has been unjust or ill advised, then, to prevent the dissipation of estates at the hands of careless executors, the executor individually will be compelled to bear the burden. Thus says the Supreme Court of Massachusetts in Hardy v. Call, 16 Mass. 530: "If the judgment for costs could be legally recovered against the goods and estates of testators and intestates, all such estates might go for the payment of costs in frivolous suits. Judgment, therefore, in every case commenced by an executor or administrator in which defendant becomes entitled to costs, ought to be entered against such executor or administrator personally. After payment he may charge the amount in his account of administration to be allowed or not as it may appear to the judge of the probate court that the suit was discreet or otherwise." See, also, Lynch v. Webster, 17

R. I. 513, 23 Atl. 27, 14 L. R. A. 696; O'Hear v. Skeeles, 22 Vt. 152; Williamson v. Childress, 26 Miss. 328; Show v. Conway, 7 Pa. 136.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

150 Cal. 123

LYNCH v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Department 2, et al. (S. F. 4,737.)

(Supreme Court of California. Dec. 27, 1906.)

APPEAL—CONTINUANCE—ABSENCE OF PARTY—DISCRETION OF COURT.

Sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant a continuance; but whether the circumstances shown make it proper so to do is within the court's discretion, and its determination will not be disturbed, unless there has been a plain abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

In Bank. Application for a writ of mandate by Edward Lynch against the superior court of the city and county of San Francisco, department 2, and another. Application denied.

Edward Lynch and Bertin A. Weyl, for petitioner.

PER CURIAM. The application for a writ denied. In denying the application it is proper to say that the sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant an application for a continuance, made on his behalf. It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application for a continuance are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed, unless there has been a plain abuse of discretion. We make this statement, in view of the fact that it is alleged in the petition that, in granting continuances heretofore made, the court said that it was of the opinion that it is not a matter of discretion with the court to refuse a continuance, where it is made to appear that the defendant is unable by reason of sickness to appear. There is no decision of this court which can be properly construed as denying the discretion of the trial court in such cases.

150 Cal. 159

UNION COLLECTION CO. v. BUCKMAN. (S. F. 3,509.)

(Supreme Court of California. Jan. 3, 1907.)

1. GAMING—NOTE FOR GAMBLING—CONSIDERATION.

The consideration for a note given solely to evidence an indebtedness for money lost at a gambling game in a gambling house was contra bonos mores and unlawful under the settled law of the state, and the payee could not recover thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 44; vol. 7, Bills and Notes, § 975.]

2. BILLS AND NOTES—NONNEGOTIABLE NOTES—ASSIGNMENT—ACTIONS ON—DEFENSES.

All the defenses available against the payee of a nonnegotiable note are available against his assignee, and hence a note founded on a gambling debt can only be enforced if negotiable in form and then only by an innocent purchaser before maturity for value.

3. SAME—NEGOTIABLE NOTES—EVIDENCE—BURDEN OF PROOF.

In an action on a negotiable note, when it is shown that the consideration for the note was illegal, a prima facie case of notice to the holder is made out and the burden of proving that he took without notice before maturity and for value is on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1675–1687.]

4. SAME—CONSIDERATION OF NOTE—COMPROMISE OF VOID CLAIM—KNOWLEDGE OF CLAIMANT.

Though a compromise of a doubtful claim asserted and maintained in good faith is a sufficient consideration for a new promise, whether the claim be in suit or not, even though it may be ultimately found that the claim could not have prevailed, still a compromise of the claim is not sufficient to constitute a consideration for a new promise even when in suit, where the claim is wholly without foundation and known by the claimant to be so, and hence a compromise of a claim on promissory notes given to evidence an indebtedness for money lost at gambling was not a sufficient consideration for new notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 202.]

5. SAME—AFFIRMANCE OF ILLEGAL CONTRACT—EXECUTION OF NEW NOTES.

Under the rule that courts will not entertain any action in affirmance of an illegal contract, the action of the maker of notes evidencing a gambling debt in attempting to compromise a claim under such notes by the execution of new notes did not validate the transaction so as to justify a court in allowing a recovery on the new notes.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Union Collection Company against A. E. Buckman. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. Reid, for appellant. Wm. H. Chapman and E. G. Knapp, for respondent.

ANGELLOTTI, J. This action was brought upon two certain instruments in writing, whereby defendant agreed to pay to one Reid, plaintiff's assignor, $410 and interest. Judgment went for defendant, and plaintiff appeals therefrom, and from an order denying its motion for a new trial.

Defendant in his answer admitted the execution of the instruments, but alleged that they were given without any consideration whatever, and solely for the purpose of evidencing an alleged indebtedness for money lost to one McMahon at a gambling game, for which alleged indebtedness he had given notes to McMahon, which had been transferred to Reid, and in part renewal of which he had executed the instruments in suit. He further alleged that Reid took and held the McMahon notes with full notice of the circumstances under which they were given, and that plaintiff here had the same notice.

Upon the trial, in support of this defense and in response to the prima facie case made by plaintiff, the following facts were shown over the objection and exception of plaintiff: Defendant, at a gambling house in San Francisco and in a gambling game participated in by McMahon, who was a winner therein, lost some $1,300, for which amount he then and there, at McMahon's request, gave to McMahon three promissory notes, which notes were nonnegotiable by reason of the presence in each of a stipulation for attorney fees in the event of suit. The evidence is sufficient to support the conclusion of the trial court that the original alleged indebtedness to McMahon was for money lost by defendant at this game and won by McMahon. There was no attempt whatever on the part of plaintiff to rebut the evidence of defendant upon this proposition. These notes were transferred to Reid for collection. Reid testified that he did not represent McMahon, but some other undisclosed person who was the equitable owner of the notes, but this we regard as immaterial. Reid subsequently brought suit upon one of these notes for $500. While this action was pending and ready for trial, defendant claiming that the note therein in suit and the other two notes were given solely to settle a gambling debt, an agreement was entered into between defendant and Reid, whereunder a dismissal of the suit was had and the three notes canceled in consideration of the giving of four notes for $200 each, and interest, by defendant to Reid. These notes were also nonnegotiable. Upon these notes, $100 only has been paid. Subsequently, Reid brought another action upon two of these notes, and this action being at issue, and ready for trial, and the defendant pleading therein want of consideration, in consideration of the dropping of the case from the calendar, and its indefinite continuance, and ultimate final dismissal in the event that defendant performed his part of the agreement, defendant executed the instruments in suit, which were also nonnegotiable in form, and paid the jury costs. He also, in writing, purported to waive all defenses he might have to the claim of plaintiff, and to ratify the notes he had given. The findings of the court were in accord with the allegations of the answer. The questions raised on this appeal are presented by exceptions to the rulings of the trial court in admitting evidence as to the validity of the original notes, and by attacks on certain findings of the court on the ground of insufficiency of evidence to sustain them.

As already stated, the evidence sufficiently supports the conclusion of the trial court that the original notes were given to McMahon by defendant solely to evidence an alleged indebtedness for money lost by defendant to McMahon at a gambling game in a gambling house. At the outset, therefore, it may be stated that it is clear that, under the settled law of this state, the consideration for such notes was contra bonos mores and unlawful (Civ. Code, §§ 1607, 1667), and that McMahon could not have recovered thereon (Bryant v. Mead, 1 Cal. 441; Gahan v. Neville, 2 Cal. 81; Carrier v. Brannan, 3 Cal. 328; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Hill v. Kidd, 43 Cal. 615; Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110). It is also plain that any assignee of McMahon of said notes could occupy no better position in a suit on the same than McMahon himself. The notes being nonnegotiable, any defense available against McMahon would have been available against any assignee or person claiming under McMahon. Such a contract on the part of the loser to pay the amount of his losses at a gambling game could only be enforced if negotiable in form, and then only by an innocent purchaser before maturity for value. It is also well settled that, even in the case of negotiable paper, where an action is brought by a subsequent holder, when it is shown that the same was obtained from the maker by fraud or duress, or that the consideration therefor was illegal, a prima facie case of notice to such holder is made out, and the burden of proving that he took without notice before maturity and for value is thrown upon him. Fuller v. Hutchings, supra; Graham v. Larimer, 83 Cal. 173, 177, 23 Pac. 286; Jordan v. Grover, 99 Cal. 194, 33 Pac. 889; Shain v. Goodwin (C. C.) 46 Fed. 564. See, also, Perkins v. Prout, 47 N. H. 387, 93 Am. Dec. 449, and note. It was said in Graham v. Larimer, supra, quoting from Parsons on Notes and Bills, that the reason for this rule is that the presumption is that the original party who has obtained such an instrument and could not recover upon it will part with it for the purpose of enabling some third party to recover upon it for his benefit, and, quoting from Lord Campbell, that, when the defendant has proved fraud, or illegality in the original holder, he has raised a prima facie presumption that the plaintiff is agent for that holder. In the absence of such rebutting evidence, the finding must be that the plaintiff in such an action is not a holder without notice and for value.

From what has been said it is plain that, the illegal consideration being made to appear, a recovery on the original notes could not have been had in an action brought by McMahon, or Reid, or Reid's undisclosed equitable owner, or this plaintiff, and that any action thereon would have been without any legal foundation whatever. The same thing is necessarily true as to any notes given solely in renewal or in place of such original notes. Merely repeating a promise based on an illegal consideration cannot give it validity. Plaintiff, however, relies upon the contention that the compromises of the prior proceedings brought against defendant constituted a sufficient legal consideration for the instruments in suit, and barred all inquiry here as to the nature of the original transaction between defendant and McMahon. It cannot, of course, be successfully disputed that the compromise of a doubtful claim, asserted and maintained in good faith, constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not, but the rule is specially applicable where legal proceedings to enforce the asserted claim have been commenced and are pending and the proceedings are discontinued in pursuance of such compromise. See Spielberger v. Thompson, 131 Cal. 55, 63 Pac. 132, 678; McClure v. McClure, 100 Cal. 339, 34 Pac. 822; Rohrbacher v. Aitkin, 145 Cal. 485, 78 Pac. 1054. As to the effect of a compromise of a pending action, some general language of such nature has been used by some text-writers and courts as would, taken alone, warrant the contention of plaintiff that the compromise of the action in any case constitutes a sufficient consideration for a new promise and is a bar to all inquiry as to the merits of the original claim. See Beach on Modern Law of Contracts, § 177. Such, undoubtedly, should ordinarily be the effect of a compromise agreement made in good faith of a claim honestly asserted, for it is the policy of the law to discourage litigation and allow the parties to settle their bona fide disputes amicably. An examination of the authorities, however, discloses the fact that it has generally been recognized that, to make a compromise of a claim, even though the same be in suit, sufficient to constitute a consideration for a new promise, the claim must not be wholly without foundation, and known to the claimant to be so. See 6 Am. & Eng. Ency. of Law (2d Ed.) 714; 8 Cyc. 503, 505, 507, 509; 9 Cyc. 346; Beach on Modern Law of Contracts, § 176; Emery v. Royal, 117 Ind. 299, 20 N. E. 150; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Creutz v. Heil, 89 Ky. 429, 12 S. W. 926; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Grandin v. Grandin, 49 N. J. Law, 510, 9 Atl. 756, 60 Am. Rep. 642; Gould v. Armstrong, 2 Hall (N. Y.) 290, 294. An examination of the cases cited by Mr. Beach in support of the rule stated by him in section 177 of his Modern Law on Contracts shows that in many of those cases the courts were careful to state that there was no fraud or want of good faith on the part of the plaintiff in the prosecution of the original action which was compromised, while, in the other cases, the statement sustaining the literal text was purely obiter. In McClure v. McClure, 100 Cal. 339, 34 Pac. 822, this court quoted approvingly from Wharton on Contracts, § 533, as follows: "As has been incidentally noticed, a promise to compromise a claim utterly unfounded will not be regarded as a valid consideration. * * * It is otherwise when a suit is brought bona fide on probable cause, and a promise to compromise such suit is a valid consideration, even though the suit should be held to be unfounded."

But whatever may be the law as to cases involving no question of illegality, it is very clear that the rule contended for by plaintiff as to the effect of a compromise of an action can have no application where the claim involved therein was wholly based upon an unlawful, as distinguished from a merely insufficient, consideration. There is no better settled rule of law than the one to the effect that the courts will not entertain any action in affirmance of an illegal contract. As was said in Hill v. Kidd, 43 Cal. 615: "It is equally well settled that no action in affirmance of an illegal contract can be maintained. When parties make such contracts they must rely upon the good faith of those with whom they deal for their performance, and that failing they are denied all redress." See note to Chateau v. Singla, 114 Cal. 91, in 55 Am. St. Rep. 66. This universally acknowledged rule is not based upon any consideration for the party against whom the relief is sought and who will be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. As said in Kreamer v. Earl, 91 Cal. 112, 118, 27 Pac. 735, "it is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself," that a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them, under the rule expressed in the maxim, "ex turpi causa non oritur actio." It is, therefore, settled that the failure of the party against whom such relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express consent that the court may enforce such illegal contract, will not justify a court in enforcing the same. The illegality appearing, the court will sua sponte withhold all relief. See Kreamer v. Earl, 91 Cal. 112, 118, 27 Pac. 735; Ball v. Putnam, 123 Cal. 134, 140, 55 Pac. 773; 9 Cyc. 550. In Ball v. Putnam, supra, this court, after saying that there was evidence tending to show that the contract which lay at the bottom of all the transactions between the parties was a contract void as against public policy, said: "Enough appears to call for a rigid inquiry by the trial judge, and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor consent of the parties to it justifies the court in retaining jurisdiction of such an action."

It would seem to necessarily be the case under this well-settled rule that no action of the parties or their assignees can so validate an illegal contract, as to justify a court in enforcing it, where its illegality appears. An attempted compromise of a claim based on such a contract, whether before or after institution of action thereon, would be simply an act of the parties, looking to the complete or partial ratification of the illegal contract, and which could in no way affect the power of the court to refuse to allow itself to be used as the instrument for its enforcement. We have been unable to find any case holding that a compromise of a claim based on such a contract is supported by a legal consideration, and will be enforced by the courts, and it appears to us that any such holding would be in defiance of the well-settled rule under discussion, and contrary to every consideration of public policy. It would furnish an easy method by which the parties to an illegal contract might, by their mere stipulation, validate the same, and make it compulsory upon the courts to thereafter enforce it, although its illegality was clearly made to appear. This cannot be the law. A court will not thus allow itself to be made, as has been said, "the handmaid of iniquity."

It was held in Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269, that no compromise by the parties of differences in respect to clearly illegal contracts and transactions can purge them and produce a valid claim. The contract there involved was a gambling contract. The case of Reed v. Brewer (Tex. Civ. App.) 36 S. W. 99, is squarely in point. The action there was upon notes given in settlement of a suit brought upon an illegal contract, and it was held that the agreement of compromise did not so change and purify the transaction as to relieve it of its vice and illegality. Quoting Bishop on Contracts, the court said: "A contract executed in consideration of a previous illegal one, or in compromise of differences, growing out of it, is, like that whereon it rests, illegal and incapable of being enforced." These decisions appear to us to be in accord with the rule under discussion, and, as already said, we have found no case holding to the contrary.

Under the rule which we hold applicable here, it would seem that the question as to whether Reid or the "undisclosed equitable owner," whom he testified that he represented, had actual notice of the circumstances under which the McMahon notes were given, was entirely immaterial in this controversy. Those notes, as already stated, were not negotiable, and the successors of McMahon took them subject to any objection that might be made to their validity. They stand here in the shoes of McMahon, and any answer to a claim based thereon that would have been available against him is available against them. This includes not only such defenses as might seasonably be urged by the maker of the notes, but also such objections to the enforcement of the claim on the ground of illegality as might appear to the courts when an attempt was made to enforce it. They took the notes with knowledge, conclusively imputed to them that, if they were ultimately found to be based upon an illegal consideration, there could be no recovery thereon, and that the maker of the notes could not by any agreement of ratification or compromise render them, or instruments given in place thereof, enforceable by the courts, when their illegality should be made to appear. The defense of want of notice of the illegality of a contract is available only where the contract is a negotiable instrument, in the hands of one who has acquired it for value before maturity, and in the ordinary course of business. See Haight v. Joyce, 2 Cal. 64, 56 Am. Dec. 311; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. It is, therefore, unnecessary to determine whether the evidence shows that Reid had actual notice of the invalidity of the notes at the time they were transferred to him. It may, however, be stated that the evidence was certainly sufficient to sustain a finding that he had full notice of the claim of defendant in this regard prior to the first attempt at compromise, and that he made the compromise with knowledge imputed to him of the fact that the original notes were based on an unlawful consideraation.

Under the views we have expressed, the trial court did not err in admitting the testimony objected to, and the evidence was sufficient to support the findings in so far as the same are essential to the validity of the judgment.

Complaint is made by plaintiff that the trial court failed to find upon certain affirmative defenses tendered by the answer, viz., one of former action pending, and another of a previous order or judgment decreeing the instruments in suit to be void and of no effect. The failure to find on the issues thus tendered could not prejudicially affect plaintiff here, in view of the other findings which make it essential that judgment should go against him, even had findings been made in his favor on these issues.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

150 Cal. 167

WARREN v. CITY & COUNTY OF SAN FRANCISCO. (S. F. 4,087.)

(Supreme Court of California. Jan. 4, 1907. Rehearing Denied Jan. 31, 1907.)

TAXATION—VOLUNTARY PAYMENT—RIGHT OF RECOVERY.

The payment, for the purpose of preventing a tax sale, of taxes illegally assessed on a portion of a street, by one having property abutting on the street, but not on such portion, is voluntary; and so cannot be recovered by him, he not having secured an order of the board of supervisors, under Pol. Code, § 3804, for the refunding thereof; section 3819 relative to recovery of taxes paid under protest, where the assessment was void, providing therefor only where the "owner" of the property pays the tax.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 999, 1000.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles A. Warren against the city and county of San Francisco. Judgment for defendant. Plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Percy V. Long, City Atty., Wm. G. Burke, City Atty., Luther Elkins, Asst. City Atty. (A. S. Newburg, of counsel), for respondent.

PER CURIAM. This action was brought to recover of defendant money paid it in redemption of a lot from the sale thereof to the city for delinquent taxes. The case was heard on appeal by the district court of appeal, First appellate district, and the judgment of the superior court affirmed. The application to have the cause heard by this court, after judgment of said district court of appeal, was pending, when a general order of April 23, 1906, granting provisionally all applications for rehearings, was made. Since then a reargument of the cause has been had in this court, and, upon a consideration of the points involved, we are satisfied that the appeal was correctly decided by said district court of appeal. The opinion of that court in disposing of said appeal is as follows:

"The plaintiff brought this action to recover from the city and county of San Francisco the money paid by him to redeem a certain lot of land from a sale made to the state of California for delinquent taxes thereon. A demurrer to the complaint was sustained, and the plaintiff has appealed from the judgment of dismissal entered thereon.

"It is alleged in the complaint that the tract of land so sold to the state, and for the redemption of which the plaintiff paid the money into the city treasury, was at the time of said sale, and had been for many years prior thereto, and is now, a portion of Caroline street, an open public street duly dedicated to public use, and that, notwithstanding it had been so opened, used, and dedicated as a public street, the city and county assessor did, in the year 1896, unlawfully and in disregard of the law in such cases, assess for state and county taxes a portion of said street 100 feet in extent southeasterly from its terminus at the southerly line of Howard street, as if it were private property and not a public street; that on the 3d day of July, 1897, said portion of said street was sold to the state of California to pay said unlawful assessment for taxes against it; that thereafter the tax collector for San Francisco, pursuant to directions from the state controller, advertised said parcel of land for sale; that, in order to prevent said sale, and while said tax collector was threatening to sell the same, the plaintiff paid to the treasurer of said city and county the sum of $805.53 to redeem said land from the said illegal assessment, and to prevent and stop the said sale thereof; that he was compelled to pay the same to prevent said street from being closed and its use to him destroyed for two or more years, and that he paid the same under coercion and protest in writing; that the plaintiff was at the time of said payment, and had been for many years the owner of a lot of land fronting on said Caroline street but not abutting on that portion thereof so assessed and sold to the state; and that his said lot would be greatly impaired in value if said portion of Caroline street should be closed and he be thereby deprived of egress and ingress to and from his lot through the same.

"The plaintiff is not proceeding under section 3804 of the Political Code, as he did not obtain an order from the board of supervisors that the money paid by him to the treasurer be refunded. Section 3819 of the Political Code has no application. That section provides that the 'owner' of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest, and that, when so paid under protest, the payment shall not be regarded as voluntary. The plaintiff herein was not the 'owner' of the land assessed nor of any land bordering or adjoining that portion of Caroline street, and had no opportunity of egress from his lot upon that portion of the street assessed, and his interest in that portion of the street was no different from that of any other proprietor whose lot bordered upon any other portion of the street. See Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453. The payment of the money by the plaintiff, with full knowledge of the facts under which it was made, was voluntary, and, under well-established rules, cannot be recovered. The assessment by the city and county assessor of a portion of an open public street was made, as is stated in the complaint, 'unlawfully and in disregard of the law in such cases,' and the plaintiff is presumed to have known that it was so made without any authority and created no lien upon the land so assessed. The sale and conveyance to the state for a delinquent tax upon such assessment transferred no title to the state, and the threatened sale by the tax collector is no respect affected the rights of the public to the use of the street or to have it remain open and unobstructed. A grantee from the state under such sale by the tax collector would acquire no right in the land, or, by reason of such sale, be authorized to close the street from use by the public. There was, therefore, no compulsion or coercion upon the plaintiff, or any duress or threatened exercise of power over his person or property, and his protest did not have the effect to take from the payment its voluntary character. Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Phelan v. San Francisco, 120 Cal. , 52 Pac. 38.

"The demurrer to the complaint was therefore properly sustained. The judgment is affirmed."

We are satisfied with the foregoing reasoning of the district court of appeal in the matter, and with the conclusion reached by it.

The judgment is affirmed.

BEATTY, C. J., dissenting.

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150 Cal. 171

BROWN v. REA et al. (S. F. 3,925.)

(Supreme Court of California. Jan. 7, 1907.)

1. Municipal Corporations — Obstruction of Street—Rights of Abutting Owners—Injunction—Sufficiency of Complaint.

Civ. Code, § 3479, declares anything which unlawfully obstructs the free passage or use of a public street a nuisance. Section 3480 defines a public nuisance as one affecting an entire community or any considerable number of persons. Sections 3493 provides that a private person may maintain an action for a public nuisance only if it is specially injurious to himself. In an action to enjoin the construction or operation of a railroad in the street in front of plaintiff's premises, the complaint alleged that the construction and operation of the railroad would greatly obstruct the use of plaintiff's premises and impair the easement of access thereto and egress therefrom, and would greatly hamper plaintiff in carrying on his business on the premises, and lessen the value thereof. *Held*, that the allegations were merely statements of the plaintiff's opinion or conclusion as to the effect of defendants' proposed acts, and hence the complaint was demurrable as not showing a nuisance resulting in some special injury within the meaning of Civ. Code, §§ 3479, 3480, 3493.

2. Same.

The operation of a railroad upon a street is not, as to abutting owners, a nuisance per se, and to warrant an injunction restraining such operation, facts must be alleged which show that a nuisance will result from defendants' proposed acts, and that plaintiff will suffer some peculiar injury therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1447, 1448, 1493, 1503.]

3. Eminent Domain—Damages to Abutting Property—Actions—Sufficiency of Complaint.

Const. Cal. art. 1, § 14, provides that private property shall not be taken or damaged for public use without just compensation having first been made. In an action to enjoin the construction or operation of a railroad in the street in front of plaintiff's premises, a complaint alleged that the proposed work would "greatly lessen and diminish the value" of the property. *Held*, that this was an allegation merely of opinion or conclusion, too general and indefinite to warrant relief by injunction, even if the proposed acts could be enjoined until the payment of the alleged damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 799.]

4. Municipal Corporations — Obstruction of Street—Rights of Abutting Owners—Action for Damages—Sufficiency of Complaint.

In an action to enjoin the construction and operation of a railroad in the street in front of plaintiff's premises, and to recover damages for past injury, the complaint alleged that defendants had already commenced digging and excavating the street and "made a deep and wide trench therein, which greatly obstructs and impedes traffic on said street." There was no allegation that this trench was in the part of the street in front of the plaintiffs' premises, nor was it alleged that the trench either obstructed plaintiff's ingress to or egress from his premises. *Held*, that the complaint did not state a cause of action for damages.

Department 1. Appeal from Superior Court, Santa Clara County; Hiram D. Tuttle, Judge.

Action by Frederick Brown against James Rea and others for damages, and for an injunction restraining defendants from digging and making an excavation in a certain street, or laying ties and rails thereon, or running cars thereon for any purpose. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. P. Veuve, for appellant. Louis O'Neal and Owen D. Richardson, for respondents.

SLOSS, J. The plaintiff filed a complaint alleging the following facts: That he is the owner of a lot of land in the city of San Jose, having a frontage of 88.6 feet on North Market street, a public street of the city; that upon this lot there is a building in which plaintiff is carrying on a wholesale grain and produce business, that in the conduct of said business it is necessary to use large drays and wagons to carry the merchandise to and from said premises, and that said trucks and wagons need free and unobstructed access and ingress in and to said premises from Market street. The complaint alleges that the defendants wrongfully and without right threaten and intend to enter Market street, and the part thereof immediately in front of plaintiff's premises, for the purpose of laying ties and rails thereon in the construction of two railroads, each of which will have double tracks, and that the defendants have actually commenced the digging and excavating of the street, and have already made a deep and wide trench therein which greatly obstructs and impedes the traffic on said street, and that the defendants threaten and intend to continue to tear and excavate the street and the part thereof immediately in front of plaintiff's premises, to lay ties and rails thereon, and, when the same are laid, to permanently run cars and motors thereon; that the occupation and use of said street and the part thereof adjoining plaintiff's premises and business house will irreparably injure and damage plaintiff and will greatly endanger and obstruct the use of plaintiff's premises, and will particularly and irremediably impair the right and easement of access thereto and egress therefrom, and will greatly obstruct, hamper, and impede plaintiff in the carrying on of his business on said premises, and will greatly lessen the value thereof, and will irremediably impair and destroy plaintiff's rights in Market street and his easement of access to and ingress in and to and egress from his said premises; that plaintiff has already suffered damage by reason of the premises in the sum of $1,000. The prayer of the complaint is for said sum of $1,000 and for an injunction restraining the defendants from digging and making any excavation in Market street, or laying ties and rails thereon or running cars thereon for any purpose. The railroad company and the defendant Elder demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. Defendant Rea demurred upon the same ground and further specified certain particulars in which, as he claimed, the complaint was uncertain. The demurrers being submitted to the court, an order was made sustaining all of them, with leave to the plaintiff to amend within 10 days. No amendment having been made within the time allowed, the defendants had judgment against the plaintiff for their costs. From this judgment the plaintiff appeals.

It is unnecessary to consider any of the special grounds of demurrer urged by the defendant Rea, since we are satisfied that the general demurrers were properly sustained. Apparently the plaintiff attempted in his complaint to allege facts showing a threatened nuisance, the maintenance of which would be especially injurious to him. A nuisance is defined in the Civil Code, § 3479, as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Section 3480 of the Civil Code defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Generally speaking, a public nuisance does not furnish ground for action by a private person, but such public nuisance may inflict upon an individual such peculiar injury as to entitle him to maintain a separate action for its abatement, or to recover damages therefor. Civ. Code, § 3493. The injury to the individual must, however, be different in kind and not merely in degree from that suffered by the general public. Aram v. Schallenberger, 41 Cal. 449; Bigley v. Nunan, 53 Cal. 403; Hogan v. R. R. Co., 71 Cal. 87, 11 Pac. 876. Ordinarily an obstruction to a highway, if unauthorized and illegal, is a public nuisance. The injury is to the right to travel upon the highway, which right resides in the public generally. Such obstruction may, however, constitute a private nuisance as well. Every owner of land abutting upon a highway has a right of access from his land to the highway and from the highway to his land. This right of access is an easement, and an obstruction to the highway which at the same time obstructs this easement is a peculiar injury to the abutting landowner and gives him a cause of action. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

The plaintiff undoubtedly sought to allege such an obstruction of this easement as would constitute a peculiar injury to him. But in the complaint he does not set forth any facts which show that this right of access has been obstructed by the work already done, or will be obstructed or impaired by the work to be done. It is true that he asserts repeatedly that the construction and operation of the railroad will have such effect, but this is merely an allegation of his conclusions and opinions, and cannot be considered as stating a cause of action. The facts alleged are merely that the defendants are constructing and intend to operate a four-track railroad upon the street in front of his premises. These facts alone do not make it appear to the court that the plaintiff's right of passage between the street and his premises will be in any degree affected. The operation of a railroad upon a street is not, as to abutting owners, a nuisance per se. It may or may not be a nuisance, according to the manner of its construction and operation, and the surrounding circumstances. In the present case the complaint does not allege the width of the street, the location upon the street of the proposed ties or rails, whether or not the ties or rails when completed will project above the surface of the street, how often or in what manner cars or motors will be run upon the rails, or any circumstances showing anything more than that a railroad will be operated upon a street adjoining the plaintiff's premises. It is not even stated whether or not the proposed railroad is a street railroad. The mere fact that railroad cars are to be operated on a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation of the railroad.

We do not overlook the consideration that, under the constitutional provision that "private property shall not be taken or damaged for public use without just compensation having first been made." (Const. Cal. art. 1, § 14), damages may be recovered by an abutting owner for any public use of a street which damages his adjoining property, or his easement of access to and from the street. Eachus v. L. A. Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Kishlar v. S. P. R. R. Co., 134 Cal. 636, 66 Pac. 848; St. Clair v. S. F., etc., Ry. Co., 142 Cal. 647, 76 Pac. 485; Smith v. S. P. R. R. Co., 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17. And, perhaps, a proposed use could be enjoined until the payment of the damage which would follow such use. But the complaint, whether seeking damages after the construction, or an injunction before, must show some actual or threatened injury to a private property right of the plaintiff, and this the present complaint fails to do. The allegation that the proposed work will "greatly lessen and diminish the value" of the property is, like other statements, a mere averment of opinion or conclusion too general and indefinite to afford a basis for relief by injunction.

So far as this is an action to recover damages for past injury, the allegations of the complaint are open to the same criticism directed against the averments of threatened acts. All that is stated is that the defendants have already commenced digging and excavating the street, and "made a deep and wide trench therein, which greatly obstructs and impedes traffic on said street." There is no allegation that this trench is in the part of the street in front of the plaintiff's premises, nor is it averred, even by way of conclusion, that the trench obstructs the plaintiff's ingress to or egress from his premises. Even if the trench were shown to be immediately opposite plaintiff's property, its character and dimensions are not described. The words "wide and deep" convey no such definite idea as is required in a pleading of this character. Since the only fact alleged as a basis for the recovery of damages is the excavation of this trench, it follows that the complaint fails to show a cause of action for damages, as well as for an injunction.

There is abundant authority in support of the principal proposition discussed in this opinion; i. e., that in an action to enjoin a nuisance there must be an allegation, not merely of the plaintiff's opinion or conclusion as to the effect of the proposed act, but a statement of facts from which the court may draw the conclusion that a nuisance will result. Some of the cases illustrating this rule are Payne v. McKinley, 54 Cal. 532; Dunn v. City of Austin (Tex. Sup.) 11 S. W. 1125; Bowen v. Mauzy, 117 Ind. 258, 19 N. E. 526; Begein v. Anderson, 28 Ind. 79; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14; Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516; Thebaut v. Canova, 11 Fla. 167; Reynolds v. Presidio & Ferries Ry. Co. (Cal. App.) 81 Pac. 1118. See, also, note to Ryan v. Copes, 73 Am. Dec. 106.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

150 Cal. 147

BOCA & L. R. CO. v. SUPERIOR COURT OF LASSEN COUNTY. (S. F. 4,651.)

(Supreme Court of California. Jan. 3, 1907.)

1. Constitutional Law — Due Process of Law — Deprivation of Property — Railroad Crossing—Removal.

In a suit to foreclose a railroad mortgage, petitioner, a connecting railroad, claimed a right of way for certain crossings over the right of way and tracks of the mortgagor, after which suit was brought to restrain petitioner from using one of such crossings, and a preliminary injunction granted. Affidavits having been subsequently filed showing violations of the injunction, the court, without hearing or notice, ordered that the crossing be taken up forthwith; that an agent be appointed to perform the work and to safely keep the ties, steel, and iron removed, and not deliver the same to petitioner until a further order of the court. *Held*, that such order constituted a deprivation of petitioner's property without due process of law, and was therefore void.

2. Certiorari—Scope of Remedy—Orders—Want of Jurisdiction.

Code Civ. Proc. § 937, provides that an order made out of court without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice in the manner in which other motions are made. *Held*, that such section was applicable only to such orders as the court or judge had jurisdiction to make without notice, and did not prevent the review by certiorari of a purported order which was void for want of jurisdiction.

3. Same—Other Adequate Remedy.

Code Civ. Proc. § 1068, provides that certiorari may issue only where there is no appeal, and, in the judgment of the court, no plain, speedy, and adequate remedy, and section 963, subd. 2, authorizes an appeal from an order granting a mandatory injunction or an order appointing a receiver. *Held*, that an order directing the removal of a railroad crossing and appointing an agent of the court to perform the work was not reviewable on appeal under the latter section, and was, therefore, reviewable on certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

In Bank. Certiorari by Boca & Loyalton Railroad Company against the superior court of Lassen county, to review an order directing the removal of a railroad crossing. Order annulled.

E. De Los Magee, for petitioner. Dodge, Parker & Knight, for respondent.

ANGELLOTTI, J. This is a proceeding in certiorari, to review an order of the superior court of Lassen county made July 14, 1906, in an action pending in that court. That action was one brought by the California Safe Deposit & Trust Company, a corporation, to enforce by foreclosure the lien created by a certain trust deed or mortgage given to secure the payment of bonds issued by the Sierra Valleys Railway Company, and covering the railroad property of such last-named company situated in Lassen and Plumas counties. The plaintiff here, the Boca & Loyalton Railroad Company, was made a party defendant in that action, the allegation being that it claimed some interest in the property as purchaser or judgment creditor or otherwise, which interest was subject to the lien of the plaintiff's trust deed or mortgage. The relief sought was for a sale of the mortgaged property, the application of the proceeds to the payment of the indebtedness, costs, etc., and for a judgment against the Sierra Valleys Railway Company for any deficiency that might remain after such application. The Boca & Loyalton Railroad Company, on June 1, 1906, answered in that action, claiming, among other things, a right of way for two crossings for its railroad over the right of way and track of the Sierra Valleys Railway Company in Plumas county, which crossings had been put in place and were being operated by plaintiff. The claim of plaintiff here was alleged to be superior to the lien of the trust deed or mortgage, and was based upon an alleged purchase at execution sale, and also upon certain orders made in a condemnation suit brought by said plaintiff in the superior court of Plumas county, which action is still pending. On June 19, 1906, the California Safe Deposit & Trust Company instituted an action in the superior court of Lassen county against plaintiff here, for an injunction restraining plaintiff from using one of said crossings in the operation of its railroad, the ground thereof being that such use was without right, and would depreciate the value of the mortgage security to the damage of the bondholders and the Sierra Valleys Railway Company. A preliminary injunction in accordance with the prayer of the complaint was thereupon granted. There is a claim that this injunction proceeding was dismissed by the plaintiff on June 30, 1906, but we will here assume that the action was never effectually dismissed, and is still pending. On July 14, 1906, the Sierra Valleys Railway Company, defendant in the foreclosure action, with the expressed consent of the Nevada-California-Oregon Railway, the holder of bonds secured by the trust deed or mortgage, presented in the foreclosure suit its notice of a motion, to be made on August 20, 1906, for the discharge and removal of the plaintiff trustee, on the ground that such trustee was seeking, to the prejudice of the bondholders and the Sierra Valleys Railway Company, to dismiss the injunction proceeding. Affidavits presented in connection therewith showed violations by the Boca & Loyalton Railroad Company of the injunction issued in the injunction proceeding. Upon reading and filing the notice of motion, and the accompanying papers, the judge of the superior court of Lassen county, in chambers, and without any notice whatever or opportunity for hearing to the Boca & Loyalton Railroad Company, and without requiring any bond or security, on July 14, 1906, made the order here under review. That order recites that it has been made to appear satisfactorily to such judge by such showing that the Boca & Loyalton Railroad Company, aided and abetted by the trustee, has been using said crossings in violation of the injunction granted in the other proceeding, and that such use is detrimental to the interests of the Sierra Valleys Railway Company and the bondholders, and then provides as follows:

"Now therefore, it is ordered that so much of the said crossing and of all and singular the track, rails, ties, and materials of every kind as are not properly a part of the roadbed, railroad, and ties, or either, of said Sierra Valleys Railway Company, which were placed, laid, erected or constructed, or which now lie in, over or upon or across the right of way, roadbed and track, or either, or any of them, of said Sierra Valleys Railway Company at the point or in the section, township and range aforesaid, be taken up and removed in such manner as may be or may to the person hereinafter appointed for that purpose, seem necessary or proper, and that when so removed the ties and steel and iron so taken up and removed shall be properly placed and safely kept in as good order and condition as the circumstances permit and so that same shall not and may not until further order of this court be had or taken possession of by said Boca & Loyalton Railroad Company.

"And it is further ordered that any rail, a portion of which is now or at the time of said removal in place upon said right of way shall be taken up and removed its entire length and not cut unless interference with such removal be made or offered in which event same may be removed in part or otherwise as circumstances may require.

"And the parties hereto, all and singular, their, and each of their, agents, servants, and employés, and all persons acting or purporting to act under, in aid or assistance, or by permission or authority of them or of either or any of them, are hereby required to refrain from any and all acts of violence, and from in any wise interfering with, but any of them may aid, the execution thereof, and said defendant is particularly enjoined not to interfere with, or in any manner obstruct, the removal of said crossing, track, rails, ties, and materials, in the manner aforesaid, but to permit the same to be done peaceably and quietly, without let or hindrance.

"It is further ordered that P. F. Kinney of Reno, Nevada, be, and he is hereby, appointed as the agent and representative of this court to see that the order is carried into effect according to its true intent and meaning, and with all reasonable dispatch, with authority to and in him to call to his assistance, employ and deputize any and all persons to him seeming to be necessary or proper in so doing and therein to use such means and force as may seem necessary for the proper execution hereof, and he, the said P. F. Kinney, is hereby instructed to make full report to us of all his proceedings as such agent.

"All costs and charges for the purpose of the enforcement of this order shall be at the sole cost, and expense of said Sierra Valleys Railway Company."

In accord with the terms of this order, the agent appointed by the court, on the 14th and 15th days of July, 1906, removed said crossing, and holds the rails and ties removed in a safe place and subject to the further order of the court. On July 26, 1906, plaintiff here moved the superior court to vacate said order, and this motion was denied on the same day.

It is alleged in what is styled a supplemental return, that, on July 18, 1906, the court suspended the injunction issued in the injunction proceeding, and that on the same day the Boca & Loyalton Railroad Company did itself replace the crossing removed and has ever since continually used the same. These allegations are material only upon the question as to whether this proceeding in certiorari, instituted July 30, 1906, is not a moot case, involving no actual controversy.

We know of no rule of law that can be successfully invoked in support of the order under review. It cannot be disputed that its effect was to deprive the Boca & Loyalton Railroad Company of property of which it was in the peaceable possession, and to take from it property of which it claimed to be and was, in fact, admitted to be the owner, and this, it seems clear to us, was done without the due process of law guarantied by both federal and state Constitutions. Whether it was entitled to have this property remain in the place where it was, constituting a railroad crossing over the right of way and track of the Sierra Valleys Railway Company, which was its claim made by the allegations of its answer in the foreclosure action, was a question that could only be legally determined in an orderly manner, in consonance with the rules and principles established by our jurisprudence for the determination of controversies as to property rights. The crossing constructed and maintained by it under claim of right could not be legally torn up and converted into mere rails and ties, and those rails and ties, admittedly owned by it, removed and withheld from its possession without some kind of notice and an opportunity to appear and be heard in support of its claim, for that much certainly is included in the constitutional guaranty that one shall not be deprived of property without due process of law. 8 Cyc. 1084. It may be admitted that in a proper proceeding brought to obtain an injunction prohibiting it from using the crossing, an order for the issuance of a temporary injunction prohibiting such use might legally have been made without notice. Such was the order made in the injunction case. In such a case, the party restrained would, pending the determination of proceedings on his part to dissolve the injunction, be secured by the bond required by our statute to be given. But there is nothing in our law warranting a court in ordering, without notice to the person maintaining the same in place under a claim of right, the removal of such a crossing and the confiscation of the materials composing the same. The order complained of is in violation of the constitutional guaranty heretofore referred to, and is, for that reason, void. This seems so plain as not to require further discussion. There are other objections made going to the question of the validity of this order, which it is unnecessary here to notice.

It is urged that, under section 937, Code Civ. Proc., the only remedy in case of an order made without notice to the adverse party is an application to the judge, ex parte or on notice, that it be vacated, which application is addressed to the discretion of the court. Manifestly, this provision of law is applicable only to such orders as a court or judge has power or jurisdiction to make without notice. It is not within the jurisdiction of a court or judge to deprive a person of property without due process of law, and a purported order having such an effect may be annulled on certiorari. Our law provides that the writ of certiorari may issue only where there is no appeal, and, in the judgment of the court, no plain, speedy and adequate remedy. Code Civ. Proc. § 1068. It is suggested that the order complained of is, in effect, either an order granting a mandatory injunction, or an order appointing a receiver, from either of which orders an appeal would lie. Code Civ. Proc. § 963, subd. 2. Manifestly, it is neither an order granting an injunction nor an order appointing a receiver. It does not prohibit or command the performance of any act by any party to the action, but simply purports, in an ordinary foreclosure action, to empower a third person, who is not a party to the action, and who is designated as an agent of the court, to remove and retain the property of petitioner. There is no suggestion in the record of the appointment of a "receiver" in the sense in which that term is used in law. A receiver may, under certain circumstances, be appointed in a foreclosure proceeding to take possession and control of the mortgaged property, but the property here ordered taken admittedly constituted no part of such property. The order was not appealable, and we cannot see that plaintiff had any other plain, speedy, and adequate remedy against the same.

As we understand the record, although plaintiff has reconstructed a crossing at the original place, the materials of the old crossing removed by the agent of the court are still withheld from the possession of plaintiff under the terms of said order, which order the court has refused to vacate, although motion in that behalf was made by plaintiff. Under these circumstances it cannot be held that we have before us only a moot case, involving no actual controversy.

The order under review must be annulled, and it is so ordered.

We concur: SHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

150 Cal. 153

BOCA & L. R. CO. v. SUPERIOR COURT OF LASSEN COUNTY. (S. F. 4,647.)

(Supreme Court of California. Jan. 3, 1907.)

1. ATTORNEY AND CLIENT—AUTHORITY OF CLIENT.

While a party to an action may appear in his own proper person or by attorney, he cannot do both, so that as long as he has an attorney of record in the action the court cannot recognize any other as having management or control thereof, and the party can act only through his attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 162.]

2. SAME—DISMISSAL—ACT OF PARTY—CONSENT OF ATTORNEY.

Code Civ. Proc. § 581, subd. 1, provides that an action may be dismissed "by the plaintiff himself," by written request to the clerk filed among the papers in the case, at any time before trial, on payment of costs, provided a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of the defendant. *Held*, that such section did not authorize a party, acting in his own proper person, to dismiss by filing a written request to the clerk, where such party had appeared by attorney and then had an attorney of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 162, 167.]

3. DISMISSAL—MOTION BY ATTORNEYS.

Where plaintiff, having an attorney of record, attempted to dismiss the suit without such attorney's consent, under Code Civ. Proc. § 581, subd. 1, by filing a written request to the clerk for dismissal and paying the costs before trial, the mere making of a subsequent motion for a dismissal by plaintiff's attorney in open court did not constitute a dismissal under such section, and did not impair the jurisdiction of the court over the cause.

4. PROHIBITION—RULINGS—REVIEW.

Where, at the time an application was made for a writ of prohibition to restrain the superior court from making any order in a certain action other than an order of dismissal, a motion to dismiss had only been partially heard and a preliminary injunction issued had been suspended, it could not be presumed, on the hearing of the application for such writ, that the court would not award petitioner all the relief he was entitled to on the determination of the motion to dismiss.

In Bank. Application for a writ of prohibition against the superior court of Lassen county and Hon. F. A. Keeley, judge thereof. Alternative writ discharged.

E. De Los Magee, for petitioner. Dodge, Parker & Knight, for respondent.

ANGELLOTTI, J. Plaintiff seeks a writ of prohibition, restraining the superior court of Lassen county from making any order in a certain action instituted in that court by the California Safe Deposit & Trust Company against plaintiff here, other than an order of dismissal. The action referred to was one to obtain an injunction restraining plaintiff here from using a certain railroad crossing over the road of the Sierra Valley Railway Company in Plumas county, the facts in regard thereto being detailed in the opinion in Boca & Loyalton R. R. Co. v. Superior Court of Lassen County (S. F. No. 4,651, this day filed) 88 Pac. 715. An alternative writ having been issued, the defendant made answer, and the matter has been submitted upon a demurrer to such answer, there being no material conflict as to the matters which are controlling here.

The main contention of plaintiff is that the injunction action has been dismissed by the plaintiff, and that the superior court is, therefore, without jurisdiction to make further orders therein. The action was commenced on or about June 5, 1906. According to the allegations of the affidavit or complaint of plaintiff here, the plaintiff in that action, on June 30, 1906, no counterclaim having been made or affirmative relief sought by the defendant therein, sent its discontinuance in writing of said action to the clerk of said court, with its written request that he enter a dismissal of the same, all of the costs having been paid. No such entry was made by the clerk, he basing his refusal to so do upon a certain order made by the court restraining him from so doing. On July 18, 1906, plaintiff by its attorneys moved the superior court for a dismissal of said action, there having been no appearance on the part of defendant, and all costs having been paid. That motion had not been decided at the time of the institution of this proceeding. According to the allegations of the answer, the only written request for, or notice of, dismissal sent to the clerk was one signed by the plaintiff in said action by its manager, and not signed by any attorney of record, said plaintiff up to that time having appeared in said action by attorney only. It further appears that the subsequent motion for dismissal made by the attorneys on July 18, 1906, has only been partially heard, the further hearing and determination thereof having been continued by the court until the determination of this proceeding.

Plaintiff's position is that, under subdivision 1, § 581, Code Civ. Proc., providing that an action may be dismissed "by the plaintiff himself, by written request to the clerk filed among the papers in the case, at any time before trial, upon payment of costs; provided, a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant," the presentation of the proper request to the clerk, and payment of costs, operated to divest the court of jurisdiction to make any further order in the case, other than one requiring the clerk to make the proper entry of dismissal in its register. It may be conceded for the purposes of this proceeding that, if the above-quoted provision of law was complied with by the plaintiff in the injunction action, the position of plaintiff here is sustained by the decision of this court in Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299.

It is, however, the settled law of this state that, while a party to an action may appear in his own proper person or by attorney, he cannot do both, and that, as long as he has an attorney of record in an action, the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney. It may be that good reasons can be urged in support of a contrary rule, but the rule stated is so firmly settled here that we are not warranted in now departing from it. In the early case of Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164, the question arose under a statute similar to subdivision 2 of section 581, authorizing an action to be dismissed "by either party upon the written consent of the other," and the lower court had granted the motion for a dismissal of the action based upon the written consent of the plaintiffs in person, which consent was not signed by the attorney of record for plaintiffs. The order of dismissal was reversed by this court. The court said: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court and the due and orderly conduct of a cause that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney, as provided in section 10 of the act concerning attorneys and counselors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney. Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary." In Mott v. Foster, 45 Cal. 72, a stipulation extending time signed by the plaintiff in person where he had an attorney of record was held to be a nullity, and the same was held in Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809, the court saying that where a party appears and is represented by an attorney of record, he cannot himself assume control of the case, and that if he signs a stipulation dismissing the action or extending time for any purpose, the same will be disregarded by the court. All of these authorities are approvingly cited in Crescent Canal Company v. Montgomery, 124 Cal. 134, 145, 146, 56 Pac. 797, where the rule was again declared. The general rule thus stated does not appear to be disputed by counsel for plaintiff here, but he claims that the rule is not applicable to the dismissal provided for by subdivision 1 of section 581, which, by the express terms of the subdivision, is to be made "by the plaintiff himself." His claim is that this use of the word "himself" means that such dismissal must be made by the plaintiff in his own proper person. If this construction is to be given to the language, a dismissal under subdivision 1, § 581, Code Civ. Proc., could not be made in the manner in which such dismissals are ordinarily made, viz., through the attorney, but would in all cases be required to be made by the plaintiff in his own proper person. Such certainly has never been understood to be the law, and the language used, when considered in connection with the remainder of the section, is not reasonably susceptible of such a construction. The words relied on, which were a part of the section on the same subject in the old practice act, and which have always been a part of this subdivision of section 581, Code Civ. Proc., were used simply to distinguish the dismissal therein provided for as one that was to be made by the action of the plaintiff alone, without any concurrence of the other party or the court, while the dismissals provided for by other subdivisions of the same section could be made by a party only when upon the written consent of the other party, or by the court upon motion of a party or upon its own motion. So far as this question is concerned, the words used in subdivision 1 of section 581, Code Civ. Proc., have no different meaning from the words "by either party" upon the written consent "of the other" in subdivision 2 of the same section, as to which is was held in Board of Commissioners v. Younger, supra, that the consent must be signed by the attorney of record where there is such an attorney.

To accomplish the effect given by the decision in Hopkins v. Superior Court, supra, to a written request for dismissal under subdivision 1 of section 581, Code Civ. Proc., the case must be brought squarely within the terms of that subdivision, and to do this, the request for dismissal must, under the authorities cited, be signed by the attorney of record for plaintiff, if there be such an attorney. Otherwise, the clerk is not authorized to recognize the same as a discontinuance of the action, or to make entry of dismissal in his register, and the jurisdiction of the court over the cause is not impaired. The mere making of the subsequent motion by the attorneys for plaintiff for a dismissal, in open court, on July 18, 1906, was not a dismissal under subdivision 1 of section 581, Code Civ. Proc., or in the manner or form provided by that subdivision, and in no degree impaired the jurisdiction of the court over the cause. Whether or not the court should grant that motion in the face of the showing in opposition made by the parties beneficially interested in the maintenance of the action, and for whom plaintiff had commenced and was maintaining the action solely as a trustee, is a question it is not necessary here to decide. That motion is pending undetermined. Its pendency does not affect the jurisdiction, and we must now assume that it will be correctly determined.

It was further urged on the application for a writ of prohibition that, under the circumstances alleged to have been shown to the superior court of Lassen county on the motion to dismiss made July 18, 1906, said court is without jurisdiction to grant or maintain an injunction enjoining plaintiff here from using the railroad crossing situate in Plumas county. As already stated, the motion of July 18, 1906, has only been partially heard and is now pending undetermined. According to the allegations of the answer, pending its determination, the preliminary injunction issued in the action has been and is now suspended, under the terms of an order of the superior court of Lassen county. Under such circumstances, we cannot now assume that the superior court will not, in determining said motion, grant plaintiff here all the relief to which it is legally entitled, and, in accord with our settled rule of practice we should decline to restrain the court below from proceeding, in advance of the ruling of such court, on said motion. See Havemeyer v. Superior Court, 84 Cal. 327, 403, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

This is sufficient for all the purposes of this proceeding.

The alternative writ of prohibition heretofore issued is discharged and this proceeding dismissed.

We concur: McFARLAND, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

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150 Cal. 140

HIBERNIA SAVINGS & LOAN SOCIETY v. ROBINSON et al. (S. F. 3,976.)

(Supreme Court of California. Jan. 3, 1907.)

1. Assistance, Writ of—Scope—Mortgages—Foreclosure.

Where the estate of the deceased wife of a deceased mortgagor was not made a party to foreclosure proceedings, the estate's equitable interest could not be adjudicated on an application by the purchaser under the foreclosure proceedings for a writ of assistance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assistance, Writ of, § 1.]

2. Injunction—Writ of Assistance.

The right of a party to restrain the execution of a writ of assistance depends on his being in possession of the property at the time the writ was sought to be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 61.]

3. Administrators — Real Estate — Possession.

On an application by an administrator to restrain the execution of a writ of assistance, evidence *held* sufficient to sustain a finding that the administrator was not in possession of the property.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Hibernia Savings & Loan Society against Charles H. Robinson and others. From an order discharging an order to show cause why the execution of a writ of assistance should not be perpetually restrained, obtained by Clarence W. Purrington, as administrator of the estate of Caroline A. Robinson, deceased, he appeals. Affirmed.

George D. Collins, for appellant. Tobin & Tobin, for respondent.

SLOSS, J. The Hibernia Savings & Loan Society commenced an action to foreclose a mortgage on several parcels of real estate in the city and county of San Francisco. Some of the defendants named in the complaint defaulted, and a decree of foreclosure was made and entered in regular form as against them. The plaintiff became the purchaser at the foreclosure sale, and, no redemption having been made within the statutory time, received the commissioner's deed on October 30, 1902. On May 13, 1903, the plaintiff procured a writ of assistance and delivered it to the sheriff of the city and county for execution. This writ directed the sheriff to put the plaintiff in possession of one of the parcels of land included in the foreclosure proceeding. On May 14, 1903, Clarence W. Purrington, as administrator of the estate of Caroline A. Robinson, deceased, filed in the superior court an affidavit alleging that Caroline A. Robinson at the time of her death was the owner and in possession of the piece of land described in the writ of assistance, and that affiant had on the 8th day of October, 1901, been duly appointed her administrator, and ever since had been and still was in the actual possession of the property in question. Upon this affidavit the court below made an order directing the plaintiff to appear and show cause why an order should not be made perpetually restraining the execution of the writ of assistance and restraining the sheriff from in any manner interfering with the possession of Clarence W. Purrington as such administrator. Upon the hearing of the order affidavits and counter affidavits were read and oral testimony was taken. Thereafter, on the 20th day of November, 1903, the court made an order discharging the order to show cause. Purrington, as administrator, now appeals from the order of November 20th.

The mortgage had been executed by Charles H. and Thomas B. Robinson. Thomas B. had died before the commencement of the action, and his executors, together with Charles H., were made defendants, and judgment was taken against them. The estate of Caroline A. Robinson was not made a party to the foreclosure proceedings, and her interest, if she had any, was not affected by the foreclosure decree. Nor could her claim of title be adjudicated in a proceeding like the one under review. "The courts will not undertake to settle the conflicting legal or equitable rights of persons not parties to a foreclosure suit, upon an application for a writ of assistance; to adjudicate such rights upon affidavits or on a motion." Enos v. Cook, 65 Cal. 175, 3 Pac. 632. Any person claiming title to property has the right to litigate the validity of his claim in a proceeding in which the question of title can be properly presented and determined. As this court said in Ex parte Hollis, 59 Cal. 405: "If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. * * * The issue as to such title should be tried in an appropriate action, in which the verdict of a jury or the findings of a court may be had upon issues properly framed for the purpose of definitely determining the question of title." And, if a person not made a party to foreclosure proceedings is in possession under a claim of title, he has a right to protect his possession by the procedure here adopted, to wit, a motion to restrain the execution of the writ of assistance. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48.

Indeed, these propositions are not contested by the respondent, which concedes that, if Purrington as administrator was in possession of the premises at the time of the issuance of the writ, the order asked for by the appellant should have been made. The contention of respondent is, however, that Purrington was not and never had been in possession of the premises. Undoubtedly his right to restrain the execution of the writ of assistance depended upon his being in possession; for, if he was not, his rights could not in any degree be affected by the execution of the writ. Whether or not he was in possession was a question of fact to be determined by the trial court. In making the order complained of, that court evidently found as a fact that the estate of Caroline A. Robinson was not in possession of the premises, and the only question here is whether that implied finding is sustained by the evidence. A brief statement of the facts shown on the hearing will suffice to demonstrate that there was more than sufficient evidence to support the conclusion reached. It appeared that the person in actual physical occupation of the premises was Walter T. Robinson, a son of Thomas B. Robinson, one of the mortgagors. Thomas B. Robinson and Caroline A. Robinson had been husband and wife. Caroline died in 1891, Thomas in 1897. From the death of Caroline A. Robinson in 1891, Walter T. Robinson lived upon the premises with his father until 1897, and after his father's death remained there until the time of the hearing in the court below. The real issue between the parties was whether Walter T. Robinson was in possession as a tenant of Purrington, the administrator of Caroline A. Robinson's estate, as asserted by the appellant, or whether he held by virtue of some other claim. At the hearing the appellant introduced an affidavit of Purrington himself, in which he averred that ever since his appointment as administrator he had been in the actual possession of the property. In response to this the respondent offered the affidavit of George A. Clough, denying this allegation on information and belief, and setting forth certain facts which, as is claimed, tend to show that Purrington, Walter T. Robinson, and George D. Collins, the attorney for the appellant, had entered into a fraudulent scheme to retain possession of the said property. We will not further notice these charges of fraud, as we do not deem them important here. Counter affidavits were filed by the appellant, one being the affidavit of Collins and the other that of Walter T. Robinson, both of which deny the charges of fraud and assert positively that Purrington was in possession as administrator, Robinson averring that his occupancy of the premises was exclusively under the said administrator and as his agent.

So far as these affidavits are concerned, it may be conceded that the affidavit of Clough, being merely on information and belief, leaves the positive allegations of the appellant's affidavits without substantial contradiction. But at the hearing the respondent called and examined both Purrington and Walter T. Robinson, and their oral testimony was decidedly at variance with their affidavits. Purrington testified that as administrator he had not handled any money, nor made out accounts, nor drawn any rents. While he stated that the property was occupied by Walter Robinson as his tenant, he also stated that such tenant did not pay any rent; that he did not know why he let Robinson stay; that during the two years of his administration he (Purrington) had never asked for any rent; that he had not paid any of the bills against said property, such as gas and water charges; that he had not paid any taxes; and that he had never taken any steps to get possession of the property. He testified further that he had never been in the house, and that he did not think he had ever spoken to Walter T. Robinson about the possession of the premises. His only explanation of his failure to ask for rent was that he understood that the tenant was not able to pay. Walter T. Robinson testified that he had been living on the property since 1891; that he had been living there with his father until 1897, and had continued to live there since the death of his father; that he had paid the taxes on the property and the water rates; that the administrator had never asked him for any rents; and that the only conversation they had had regarding the property was that the administrator had asked him occasionally whether he was still living on the property, to which he had replied that he was. He had also stated to the administrator that he had paid the taxes. On cross-examination he testified that, while he had paid the taxes, he had not given the receipts to the administrator, and that, when he did pay the taxes, he paid them in the name of his wife, Isabelle W. Robinson.

On this testimony we do not see how the court could have failed to come to the conclusion which was reached, namely, that the statements in the affidavits of Purrington and Robinson to the effect that the latter was holding as tenant of the Caroline A. Robinson estate were collusive and false, and that, in fact, Purrington as administrator had never been in possession of the premises, either in person or by tenant. Under these circumstances the appellant was not entitled to restrain the issuance of the writ of assistance.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

150 Cal. 131

MEYER v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 3,846.)

(Supreme Court of California. Jan. 3, 1907. Rehearing Denied Jan. 31, 1907.)

1. Municipal Corporations—Bonds—Purposes of Issue—Provisions for Payment—Liability of City.

Act March 23, 1876 (St. 1875–76, p. 433, c. 326), provides for the widening of Dupont street by the city of San Francisco, and the raising of the money to do so by the sale of bonds to be paid out of a tax upon the lands within a specified district declared to be benefited by the improvement. It also provided that all claims against the city for any part of the debt so created were waived. *Held*, that the bonds were not a general obligation of the city, to be enforced by a personal judgment against it.

2. Mandamus — Pleading — Complaint — Sufficiency.

A complaint, to authorize a writ of mandamus to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, must show an existing duty and a failure to perform the same on demand.

3. Municipal Corporations—Bonds—Remedy for Enforcement—Bonds Payable from Special Fund.

Act March 23, 1876 (St. 1875–76, p. 433, c. 326), authorized the board of supervisors of the city and county of San Francisco to pass an order for the widening of Dupont street in the city. It provided that all damages and expenses should be paid by bonds of the city and county, and that for the payment of the interest and principal there should be levied a tax upon the lands benefited thereby. It further provided that the city and county should not be liable for the debt so created. *Held*, that the bonds as issued, being nominally the bonds of the city and county, to be paid from a special fund, which it was the duty of such corporation to provide, the holders could maintain an action to recover a judgment thereon against the city and county, to establish and perpetuate the bonds as a claim upon the funds to be raised under the act and to prevent the bar of the limitations.

4. Same—Payment—Interest after Maturity.

Where bonds were issued under Act March 23, 1876 (St. 1875–76, p. 433, c. 326), providing for the payment of the principal and annual interest and nothing more, and creating a specific fund for the payment of the bonds, no liability could arise to pay interest on the principal or annual interest after maturity under the general statute, providing for interest on all contracts after maturity.

5. Same — Actions — Defenses — Necessary Parties.

In an action against a city to enforce the payment of certain bonds, payable out of a special fund, provided by a tax levied on certain property in the city, it was averred that there was an unauthorized overissue of the bonds. *Held*, that the question whether this defense can be made without an allegation that plaintiff is not a bona fide holder cannot be decided in an action in which the owners of the property against which the tax is levied were not made parties.

6. Same.

In an action against a city to enforce the payment of certain bonds payable out of a special fund, provided by a tax levied on certain property in the city, it was alleged that certain owners of the property against which this tax was levied had obtained judgments perpetually enjoining the tax collector of the city from collecting this tax on the lands owned by them. *Held*, that the question whether these judgments bind both the city and the bondholders, neither of whom were parties to the actions in which the judgments were rendered, cannot be decided in an action in which the owners of the property affected by the judgments were not made parties.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Albert Meyer against the city and county of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

Franklin K. Lane, City Atty., Percy V. Long, City Atty., and Naphtaly, Freidenrich & Ackerman (D. Freidenrich, of counsel), for appellant. Rosenbaum & Scheeline, for respondent.

SHAW, J. This is an action to recover of the defendant the amount due upon 13 Dupont street bonds, issued by the defendant and held by the plaintiff. A general demurrer to the complaint was overruled by the court below, the defendant answered, and thereupon, upon motion of plaintiff, judgment was entered for the plaintiff upon the pleadings, from which the defendant appeals.

The complaint alleges the execution of the bonds, sets forth one of them verbatim; states that the others are of the same tenor and effect, differing only in the number; avers that the plaintiff is the holder of the bonds, and that the sum of money named in the bonds is due from the defendant to the plaintiff and is unpaid, although payment of the same has been demanded. The bonds became due, according to their terms, on January 1, 1897. The suit was begun on December 31, 1900. The prayer is for an ordinary judgment against the defendant for the amount of the bonds sued on, and for costs of the action. The bonds state on their face that they were issued under the provisions of the act of March 23, 1876 (St. 1875–76, p. 433, c. 326), for the widening of Dupont street, and that they were to be paid out of the fund to be raised by taxation as provided in that act. The provisions of the act referred to are thus made a part of each bond. The fund in question was to be raised by means of a special tax to be levied annually for 20 years upon the lands within a certain district described in the act, in a sufficient amount, each year, to pay the annual interest on the bonds and one-twentieth of the principal thereof. Separate annual levies were to be made, one for the interest and the other for the annual installment of the principal. Section 22 (page 443) of the act is set forth in full in each bond, with the statement that the bond is issued by the city and taken by the holder thereof under the conditions therein expressed. This section declares in substance that the completion of the work of widening the street as provided in the act should be deemed an acceptance by the landowners of the lien created by the act for the tax to be levied, and should operate as a waiver by the holders of the bonds of all future claim upon the city and county of San Francisco for any part of the debt created by the bond. The record is silent as to the date of the completion of the work provided in the act, but, as no question is raised concerning it, we will assume that it was completed before the suit was begun.

The effect of these provisions and conditions is that there is no obligation on the part of the city and county of San Francisco to pay the bonds, and that the amount named therein never became due from the defendant as alleged. The bonds were to be paid out of a special fund, to be raised by certain city officers by means of a special tax upon the lands within a specified district declared to be benefited by the improvements. All claims against the city for any part of the debt was waived, and the debt was due out of the funds to be raised in accordance with the provisions of the act, and not otherwise. It never became a general obligation of the city, to be enforced by a personal judgment against it, such as that prayed for in the complaint.

The judgment so obtained cannot be upheld under the allegations of the complaint. Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. To authorize a writ the complaint must show an existing duty and a failure to perform the same on demand. People v. Romero, 18 Cal. 91; Crandall v. Amador Co., 20 Cal. 75; Oroville, etc., Co. v. Plumas Co., 37 Cal. 363. No breach of duty is alleged except the failure to pay the bonds. Under the provisions of the act that duty could not arise until there had been sufficient funds raised by the special tax, applicable to these bonds, to pay the same. Cramer v. Sacramento, 18 Cal. 384. This fund may or may not have been raised. It is not alleged, and it is not to be presumed.

But, although no action could be maintained to recover a general judgment against the city for the money due on the bonds, and the complaint is insufficient to authorize a writ of mandamus, conceding that a mandamus suit to enforce payment of the bonds would lie against the city in any case, we think that the plaintiff may, nevertheless, maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and to prevent the bar of the statute of limitations. At the time the action was begun but one day remained of the period of limitation. By the expiration of that period the plaintiff would have been barred forever of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid. The delay was not the fault of the plaintiff. Circumstances might exist under which it would not be the fault of the defendant, or its officers, and in which plaintiff could not force payment by mandamus, as, for instance, if the officers, although exercising reasonable diligence, had been unable to collect the tax until after the period of limitation had run. In such a case the plaintiff would be practically without remedy if he could not maintain an action to prevent the running of the statute against him. Justice requires that he shall have some means of preventing his claim from becoming outlawed. No better or more appropriate remedy can be suggested than that of an action of the character above indicated.

In this conclusion we are supported by the example of the federal court in a somewhat analogous case. Those courts have no original jurisdiction to issue writs of mandamus. The writ can only issue after judgment and in aid of its enforcement and execution. U. S. v. County Court, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; Labette Co. v. Moulton, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698. With respect to bonds which constitute an obligation against a portion only of the county or city, and which do not constitute a general obligation against such corporation, those courts found themselves in somewhat of a dilemma. The bonds in question there, as here, purported to be issued by the city or county, respectively, but it was held that they did not constitute a general obligation against the obligor sufficient to authorize a general judgment thereon. In those courts, if no judgment could be obtained, there could be no mandamus, and a bondholder would be without remedy therein to enforce his obligation. In this situation it was said: "The holder of these bonds cannot have any remedy in the federal courts unless he is entitled to recover a judgment thereon and to enforce such judgment, if necessary, by mandamus. * * * It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds. * * * This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt." Jordan v. Cass Co., 3 Dill. 185, 13 Fed. Cas. No. 7,517, p. 1088. This case was followed by Cass Co. v. Johnston, 95 U. S. 360, 24 L. Ed. 416; Davenport v. Dodge Co., 105 U. S. 237, 26 L. Ed. 1018; and Mather v. San Francisco, 115 Fed. 37, 52 C. C. A. 631. The latter was an action upon some of the Dupont street bonds, of which the bonds in suit in this case at bar form a part. Upon similar reasoning we can say that the provision that the bonds here involved should be issued in the name of the city and county implies that the city and county can be sued, when necessary to preserve the plaintiff's rights and prevent the bar of the statute of limitations, and that in such action a judgment can be given establishing the debt for that purpose. The prayer of the complaint may be disregarded. It does not measure the plaintiff's rights. The complaint entitles him to some relief and the demurrer was therefore properly overruled.

We are of the opinion, however, that in giving judgment on the pleadings the court improperly allowed the interest which accrued on the bonds after their maturity. The act in question provided a scheme for a public improvement, the cost of which was to be paid by a special assessment upon the lands in the district specially benefited thereby. For this purpose the assessment district was created, and upon the real property therein there was imposed the burden of such payment. This burden was laid by the defendant without the consent of the owners of the property. The Legislature has power to do this for the purpose of defraying the expense of public improvements; but such statutes are to be construed in favor of the property owner, at least to this extent, that the burden imposed cannot exceed that which the terms of the statute, either expressly or by fair implication, authorize. This statute not only does not expressly authorize a charge of interest on the bonds after their maturity, but its provisions fairly imply that such interest was not to be paid. It provides that the bonds should be "payable in twenty years from their date, unless sooner redeemed, as in this act provided," and that they should "bear interest at the rate of seven per cent per annum, payable semi-anually." This language does not necessarily imply that interest is to run after maturity. Coupons for the annual interest, consecutively numbered, were to be attached to each bond in such manner as to be easily removed. It was further provided that a tax should be levied annually upon the lands in the district to pay the interest as it matured, and that the money thus raised was "to be paid out by said treasurer only in payment of the coupons attached to said bonds, as the same from time to time become due," and that at the same time and in the same manner there should be annually levied a tax sufficient to pay one-twentieth of the principal, to constitute a sinking fund and which should be paid out only in redeeming the bonds. Provision was made for calls for bonds to be paid in the order of issuance whenever there was on hand $10,000 or more of the sinking fund. The 20 annual levies thus provided for, if made and collected as required, would fully pay the entire amount of principal and interest of the bonds. We think the provision of the act requiring the interest coupons to be attached to the bonds is to be understood as meaning that coupons were to be attached for each year's interest accruing up to the time of their maturity. There is no provision for the attaching of any coupons for interest accruing after maturity. And, in view of the rules of construction applicable to such acts, we must hold that there is no authority either to issue such coupons or to attach them to the bonds. The provision that the levy made for the payment of interest was to be applied "only" to the payment of the coupons implies that no tax was intended to be levied for any interest except that represented by the coupons, and hence that it was not to be levied for interest accruing after maturity. There being no provision for the payment of any interest accruing after maturity, the act must be understood as intending that no such interest was to accrue. The case of Kendall v. Porter, 120 Cal. 108, 45 Pac. 333, 52 Pac. 143, is cited to the contrary. We think, however, that the act there construed is easily distinguishable from that here involved. The bonds there under consideration were the general bonds of the city of Sacramento, and both the principal and the interest was to be paid out of a certain fund consisting of a certain proportion of the general annual revenues of the city. This revenue would, of course, continue indefinitely after the maturity of the bonds as well as before. There was not in that case separate taxes for the interest and the principal, to be applied exclusively for the purposes for which it was levied, nor a specified number of levies to be made for a specified number of years. There was no certainty that the fund provided in that case from the annual revenues of the city would be sufficient to pay the bonds at or before their maturity, as is the case here. The court held that the act not only failed to show an intent to terminate the interest upon the maturity of the bonds, but that it indicated with some clearness an intent that they should bear interest until paid. The provisions and circumstances above noted, which do not exist here, are sufficient in our opinion to distinguish that case from the present one, and to require the contrary conclusion as to its effect and purport. The present case is more like those of Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115, and Davis v. Sacramento, 82 Cal. 562, 22 Pac. 1118, which involved the interest on the coupons which were attached to the bonds in question in Kendall v. Porter, supra. It was held in those cases that the interest coupons did not bear interest after maturity. The court said: "The act provided for the payment of the principal and annual interest, and nothing more. There was no other fund out of which the interest demanded could have been paid." So here the act provides that a fund should be raised annually during the time the bonds were maturing, but no longer, and there is no provision for the payment of subsequent interest. It was said in Bates v. Gerber and Kendall v. Porter, supra, that "the statute is the measure of the bondholders' rights." It is also the measure of the property owners' burden. No provision being made for the payment of any further amount than that of the principal and interest accruing up to maturity, no further interest can be allowed.

Section 1917 of the Civil Code, which provides that "unless there is an express contract in writing, fixing a different rate interest is payable on all moneys at the rate of seven per cent. per annum, after they become due on any instrument of writing," does not apply here, because, as we construe the act of 1876, it does, by fair intendment, declare that interest shall not be payable after maturity.

The answer attempts to aver that there was an unauthorized overissue of the bonds. It does not allege any facts showing that the plaintiff's bonds constituted a part of this alleged overissue. The statute appears to contemplate that bonds might be issued at different times until the aggregate issue equaled the authorized amount. In such a case the bonds would all be valid, except those issued after the limit was reached.

The question is raised as to whether, in view of the recitals on the face of the bonds, this defense can be made without an allegation that plaintiff is not a bona fide holder. This question, we think, ought not to be decided in the absence of the property owners, or some one of them, at least, who might represent them all. Neither the city, nor its officers, have any substantial interest in the question. It is the property owners who must bear the additional burden, if any there be, and none of them are parties to the action.

It is also alleged that certain property owners have obtained judgments, which remain in full force, perpetually enjoining the tax collector of the city and county, and his successors in office, from collecting from the lands owned by them any tax levied under the act, that the levies provided for in the act were regularly made each year for the 20 years, as required, upon all the lands in the district, and that the tax has been paid upon all of said lands, except that levied upon the lands protected by the said judgment. It is claimed that these judgments bind both the city and the bondholders, neither of whom were parties to the actions in which the judgments were rendered. This question is also one in which the property owners concerned are vitally interested, and which should not be decided until they have an opportunity to be heard. When the case is remanded, these property owners should be made parties to the action, if the plaintiff desires to attempt in this action to obtain judgment for any relief other than to establish the debt and prevent the bar of the statute of limitations. We are satisfied that he can obtain a judgment of this character without making the property owners parties, but this rule can be allowed only with the qualification that a judgment against the city alone, which merely has that effect, would not bind the owners of the property, nor estop them from showing that the bonds were invalid, or not enforceable, for other reasons.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

We concur: ANGELLOTTI, J.; SLOSS, J.

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4 Cal. App. 585

NICHOLDSON v. NESBITT, Sheriff. (Civ. 332.)

(Court of Appeals, First District, California. Dec. 13, 1906. Rehearing Denied Jan. 4, 1907.)

1. JUDGMENT — LIEN — PRIORITY OF CONVEYANCE.

The filing of an abstract of a judgment rendered in another county created no lien against land where the debtor had previously conveyed it and the deed had been recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1325.]

2. FRAUDULENT CONVEYANCES—HOMESTEAD.

A voluntary conveyance of a homestead cannot be regarded as in fraud of creditors, since, being exempt from execution, its transfer could not hinder nor prejudice them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 118.]

3. APPEAL—PRESENTATION IN LOWER COURT OF GROUND OF REVIEW—NECESSITY FOR.

Where a sheriff levied upon land which had been previously conveyed by the debtor and was enjoined from selling it on the theory that, having been the debtor's homestead, the conveyance could not be void as in fraud of his creditors, on appeal the sheriff could not have the judgment modified so that it might be determined whether the value of the land exceeded the statutory homestead limitation, where no issue of that nature was presented to the lower court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1079-1120.]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Sarah Nicholdson against W. J. Nesbitt, sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

Dickerman & Torchiana, for appellant. Zabala & Wyatt, for respondent.

HARRISON, P. J. Action to enjoin the appellant, as sheriff of the county of Monterey, from selling certain real property of the plaintiff situate in that county, under an execution issued upon a judgment against her grantor. Judgment was rendered in favor of the plaintiff, and the defendant has appealed therefrom upon the judgment roll without any bill of exceptions.

April 14, 1892, Murdock Nicholdson was the owner and seised in fee and in possession of the real property described in the complaint, and was a married man residing thereon with his family, and on that day Emma M. Nicholdson, his wife, made, executed, and acknowledged a declaration of homestead in proper form upon said property, which was duly recorded in the office of the county recorder of that county. The said homestead was not in any manner abandoned until January 12, 1903, when said Nicholdson and his wife executed a conveyance thereof to the plaintiff herein, who is their daughter, which was duly recorded the next day in the office of the county recorder, and she has, since said conveyance, been in the possession of said property. No money or other valuable consideration was paid by her for said property, the conveyance to her reciting the consideration of "love and affection." July 16, 1902, a judgment was rendered by the superior court in and for the county of Santa Clara in favor of Michael Cassin and John Tarpey and against the aforesaid Murdock Nicholdson for the sum of $2,050.72, which is still unsatisfied. At the time of the aforesaid conveyance to the plaintiff the said Murdock Nicholdson had no other property with which to satisfy said judgment. February 13, 1903, a duly certified abstract (transcript?) of the docket of said judgment was filed in the office of the county recorder of Monterey county. June 5, 1903, a writ of execution upon said judgment was issued out of the superior court of Santa Clara county, and placed in the hands of the appellant as sheriff as aforesaid, with instructions to levy the same on the aforesaid real property. Under said instructions the appellant on July 1, 1903, levied the said writ of execution upon the property, and gave notice, in the manner provided by law, that he would, by virtue of said writ and levy, sell the same in satisfaction of the aforesaid judgment. The plaintiff thereupon commenced the present action to restrain him from making the sale. The sheriff filed an answer to the complaint, and defended his action upon the aforesaid writ. The other defendants made no appearance in the case. Upon these facts the superior court held that the plaintiff was the owner in fee of the property, and that it was not subject to the lien of the judgment against her grantor, or liable for the payment of any portion thereof, and rendered judgment enjoining the sheriff from selling the same and from taking any further proceedings under said writ.

As the conveyance to the plaintiff and the record thereof were made prior to the time when the transcript of the docket of the Santa Clara judgment was filed in Monterey county, the filing of the transcript of that docket created no lien upon the property described in the complaint. The property was, therefore, not affected by the judgment until the levy thereon under the writ of execution issued out of the Santa Clara court, and prior to the time of such levy the property had been conveyed to, and stood of record in, the name of the plaintiff, without any interest therein in the judgment debtor. Accordingly the sheriff defends his acts and his right to sell the property by virtue of this levy, upon the ground, as alleged in his answer, that the conveyance to the plaintiff is void in that it was executed for the purpose of delaying and defrauding the creditors of said Murdock Nicholdson, and especially said Tarpey and Cassin, and in support thereof invokes the provisions of section 3442, Civ. Code, that "any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by a party while insolvent, or in contemplation of insolvency, shall be fraudulent and void as against existing creditors." Section 3441, Civ. Code, declares that "a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation," and section 3442 is to be construed with the limitations provided in this section. A voluntary transfer of property by an insolvent is valid against all persons except his creditors, and can be impeached as fraudulent by them only when they have been defrauded thereby. Under section 3440, Civ. Code, the transfer must not only be fraudulent, but it must be made with intent to defraud his creditors. But unless the transfer can have the effect of defrauding the creditor there can be no presumption that the insolvent intended to defraud him. If the creditor could not, under any circumstances, cause the property so transferred to be applied toward the satisfaction of his debt, he has suffered no injury, and cannot claim to have been defrauded.

As the property herein involved was the homestead of the judgment debtor, and for that reason exempt from execution or forced sale in satisfaction of the judgment upon which the writ of execution was issued, it was beyond the reach of the judgment creditor, and therefore he was not defrauded by the transfer. In Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045, the homestead had been sold, and the husband had made a gift of the proceeds to his wife, for which she had taken from a banking house a certificate of deposit in her own name. Thereafter certain creditors of her husband sought, by a writ of attachment, to subject this certificate of deposit to their claims against the husband. The Supreme Court held: "The homestead from which the money was derived was not subject to the claim of any creditor of the plaintiff's husband, and a transfer of it by the husband to her could not, under any circumstances, be held, as a matter of fact, to be with the intent to defraud his creditors. His creditors could not by any legal process take the property covered by the homestead, and its voluntary transfer to the wife would not 'obstruct the enforcement by legal process of any right to take the property affected by the transfer' (Civ. Code, § 3441); neither would such transfer of its proceeds." "As general creditors have no claim or lien upon the homestead of the debtor, it follows naturally that a conveyance or incumbrance of such homestead cannot, as a rule, be fraudulent as against them. And this has been held true though there was no consideration for the conveyance." Am. & Eng. Ency. of Law, p. 664, citing in support of the last proposition authorities from several states. "Creditors are held not defrauded by the conveyance of the homestead without consideration. Having no right to make their money by execution against it, they have no cause to complain. It is incumbent on the creditor who complains of a fraudulent conveyance to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears. Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts for the payment of wihch it cannot be taken in execution. They could not reach it if not conveyed, and hence the motives for the conveyance do not concern them." Waples on Homestead, 519. See, also, Thomson v. Crane (C. C.) 73 Fed. 329 [Nev.]; Fellows v. Lewis, 65 Ala. 343, 39 Am. Rep. 1; Rhead v. Hounson, 46 Mich. 244, 9 N. W. 267; Stanley v. Snyder, 43 Ark. 430; Anderson v. Odell, 51 Mich. 492, 16 N. W. 870; Tracy v. Cover, 28 Ohio St. 61; Arthur v. Wallace, 8 Kan. 267.

We cannot entertain the proposition of the appellant to modify the judgment of the superior court so that the defendants may have it determined whether the value of the homestead premises exceed the sum of $5,000; no issue of that nature is presented in the defendant's answer, nor was any motion of that nature presented to the superior court; nor is any fact set forth in the record upon which such modification could be based.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 616

JOHNSON et ux v. CENTER. (Civ. 318.)

(Court of Appeal, First District, California. Dec. 20, 1906. Rehearing Denied by Supreme Court Feb. 18, 1907.)

1. Appeal—Motion for Nonsuit—Record.

Where the record fails to show on what grounds a motion for a nonsuit was made, the court on appeal cannot say that the trial court erred in overruling it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867, 2895.]

2. Railroads—Injuries to Persons on Track—Negligence—Question for Jury.

Evidence in an action against a railroad for injuries to a traveler in a collision with a train examined, and *held*, that the question of the negligence of the railroad was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152–1165.]

3. Same—Contributory Negligence—Question for Jury.

Evidence in an action against a railroad for injuries to a traveler in a collision with a train examined, and *held*, that the question of contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1166–1189.]

4. Evidence—Opinion Evidence—Admissibility.

A witness, in an action against a railroad for injuries to a traveler in a collision with a train, cannot testify that the engineer in charge of the train took every precaution that an engineer could take to stop the train and avoid the accident; that being a matter to be determined from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2248, 2251.]

5. Appeal—Erroneous Exclusion of Evidence—Harmless Error.

Where, in an action against a railroad for injuries to a traveler in a collision with a train, the conductor and engineer in charge of the train had testified as to what the engineer did do to stop the train and prevent the accident, and when he did it, the sustaining of an objection to the question, asked the conductor, as to what precaution the engineer took to stop the train and prevent the accident, was not prejudicial.

6. Negligence—Contributory Negligence—Last Clear Chance.

Though one by his own negligence places himself in a place of danger, another may not wantonly injure him, and, if aware of the danger, must use ordinary care to avoid injury, and is liable for a failure so to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115.]

7. Railroads—Injury to Travelers—Action—Evidence—Instructions.

Where, in an action for injuries to a traveler in a collision with a train, the evidence showed that the engineer in charge of the train saw that the traveler was in a place of danger in time to have avoided the accident by the use of the appliances at his command, the refusal to charge that where there has been mutual negligence, and the negligence of each contributed to the injury, no recovery could be had, was proper, for, if given without qualification, it would confuse the jury.

8. SAME.

Where, in an action for injuries to a traveler, the evidence showed that the engineer in charge of the train saw that the traveler was in a place of danger in time to have avoided the accident, and the court charged that there could be no recovery for injuries negligently inflicted on one person by another, where the injured person by his own negligence proximately contributed to the injury, and could have avoided the injury by reasonable care, unless the employés in charge of the train wantonly so operated it as to cause the collision, an instruction that where both parties have been equally negligent, and the negligence of each directly contributed to cause the injury, no recovery could be had, was not erroneous, though it was not a complete statement of the law.

Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Oscar Johnson and wife against Hugh Center. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. W. Burchard, C. L. Witten, H. W. McComas, and W. R. Bowden, for appellant. W. B. Hardy and Jackson Hatch, for respondents.

HALL, J. Plaintiffs are husband and wife, and brought this action for damages for injuries alleged to have been inflicted on the wife, Hilma Johnson, by the servants of defendant in running a railroad train against a buggy in which said Hilma Johnson was riding, whereby she was thrown from the buggy and her foot caught under the engine and injured. The action was tried before a jury, and the verdict was in favor of plaintiffs. Defendant appeals from the judgment and from the order denying his motion for a new trial.

At the close of plaintiffs' case defendant moved for a nonsuit, which was denied; but the record fails to show upon what grounds the motion was made, for which reason we cannot say that the court erred in its ruling. The record simply states that at the close of the plaintiffs' case "defendant moved the court for a judgment of nonsuit in said action," and that it was argued, denied, and exception reserved, being almost an exact counterpart of the record in Durfee v. Seale, 139 Cal. 603, 73 Pac. 435, where it was said: "The motion in this case did not specify any grounds whatever, and the motion was therefore properly denied." See, also, Silva v. Holland, 74 Cal. 531, 16 Pac. 385.

It is contended by defendant that the evidence is not sufficient to support the verdict, and in this regard it is claimed that the evidence fails to show that Mrs. Johnson was injured by any negligence or fault of defendant, and that it conclusively appears that she was injured as the result of her contributory negligence. We do not think the contention of appellant upon this point can be sustained. It appears from the record that at the time of the accident defendant operated a steam railroad along a public highway known as "Alum Rock Avenue." Upon each side of the railroad tracks were two traveled wagon roads; the one upon the southerly side, with which this case is mostly concerned, being separated from each other by a ditch and a row of trees. Over the ditch, however, at irregular intervals, were driveways. On the day of the accident the plaintiffs, with their two year old child and Miss Johnson, a sister of Mr. Johnson, were returning to San José from Alum Rock Springs. Mr. Johnson was on a bicycle, and rode about 100 yards ahead of the buggy, in which were the two women and the child. The buggy was drawn by a 13 or 14 year old gentle horse, one that had been used by Mr. Johnson in San José on former occasions, and had never appeared to be afraid of electric cars, and on the morning of the day of the accident on their trip to Alum Rock had passed the railroad train of defendant without showing any symptoms of alarm. Miss Johnson, a young woman 22 years of age and accustomed to driving, was driving the horse, and Mrs. Johnson held the sleeping child. When they first saw the approaching train it was 1,000 feet or more away, and they were on the roadway on the north side of the track. They crossed the railroad track to the first roadway south of the track in safety, and the horse proceeded for a time along the road without showing any signs of alarm, and then stopped, threw up his head, and showed signs of being alarmed at the approaching train. Although Miss Johnson whipped the horse and urged him forward, he presently commenced to back, and finally, notwithstanding her whipping and urging, cramped the buggy and backed it onto and across the railroad track, so that the horse was on the track, and finally, getting turned so that his head faced away from the train, he started forward and drew the buggy again onto the track, where the hind wheel was struck by the engine, and Mrs. Johnson thrown out. There is evidence in the record that when the buggy was backed onto the track the engine was 100 yards away from the buggy, and could have been stopped within a distance of 125 feet. There was evidence tending to show that the engineer saw horse and buggy and women before the horse commenced to back, and watched them all the time, and yet did not slow down his engine until within 60 or 100 feet of the buggy. Upon some of these points there was, as is usual in such cases, a sharp conflict of testimony, and we are stating the evidence that is most favorable to plaintiffs. If the jury believed the evidence that tended to show that, when the engine was 100 yards away from the buggy, the engineer saw that the driver (a woman) could not manage the horse, and that he had backed the buggy onto the track, and yet took no steps to slow down or stop his train until within 60 or 100 feet of the buggy, we cannot say as matter of law that they were not justified in finding that the engineer was guilty of negligence which caused the accident that followed.

Neither can we say as a matter of law that the driver of the horse was guilty of negligence, because she drove what appeared to be a perfectly gentle horse along a public traveled highway traversed by a railroad track. While it is claimed by counsel for defendant that the driver of the horse caused him to back the buggy onto the track, the evidence for the plaintiff does not show it, but simply shows that the horse became unmanageable, and without fault of the driver backed onto the track.

The contention that the verdict is not supported by the evidence cannot be sustained.

The court properly sustained plaintiffs' objection to the question put to the conductor: "Did the engineer take every precaution that an engineer could take to stop his train and prevent the accident?" This was a matter to be determined by the jury from the evidence as to what he did, when he did it, and under what circumstances. The next question, however, "What precaution, if any, did the engineer take to stop the train and prevent the accident?" might very properly have been allowed; but inasmuch as the conductor, as well as the engineer, had already testified fully as to what the engineer did do and when he did it, we do no think the ruling of the court in disallowing the question justifies a new trial of the action. On examining the testimony given by the conductor we find that he testified that the slowing down of the train commenced about 100 yards from the rig, that it was then going 9 or 10 miles an hour, and he (the engineer) reduced it about one-half; that the reduced speed was kept up until the train got near the rig, when the train stopped. He also said that when the horse commenced to back, which he said was when the train was 20 feet away, the engineer reversed the engine. The objection to the question was as to its form only, and was sustained apparently upon that ground; and while the objection to the question seems to us a little hypercritical, we do not think the ruling of the court was intended to prevent, or did prevent, the defendant from eliciting from the witness any fact within his knowledge concerning what the engineer did. Defendant did not reform his question, or further attempt to draw from the witness testimony as to any particular thing that the engineer did.

Defendant requested the court to charge the jury as follows: "Where there has been mutual negligence, and the negligence of each party contributed to cause the injury, no recovery of damages can be had"—which the court refused, but in lieu thereof instructed the jury as follows: "Where both parties have been equally negligent, and the negligence of each party directly contributed to cause the injury, no recovery for damages can be had." It is now urged by defendant that the court erred, both in refusing the instruction requested, and in giving the substituted instruction. First, as to the refusal to give the requested instruction, while it states a general rule of liability, it is not without qualification applicable to all cases. Thus, although a person by his own negligence has placed himself in a place of danger, another person may not wantonly injure him, but, if aware of the danger to the first party, must use ordinary care to avoid injuring such person. For a failure so to do such person is liable in damages. "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500. In the case at bar there is evidence which tends to prove that the engineer of the train saw that Mrs. Johnson was in a place of danger in ample time to have avoided the accident by the use of the appliances at his command. The court was, therefore, justified in refusing the instruction as requested. If given without qualification, it would have been confusing and misleading to the jury.

Neither was the defendant injured by the giving of the substituted instruction; for, while it is not a complete statement of the law, it is correct so far as it goes. It is true that where both plaintiff and defendant are equally negligent, and the negligence of each party directly contributes to cause the injury, no recovery for damages can be had. In other instructions the court fully protected the defendant from any injury by reason of the incompleteness of the statement of the law as to contributory negligence on the part of plaintiff contained in the instruction now under consideration. Thus the court, at the request of the defendant, charged the jury as follows: "I instruct you that there can be no recovery for damages for injuries negligently inflicted upon one person by another, if the injured person by her own negligence, or by the negligence of another person legally imputed to her, proximately contributed to the injuries"—and also: "If the party injured could have avoided the injury by the use of reasonable care, then plaintiffs cannot recover unless the defendant's employés willfully and wantonly so operated the train as to cause the collision." For these reasons, the court did not err in giving the modified instruction.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

4 Cal. App. 626

HIBERNIA SAVINGS & LOAN SOCIETY v. HINZ et al. (Civ. 311.)

(Court of Appeal, First District, California. Dec. 24, 1906.)

1. PLEADING—ANSWER—AMENDMENT.

Where the facts relied on as a defense were either defectively or erroneously stated in the answer, and it did not appear that the defect or error was incurable, the court properly permitted an amendment in which defendant could allege, not only the facts previously stated, but also defensive matter coming to defendant's knowledge after the sustaining of a demurrer to the original answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 793.]

2. HOMESTEAD—RIGHTS OF SURVIVING WIFE.

Where property covered by a homestead declaration had been selected from the community property of the husband and wife, it vested absolutely in the wife on the death of her husband, and, while held by her, retained its homestead character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 261-270.]

3. EXECUTORS AND ADMINISTRATORS — CLAIMS — FAILURE TO PRESENT — EFFECT—MORTGAGES—FORECLOSURE.

Code Civ. Proc. § 1475, provides that, if there be subsisting liens or incumbrances on the homestead left by a deceased person, the claims secured thereby must be presented and allowed as other claims against the estate, and, if the funds of the estate be not sufficient to pay them, the liens or incumbrances shall be enforced against the homestead only for the deficiency remaining after payment of the proportionate amount allowed from the estate; and section 1500 declares that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator. *Held*, that where a widow executed a mortgage on the homestead, which vested in her on the death of her husband, and on her death the holder of the mortgage failed to present any claim against her estate within the time limited for presentation of claims, no action could thereafter be maintained thereon either to recover the debt or to foreclose the mortgage.

4. HOMESTEAD—TERMINATION OF EXEMPTION—BURDEN OF PROOF.

Where a widow became vested of a homestead on the death of her husband, and thereafter mortgaged the same and died, there was no presumption that she left no family surviving her and that the homestead exemption terminated on her death; but the burden of proof of such facts was on the holder of the mortgage.

Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by the Hibernia Savings & Loan Society against Auguste Laidlaw, as executrix of the estate of Julia A. E. Hinz, and others. From a judgment for defendant Laidlaw, plaintiff appeals. Affirmed.

Tobin & Tobin, for appellant. Alex G. Eells, for respondents.

HARRISON, P. J. Action for the foreclosure of a mortgage executed to the plaintiff by Julia A. E. Hinz, since deceased. Judgment was rendered in favor of the respondent, and the plaintiff has appealed from the judgment upon the judgment roll, including a bill of exceptions.

The facts presented at the trial, as appears from the record, are as follows: September 19, 1903, the property described in the complaint was the community property of said Julia A. E. Hinz and her husband, John J. A. Hinz, and on that day the said Julia executed an acknowledged in proper form and caused to be duly recorded a declaration of homestead thereon. The property was at that time subject to a mortgage, which had been executed to the plaintiff by the husband in 1890 to secure his promissory note for $3,000. Prior to the maturity of this note, viz., November 13, 1894, the said John and Julia executed to the plaintiff their joint and several promissory note for the sum of $3,000, payable in one year thereafter, and for the purpose of securing its payment executed and delivered to the plaintiff a mortgage of the said property. November 25, 1894, the husband died testate, devising the premises in question to his wife Julia. October 19, 1899, Julia executed to the plaintiff the note and mortgage set forth in the complaint herein in renewal of the note and mortgage made by herself and husband. She died February 18, 1901, leaving a last will and testament, wherein the respondent, Auguste Laidlaw, was appointed executrix. Her will was admitted to probate March 18, 1901, and letters testamentary on her estate were on that day issued to the said executrix. Thereafter, upon the order of the court, due and legal notice was given by the executrix to the creditors of Julia to present to her for allowance their claims against the estate of her testatrix. The plaintiff did not present to her any claim upon the note or mortgage set forth in the complaint, but after the time for presentation of claims had expired brought the present action for the foreclosure of the mortgage and sale of the property in satisfaction of the note.

1. The defendant filed an answer to the complaint, to which the plaintiff demurred, and its demurrer was sustained, with leave to the defendant to amend. An amended answer was thereafter filed, and the cause was tried upon the issues raised thereby. The appellant urges, as one of the grounds for the reversal of the judgment, that the demurrer should have been sustained without leave to amend; and it also urges that the defendant should not have been allowed to set up in her answer a defense different from that presented in her original answer. There was no error in the order allowing the defendant to amend her answer. If the facts relied upon for a defense were either defectively or erroneously stated therein, and it did not appear that the defect or error was incurable, the court was justified in giving her an opportunity to properly present the facts. When the amended answer was filed, the plaintiff made no motion to strike out that portion claimed by it to be a new defense, but went to trial upon the issues thereby raised. It cannot, therefore, after waiting for the judg-

ment, make this objection to the character of the answer upon an appeal therefrom. It may be added that if there was a defense to the action, which the defendant did not set forth in her original answer, even though she had no knowledge of such defense, or of the facts constituting the same, until after the order made sustaining the demurrer, it would have been the duty of the court, upon her request, to allow her to amend her answer in order that such defense might be presented. Guidery v. Green, 95 Cal. 630, 30 Pac. 786.

2. The property covered by the homestead declaration, having been selected from the community property, vested absolutely in Julia upon the death of her husband, and while held by her retained its homestead character, and was under the same protection and immunity as it was during the existence of the community. Sanders v. Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26. Its subsequent mortgage by her to the plaintiff had no effect upon its character as a homestead other than does the mortgage of a homestead which is executed by both husband and wife. It became thereby subject to the lien of the mortgage, and during her lifetime was subject to foreclosure and sale in an action by the plaintiff therefor. Upon her death, however, the provisions of section 1475, Code Civ. Proc., became operative, and required the plaintiff, as holder of the mortgage, to present its claim secured thereby for allowance as other claims against her estate, and, after such presentation, it had the right to have the claim paid out of the general funds of the estate so far as these funds were available, and to enforce the lien of its mortgage against the homestead for any deficiency remaining after such payment. Its failure, however, to make such presentation, deprived it of the right to enforce its mortgage for any part of its claim. Camp v. Grider, 62 Cal. 20; Mechanics' B. & L. Ass'n v. King, 83 Cal. 440, 23 Pac. 376. Section 1500, Code Civ. Proc., declares that "no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator." The only exception to this rule is where a mortgagee seeks to enforce a lien upon certain specific property of the estate; and unless the claimant brings himself within the exception his failure to present his claim to the executor or administrator precludes him from maintaining any action upon his claim. But where the mortgage is upon property which is subject to a claim of homestead, section 1475, Code Civ. Proc., limits the exception in section 1500 to an action for its foreclosure during the lifetime of the mortgagor (Sanders v. Russell, supra), and requires the holder of the claim secured by such mortgage to present the same "as other claims against the estate." The plaintiff, by reason of its failure to present to the executrix of Julia its claim upon the promissory note set forth in the complaint herein, is not only unable to maintain an action for the foreclosure of the mortgage, but by the above provision of section 1500 is also precluded from maintaining any action on the note independent of the mortgage. The extinguishment of the mortgage lien, by reason of such failure to present its claim, did not give it the right to bring an action upon the note without such presentation. Hibernia S. & L. Soc. v. Thornton, 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52.

3. Other questions are discussed in the briefs of counsel; but, as they have no connection with the foregoing defense, and as the rulings of the trial court thereon, even if erroneous, would not affect the above conclusion, they need not be considered. The proposition of appellant that the provisions of section 1475 are inapplicable, for the reason that upon the death of Julia the homestead ceased to exist, does not arise upon the facts contained in the record. It does not appear therefrom that she did not leave a family for which the homestead is to be preserved. Whether she did or did not leave a family is not shown; and, as there is no presumption upon the question, it was incumbent upon the plaintiff to establish the fact upon which it contends that the provisions of the section are inapplicable.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 610

AUSTIN v. UNION PAVING & CONTRACTING CO. et al. (Civ. 308.)

(Court of Appeal, First District, California. Dec. 20, 1906.)

1. Appeal — Stay of Proceedings — Execution—Conveyance of Property.

A judgment debtor, who perfects an appeal from an order denying a motion for a new trial, and who gives the usual bond for costs and a stay bond in proper form, may dispose of his real estate owned at the time of the docketing of the judgment, provided the conveyance is not made with intent to defraud his creditors; the judgment creditor having no lien on the land after the giving of the stay bond.

2. Execution—Restraining Sale—Right of Action—Cloud on Title.

A sale of land on an execution under a judgment against the grantor of the holder of the legal title of the land will cast a cloud on the title, and will be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 506.]

3. Injunction—Property and Rights Protected—Bona Fide Purchasers.

The holder of a junior title, who seeks the aid of a court of equity to protect his title against the holder of a senior title, must aver and prove that he is a purchaser for value without notice, actual or constructive.

4. Execution — Restraining Sale — Complaint—Sufficiency.

A complaint in an action to restrain a judgment creditor from selling land under an execution against a former owner, which alleges that plaintiff is the holder of the legal title to the land, prima facie shows that plaintiff is entitled to the protection of his title from the cloud that would be cast thereon by the sale under the execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 525.]

5. Appeal—Stay Bond—Sufficiency.

A stay bond given by a party against whom a judgment had been rendered for $900.29, with costs in the sum of $90.25, recited the rendition of a judgment for $900.99 and for costs amounting to $87.58, and that the party was "desirous of staying the execution of said judgment during the pendency of the appeal" from an order denying a motion for a new trial, and that the party and his sureties were bound "in the sum of $200, being double the amount named in said judgment." *Held*, that the bond was a sufficient stay bond for $2,000; the error therein being a clerical one, not affecting its validity.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Paul P. Austin against the Union Paving & Construction Company and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant the Union Paving & Construction Company appeals. Affirmed.

D. H. Whittemore, for appellant. R. Percy Wright, for respondent Austin. George D. Squires, for respondent sheriff.

HALL, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying the motion of defendant Union Paving & Contracting Company for a new trial. The first point to be considered is that the court erred in overruling appellant's demurrer to the complaint. The action was brought to restrain and enjoin the defendants from selling a piece of land alleged to be owned by plaintiff under a writ of execution under a judgment in favor of appellant and against one Ellen Mowry, a former owner of the land. The complaint alleges that plaintiff is, and ever since the 17th day of January, 1903, has been, the owner in fee of the land described in the complaint, and sets up his chain of title, from which it appears that such title was derived by mesne conveyances from Ellen M. Mowry, who was the owner of the land when a judgment in an action wherein appellant was plaintiff and Ellen M. Mowry was defendant was docketed. From the complaint it appears that Ellen M. Mowry took and perfected an appeal from an order denying her motion for a new trial in said action by giving the usual bond for costs in the sum of $300 and a stay bond in the proper form in double the amount of the judgment, after which she conveyed the land to George Mowry, who subsequently conveyed it to plaintiff. The judgment having been affirmed, defendant in this action took out execution and was proceeding to sell the land thereunder.

The point urged in support of the demurrer is that it is not averred in the complaint that plaintiff, or his immediate grantor, was a purchaser in good faith or for value. Plaintiff, however, according to the allegations of the complaint, is the owner of the legal title. At the time of the conveyance from Ellen M. Mowry a stay bond had been given, and appellant had no lien on the land. She had a right to sell it, or otherwise dispose of it, provided she did not dispose of it with intent to defraud her creditors, which intent will not be presumed. A sale of lands upon an execution against the grantor of the holder of the legal title will cast a cloud upon the title, and will be enjoined. Pixley v. Huggins, 15 Cal. 133; Porter v. Pico, 55 Cal. 175; Einstein v. Bank of California, 137 Cal. 47, 69 Pac. 616. In the latter case it is said: "The plaintiff is the owner of the legal title and in possession. It is presumed, until otherwise determined, that her title is good. The fact that the conveyance was made to her by her husband while indebted to defendant corporation would be a circumstance to be carefully considered in determining the question as to whether or not the conveyance was made with a fraudulent intent as to creditors; but upon an application for a temporary injunction we know of no rule that would require the court to presume that the conveyance was fraudulent, and, before the trial of the question, allow a sale to be made, thus clouding the plaintiff's title and compelling her to resort to an independent action for the purpose of removing such cloud." Undoubtedly the holder of a junior title, who seeks the aid of a court of equity to protect his title against the holder of a senior title, must aver and prove that he is a purchaser for value without notice, actual or constructive. Thus the holder of a subsequent recorded deed, in order to prevail over the holder of an unrecorded prior deed, must aver and prove that he was a purchaser for value and without notice. His right to recover depends upon such facts, and the cases cited by appellant are all of this character. Everson v. Mayhew, 65 Cal. 163, 3 Pac. 641; Mariner v. Smith, 27 Cal. 652. But in the case at bar plaintiff alleged himself to be the holder of the legal title, and as such was prima facie entitled to have his title protected from the cloud that would be cast thereon by the sale under the execution against his grantor. Pixley v. Huggins, supra; Porter v. Pico, supra; Einstein v. Bank of California, supra. The court did not err in overruling appellant's demurrer to the complaint.

The only other point in the case concerns the sufficiency of the bond given in the action against Ellen M. Mowry to stay execution of the judgment against her pending the appeal, and thus to release her land from the lien of said judgment. The defendants objected to the admission of the bond in evidence, and also raised the same point upon motion for nonsuit. The bond is set out in full in the findings, and thus the point is again presented in the contention that the findings do not support the judgment. The objection to the sufficiency of the bond is that by it the sureties were not bound in double the amount of the judgment appealed from. It is alleged in the complaint in this action that the judgment recovered against Ellen M. Mowry was for the sum of $900.29, together with costs in the sum of $90.25. This allegation is not denied by the answer, and thus stands as an admitted fact. The bond given was in the usual form, and correctly recited the giving of the judgment, except that it stated the amount of the judgment to be $900.99 and costs in the sum of $87.58. After providing for a liability in the sum of $300 to cover costs and damages on appeal, the bond proceeds as follows: "And whereas, said appellant is desirous of staying the execution of said judgment during the pendency of said appeal from order denying motion for a new trial we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves jointly and severally bound, in the further sum of $200, being double the amount named in said judgment, that," etc. Appellant contends that by the terms of the stay bond the sureties became bound in the penal sum of $200, and no more. If this contention be correct, the bond did not release the land of the judgment debtor from the lien of the judgment, and the judgment in this action should be reversed.

We do not think the contention of appellant is well founded. It is true that the liability of sureties cannot be extended beyond the true meaning of the terms of their contract; but this rule does not preclude the application of the ordinary rules for the interpretation of contracts. In Longfellow v. McGlynn, 56 Minn. 312, 57 N. W. 926, which was an action against sureties on a bond, the court said: "We are bound to assume that the parties intended the instrument to be effectual, not nugatory. And if what was intended as the condition may be ascertained from the terms, read in connection with the circumstances under which, and the purposes for which, as shown by those circumstances, the bond was executed, it must be sustained. * * * To thus ascertain what the parties intended by the instrument executed is strictly consistent with the rule that a surety is not to be held beyond the contract he has entered into. What contract he has made is to be determined by the same rules of interpretation as are applied to other contracts; the purpose being to ascertain what he has bound himself to do. When that is ascertained, his obligation is strictly limited to it." In London & San Francisco Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64, in discussing the rules applicable to the interpretation of the contract of a guarantor, it is said: "But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation, for the purpose of effecting the objects for which he made the instrument and the purpose for which it was to be applied." In Swain v. Graves, 8 Cal. 549, suit was brought upon an appeal bond in which the word "plaintiff" was by mistake used instead of "defendant" or "appellant," and yet it was held that the action could be maintained. The court said: "An appeal bond will be so construed as to carry out the obvious intentions of the parties. People v. Judges of Oneida Common Pleas, 1 Wend. (N. Y.) 28; Yocum v. Barnes, 8 B. Mon. (Ky.) 497. 'To support the condition of a bond the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties.' 1 Saund. 65." In Grant v. Brotherton, 7 Mo. 458, the sureties bound themselves in the sum of "two thousand," and it was held that the bond should be read as though the word "dollars" followed the words "two thousand"; it appearing from the face of the bond that it was given to secure the forthcoming of property of the value of $1,000. The court supplied an omission so as to effectuate the evident purpose of the parties.

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647. The bond now under consideration upon its face showed that it was given to stay execution of a judgment for nearly $1,000, and, though the penal sum written in the bond is $200, it is followed by the recital, "being double the amount named in said judgment." The purpose of the bond was to secure a stay of execution, to do which the law requires a bond in double the amount of the judgment, and of this the sureties are presumed to have knowledge. On reading the bond, with knowledge of the law and the purposes stated in the bond for which it was given, the ordinary mind is forced to the conviction that by a misprision and clerical error there was written in the bond "$200" insead of "$2,000." This conviction is further strengthened by the provision in the bond that if the judgment be affirmed, and appellant does not pay the same within 30 days after filing of the remittitur, judgment for the same may be entered against the sureties on motion. This in fact, was done, as appears from the undenied averment of the complaint. The conditions that, if the appellant fails to pay the judgment costs, and damages, which, if affirmed as a whole, would amount to about $1,000 or over, judgment may be entered against the sureties for such amount, is quite inconsistent with the idea that the sureties bound themselves only in the sum of $200. Judgment could only be entered against them for $1,000 upon the theory that they had bound themselves in at least that amount. Interpreting the words of this bond in the light of the circumstances under which it was given, it is evident that the sureties intended to bind themselves in the penal sum of $2,000.

For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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4 Cal. App. 604

GLASS v. GLASS. (Civ. 305.)

(Court of Appeal, Second District, California. Dec. 18, 1906.)

1. Divorce — Jurisdiction — Disposition of Separate Property.

Though in an ordinary divorce proceeding the court has no jurisdiction to dispose of the separate property of either party, yet where plaintiff sought, not only divorce, but an adjudication as to the separate character of the land and a decree quieting title thereto, and both parties submitted the question to the court, neither making objection to the joinder nor to the evidence offered under their respective claims, the court acquired jurisdiction to determine the question and to quiet title to the rightful owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 591, 592.]

2. Quieting Title—Interest Conveyed on Agreement to Pay Mortgage—Materiality of Maturity Where Promise was Repudiated.

Where a wife sued to quiet her title as against her husband to an undivided one-half of the land, claiming the whole as her separate estate, and he answered that the land was his separate estate, that she had obtained a conveyance of an undivided half upon a promise that she would discharge a mortgage upon the whole, and that she had failed to do so, and she denied having made the promise, it became unnecessary for him to show whether or not the mortgage had matured.

3. Appeal — Review — Presumptions—Vacation of Orders—Presumption of Regularity.

All intendments are in favor of a court's judgment vacating an order previously made, and in the absence of a showing to the contrary it will be presumed that the order was made in a manner and under such circumstances as justified its vacation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3714.]

4. Divorce—Order for Attorney's Fees—Authority to Vacate.

In a divorce action, the trial judge could vacate an order for the payment of attorney's fees, made ex parte, upon the wife's misrepresentation that she had no separate estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 656.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by Miriam S. Glass against Neil Glass. From a judgment partially in favor of defendant, plaintiff appeals. Affirmed.

Hester & Ladd and E. W. Freeman, for appellant. W. C. Batcheller and G. E. Delevan, Jr., for respondent.

ALLEN, J. Appeal by plaintiff from a portion of the judgment of the superior court of Los Angeles county and from an order denying a new trial.

Plaintiff, in her complaint, which was one for divorce based upon grounds of extreme cruelty, joined therewith an action to quiet her title as against defendant to an undivided one-half of certain described premises, claiming the whole thereof to be her separate estate. Defendant answered, joining issue upon all of the allegations of the complaint and further filed a cross-complaint for a divorce, charging plaintiff with extreme cruelty, and in addition alleged that the whole of the premises described in the complaint were his separate estate, that plaintiff had obtained a conveyance from defendant of an undivided one-half thereof upon the representation and promise that she would pay and discharge a mortgage lien existing upon the whole of said premises, that this she had failed and refused to do, and by reason thereof the consideration for said conveyance had wholly failed. Plaintiff answered his cross-complaint, denying that she ever made such promise and that said property was the separate estate of defendant. Upon the trial the court found both parties guilty of extreme cruelty, one towards the other, but nevertheless granted plaintiff a divorce. Upon the issues raised in relation to the property described, the court found that the property mentioned was of the value of $2,500 and was the separate property of the defendant; and, further, that the agreement of plaintiff to pay such mortgage was the sole consideration for the conveyance to her of the undivided one-half; and, further, that, the property being subject to a declaration of homestead, the same was awarded to defendant, under section 146 of the Civil Code. The court further found that at the commencement of the action plaintiff was the owner of a separate estate of the value of $7,500, exclusive of the property claimed in the complaint, and vacated a former order directing the payment by defendant to her of $100 as attorney's fees for prosecuting the action.

Appellant contends that under the authority of Reid v. Reid, 112 Cal. 277, 44 Pac. 564, no jurisdiction in divorce proceedings is in the court to dispose of the separate property of either party. This is true in an ordinary proceeding for divorce. But in the case under consideration the action instituted by plaintiff was dual in its character, seeking, as it did, not only a divorce, but an adjudication as to the separate character of certain described property, and a decree in effect quieting her title thereto. The issue was fairly made as to the property, and both parties submitted the question to the court for determination, and neither party made any objection to the joinder, nor to the evidence offered in support of their respective claims, and the court, under the pleadings and circumstances of the trial, had jurisdiction to determine the question involved as to the character of this property and to quiet the title of the rightful owner thereto.

It is further insisted that the agreement to pay the mortgage was a personal one and not a condition of the conveyance, and, even if it were a condition, no evidence was offered to show that the mortgage was either due or payable. The court found, and there is evidence in its support, that plaintiff made the agreement, and that it was the sole consideration for the conveyance to her of the undivided one-half interest, and that she never paid any part of such mortgage debt. This agreement she repudiates in her answer, and in her original complaint lays claim to the whole of the property. It is obvious, from the position assumed by her, that she never intended to carry out this agreement. "A promise made with the intention of not performing it constitutes a fraud for which a contract may be rescinded or avoided." Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 530, 52 Pac. 995, 65 Am. St. Rep. 186. The total failure of consideration made it unnecessary to give notice of rescission before bringing the action (Field v. Austin, 131 Cal. 382, 63 Pac. 692), and the repudiation of the contract rendered the matter of its maturity immaterial; for, when plaintiff brought her action asserting sole and separate ownership in the whole of the property, it amounted to a notice of repudiation of her promise theretofore made, or, at least, that she would not do or perform any contract theretofore made having as its consideration an assumption of defendant's interest in the premises.

It is next contended that the court was without jurisdiction to vacate the former order in relation to attorney's fees. That such order may be entered as a judgment, and, when so entered, an appeal will lie, is no longer an open question; but such order may be made ex parte, and is usually so made. Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114. This, of course, comprehends previous service of process. By section 166 of the Code of Civil Procedure, orders which are usually granted in the first instance upon ex parte application may be made at chambers. Section 937 of the Code of Civil Procedure provides that orders made out of court without notice may be vacated or modified without notice. All intendments are in favor of the judgment of vacation made by the court, and, in the absence of any showing to the contrary, it will be presumed that the court made the order in the manner and under such circumstances as justified the subsequent vacation and the final judgment. "The rule with reference to the power of a court to revise its own action suffers an exception in the case of ex parte proceedings." In re Sullenberger, 72 Cal. 552, 14 Pac. 513. The record discloses that the court was imposed upon when the order for fees was procured. "The object of section 137 of the Civil Code is to enable the wife to properly present her cause of action, * * * and, if she can do this by reason of the fact that she has sufficient separate estate, * * * the court would not exercise a proper discretion in directing the husband to defray her expenses in the case." Mudd v. Mudd, supra. Plaintiff in the complaint, and upon which the order was based, alleged that she had no separate estate. This the court found upon the final hearing to be untrue; that, on the contrary, she was possessed of an income-producing separate estate. Where an order ex parte has been procured not in consonance with law, and from which rank injustice must follow, the court has power, when it discovers the mistake, to correct the error, and the injured party is not remitted to an appeal for remedy. Wiggin v. Superior Court, 68 Cal. 402, 9 Pac. 646. The record discloses, by an examination of the dates of the commencement of the action and of the final decree, that the vacation was within six months after the entry of the original order, and it will be presumed, in support of the judgment of vacation, that it was within a reasonable time thereafter.

We find no error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

4 Cal. App. 647

CENTRAL TRUST CO. v. STODDARD et al.

(Civ. 333.)

(Court of Appeal, First District, California. Dec. 28, 1906. Rehearing Denied by Supreme Court Feb. 25, 1907.)

1. APPEAL—GRANTING NEW TRIAL—REVIEW.

Where an order granting a new trial was general in its terms, the court, on appeal, will examine the record, and, if there be any error justifying the court in making the order, it will be affirmed.

2. SAME — DISCRETION OF LOWER COURT — GRANTING OF NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE—REVIEW.

A motion for a new trial, on the ground of the insufficiency of the evidence to sustain material findings, is addressed to the discretion of the trial court, and its rulings thereon will not be reversed unless the discretion was abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3871-3873.]

3. DEEDS—DELIVERY—QUESTION OF FACT.

Whether or not a deed has been delivered is a question of fact determined in each case by its own particular circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 127.]

4. SAME—WHAT CONSTITUTES DELIVERY.

To constitute a delivery of a deed it must appear that the grantor intended to part with the title to the property described in the deed, and that he parted with the deed by placing it beyond recall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 117–121.]

5. SAME — EVIDENCE OF DELIVERY — SUFFICIENCY.

While between a grantor and a grantee the question of the delivery of the deed is to be determined by preponderance of the evidence, the rule is that, where rights of third parties have intervened, the proof of nondelivery of a deed must be clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 625.]

6. SAME—PRESUMPTIONS.

Where a deed, duly signed and acknowledged, is found in the possession of the grantee, satisfactory evidence to overcome the presumption of delivery is required to prove a nondelivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 634.]

7. NEW TRIAL — VERDICT CONTRARY TO EVIDENCE.

On the issue of the delivery of a deed, the evidence showed that the deed was duly acknowledged before a notary, and was found in the possession of the grantee therein named, and was placed on record. There was evidence that, when the deed was executed, the grantor handed it to the grantee, who took it. *Held*, that the trial court did not abuse its discretion in granting a new trial after a judgment of nondelivery.

8. APPEAL — REVIEW — PRESUMPTIONS — NEW TRIAL.

Where there is no bill of exceptions showing what evidence was offered on the hearing of a motion for a new trial on the ground of newly discovered evidence, or whether or not affidavits were read on the hearing, the presumption is that the order granting a motion was regular, and that proper affidavits were offered in support thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3672.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Central Trust Company of California, administrator, against Eliza Stoddard and another. From an order granting a motion for a new trial after the entry of judgment in favor of plaintiff, it appeals. Affirmed.

F. A. Berlin, for appellant. Stoney, Rouleau & Stoney, H. B. Montague, and D. M. Duffy, for respondent.

COOPER, J. Action to quiet plaintiff's title to the lands described in the complaint. The case was tried before the court, findings filed, and judgment entered in favor of plaintiff. The court afterwards granted defendant's motion for a new trial, and from the order so made the plaintiff has appealed.

The order was general in its terms, and all presumptions are in its favor. This court will examine the entire record upon which the order was based, and, if there be found in the record any error which would have justified the court in making the order, it will be affirmed. Baldwin v. Napa, etc., Wine Co. (Cal. App.) 81 Pac. 1037, and cases cited. One of the grounds of the motion was the insufficiency of the evidence to justify certain material findings, and in such case the motion is addressed to the discretion of the court below, and will not be reversed except it appears that there was an abuse of such discretion. Bledsoe v. Decrow, 132 Cal. 314, 64 Pac. 397; Estate of Motz, 136 Cal. 560, 69 Pac. 294; Baldwin v. Napa, etc., Co., supra.

The record shows that prior to September 1, 1902, David FitzGibbon, deceased, was the owner, and seised in fee simple, of the property; that on said day said FitzGibbon executed and acknowledged a deed, conveying said property to his two aged sisters, Mary Ann McCann and Eliza Stoddard. After the death of said FitzGibbon, the deed was recorded, and defendants claim through said deed. If the deed was delivered by FitzGibbon to the grantees therein named, the title was in defendants, and the judgment should have been in their favor. Whether or not a deed is delivered is a question of fact to be determined in each case by its own particular circumstances. It must appear, in order to constitute a good delivery, that the grantor intended to part with the title to the propery described in the deed, and that he parted with the deed by placing it beyond recall. While between a grantor and a grantee the question of delivery is one to be determined by a preponderance of evidence, the rule is somewhat different where the rights of third persons have intervened. In such case the proof of nondelivery should be clear and convincing. The deed signed and acknowledged before a notary public was prima facie evidence of delivery (Civ. Code, § 1055; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778), and when found in the possession of the grantee it requires satisfactory evidence to overcome the presumption of delivery (Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151). We do not deem it proper to discuss the evidence in such a way as to express an opinion upon the question as to whether or not the evidence shows that the deed was delivered in this case. It is sufficient to say that it was duly acknowledged before a notary public, was found in possession of the grantees therein named, and was placed upon record. There was evidence to the effect that, when the deed was executed, the deceased handed it to his sisters, the grantees, who took it. Suffice it to say that the court did not abuse its discretion in granting the new trial for the reasons above indicated.

Another ground of the motion for a new trial was newly discovered evidence. This could have been shown by affidavits used on the hearing of the motion. There is no bill of exceptions stating what was done, or what evidence was offered on the hearing of the motion, or whether or not affidavits were read. In such case the presumption is that the order was regular, and that proper affidavits were offered and read in support of the motion. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Wyckoff v. Pajaro Valley, etc., Co., 146 Cal. 681, 81 Pac. 17.

The order is affirmed.

We concur: HARRISON, P. J.; HALL, J.

7 Cal. Unrep. 320

HIGUERA v. DEL PONTE et al. (Civ. 322.)

(Court of Appeal, First District, California. Dec. 28, 1906.)

WATERS AND WATER COURSES—WATER RIGHTS —PRESCRIPTION—FINDINGS—EVIDENCE.

In an action to quiet title to certain land, evidence *held* sufficient to sustain a finding that defendants had acquired a prescriptive right to the use of waters of a spring located on plaintiff's land and flowing through a pipe to the land belonging to defendants.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Bernardo Higuera against David Del Ponte and others. From a judgment in favor of defendants Del Ponte and another, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Charles Clark, for appellant. W. H. Johnson, for respondents.

HALL, J. Appeal from judgment in favor of defendants Del Ponte and Persico, and from the order denying plaintiff's motion for a new trial.

The action is in form an action to quiet title to a tract of land described as "lot seven (7) of the Higuera Rancho," but, as appears from the answer of defendants Del Ponte and Persico, and from the statement on motion for new trial, the only real controversy in the case was as to the ownership of certain water flowing from a spring on lot 7 of said rancho, through an iron pipe, to lot 4 of said rancho, and the right of way therefor. Defendants pleaded that they were the owners of said water, water right, and right of way, and specially pleaded "that for more than five years prior to the commencement of this action they and their grantors have been in the open, notorious, continuous, peaceful, uninterrupted use and occupation of all that part or portion of said water flowing from the said spring on said lot seven of said Higuera Rancho, and to the said lot four of said Higuera Rancho; that the said use and occupation of said water as aforesaid has been for all of said time hostile and adverse to any claim of all persons, and that the said water has been so used by the said defendants and their grantors with the full knowledge of the said plaintiff." The court found the facts in accordance with the plea of the prescriptive right thus set up, and gave judgment accordingly. Appellant attacks the sufficiency of the evidence to sustain this finding.

This action was commenced July 21, 1903. The Higuera Rancho, prior to her death, belonged to the mother of plaintiff. In 1886 she caused a pipe to be laid from a spring situate on lot 7, now the property of plaintiff, to lot 4, now the property of defendants, for the purpose of conveying water to the family dwelling, which was situate on the portion of the rancho now known as "lot 4." From that time until the commencement of this action it is perfectly clear that the pipe has remained and water has run through it and been used by the various and successive owners of that portion of the rancho (lot 4), for irrigating an orchard and the usual domestic purposes. Mrs. Higuera died in 1889. October 8, 1891, as the result of a suit in partition, a decree of partition was rendered by the superior court of Santa Clara county, in which lot 7 of said rancho was awarded to plaintiff herein, and lot 4 to Martin Higuera, a brother of plaintiff, who died before the trial of this action. The only reference to water rights in the said decree is in these words: "And it was then and there in open court agreed by all the parties having interests in said land and premises that said Bernardo Higuera should have the ownership and exclusive use of the two springs of water nearest his house on said land."

Both parties introduced evidence to show whether or not the spring that is the subject of this controversy was one of the two springs referred to in this decree. While plaintiff and several of his relatives testified that the spring from which the iron pipe leads was one of two nearest Bernardo's house, and was intended to be reserved to Bernardo, other witnesses testified that there were at least two other springs nearer said house than the one in controversy. Indeed counsel for appellant concedes that on this point the evidence is conflicting, but the point seems to be of little or no importance as to the prescriptive right pleaded by defendants. The fact is, as abundantly appears from the record, that Martin Higuera and the successive owners of lot 4 continued to use the water flowing from said spring through said pipe openly and with full knowledge of plaintiff and of all persons in interest. It is claimed, however, that the use has not been uninterrupted, and has not been adverse. But upon these points we think the evidence was of such a nature as to warrant the court in finding that for more than five years before the commencement of the action the use had been continuous and adverse. While the evidence shows that there was a stopcock in the pipe near the spring, no witness was produced that ever turned off the water, either by the stopcock or by any other means. There was no cock or other means of stopping the flow of the water at the outlet of the pipe on lot 4. The plaintiff was himself a witness, and his testimony as to any stopping of the flow of water through the pipe is not at all clear or satisfactory. He testified that the portion of lot 7 where the spring in question is situated has been in the actual possession of his tenant, Mrs. Mesa. On his direct examination he said that there is a stopcock in the pipe near the spring, and it would stop the flow of the water when it was turned, but he did not say that it had ever been turned. He did say that Mrs. Mesa had been using the water to irrigate 9 or 10 acres of lot 7, but on his cross-examination he said that the water used by Mrs. Mesa for irrigation was the overflow, "the water used for irrigating lot seven is where Mrs. Mesa lives. It is an overflow when the pipe is full. Q. Just what escapes from the overflow when the spring is full? A. Yes, sir." Continuing, he said: "This water runs continuously, and has not been stopped off since the pipe was put in. Was used by my mother for the purpose of getting water for family use in the house." On redirect examination he modified what he had said about the water running through the pipe continuously, and said: "When Mrs. Mesa and I wanted water for that 9 or 10 acres we would stop it. We let the water run until we wanted to use it, and then would shut it off." But on recross-examination he said: "I did not stop the water off. My tenant, Mrs. Mesa, stopped it. Q. How do you know that Mrs. Mesa stopped it? A. Well, they told me they wanted the water there to irrigate." Mrs. Mesa was not called as a witness, nor was any one else who ever stopped the flow of water through the pipe. One Flavio Sargarda was also a witness for plaintiff, and appears to have been on the premises (lot 4) and in charge thereof for the owners (Severances) for two years and over immediately preceding the purchase thereof by defendants. Although it appears that plaintiff once spoke to him about the water while the Severances owned the premises (lot 4) and wanted to stop the water, he did not stop it.

Evidence was also given by the defendants to the effect that after their purchase of lot 4 plaintiff applied to them to put in a faucet at the house on lot 4 so that so much water would not be wasted. He asked it as a favor to Mrs. Mesa. This seems inconsistent with his present claim that he had the right to shut off the water from lot 4 at his pleasure.

From the whole record we are of the opinion that there is sufficient evidence to support the finding of the facts supporting a prescriptive right in the owners of lot 4 to the use of the waters that flow through the pipe.

The decree does not award to defendants all the waters of the spring in question, but only such as flows through the pipe.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

(4 Cal. App. 639)

RIORDAN v. GAS CONSUMERS' ASS'N.

(Civ. 327.)

(Court of Appeal, First District, California. Dec. 28, 1906. Rehearing Denied by Supreme Court Feb. 25, 1907.)

MASTER AND SERVANT—INJURIES TO THIRD PERSONS — MASTER'S LIABILITY — SCOPE OF EMPLOYMENT.

A corporation hired a horse and buggy from a livery stable for the use of its superintendent about the city in the discharge of his duties. The superintendent's regular hours of employment did not include one hour after 12 o'clock each day, which hour was at his own disposal. He was told by the livery stable keeper that the horse might run away unless hitched when standing. The superintendent drove to his home in order to take lunch, and, while the horse was there, between 12 and 1 o'clock, it ran away, as the superintendent was about to feed him, owing to his negligence in failing to hitch it. *Held*, that the corporation was liable for injuries ensuing to a person in the street from the runaway, as it occurred while the superintendent was in the line of his duty in feeding the horse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1219, 1220.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Timothy P. Riordan against the Gas Consumers' Association. From a judgment granting defendant a new trial, plaintiff appeals. Reversed.

Sullivan & Sullivan, for appellant. Carter P. Pomeroy, for respondent.

COOPER, J. This is an appeal prosecuted by the plaintiff from an order granting the defendant a new trial.

The action was brought to recover damages for personal injuries caused through the alleged negligent and careless manner in which a certain horse attached to a buggy was managed by the defendant through its superintendent, Fagan, by reason of which the horse ran away and collided with a buggy in which plaintiff was riding, thereby inflicting upon him the injuries complained of. Plaintiff alleges that on the 11th day of December, 1901, the date upon which the accident happened, the defendant, in the conduct of its business, used and employed a certain horse and buggy; that on said date said horse and buggy were in charge of said Fagan, a servant of the defendant, and were so carelessly and negligently managed and attended to by him that the said horse ran away and collided with the buggy in which plaintiff was seated, throwing him to the ground and thereby causing the injuries complained of. Defendant denies that on the day in question, or at any other time, the defendant, by its servant Fagan, or any other servant, carelessly or negligently managed or attended said horse; denies that at the time the said horse ran away it was in charge of said Fagan as a servant of the defendant, or that at that time said Fagan was its servant; and further denies that said horse, at the time it ran away, was in charge of the defendant, or any of its servants. The action was tried before a jury, who rendered a verdict in favor of the plaintiff for the sum of $3,500. Thereafter a motion for new trial was made by defendant, and granted by the court below, "upon the sole ground that the court committed error upon the trial of said action in denying the motion made by said defendant for a nonsuit therein, in this: that Fagan, through whose negligence plaintiff sustained his injuries, was not, at the time the horse in his charge ran away, in the defendant's employ, was not at that time engaged in carrying out his employer's business, and was not acting within the scope of his authority, and upon no other ground; and as to all other grounds upon which said motion for a new trial was made by the said defendant the said motion is denied."

This appeal presents the sole question as to whether or not Fagan was acting within the general scope of his authority at the time he allowed the horse to escape. We must presume from the record that the horse ran away by reason of the negligence of Fagan; that the injury to plaintiff was the result of such negligence; that the verdict of the jury is not excessive; and that no errors of law occurred during the trial. It then becomes necessary to state briefly the substance of the evidence and the question presented for decision. At the time the accident occurred the defendant was, and for several years prior thereto had been, engaged in the business of manufacturing and selling a regulator to be used by the consumers of gas, having its principal place of business at the northeast corner of Post and Powell streets, in the city of San Francisco, and Fagan was at said time, and for several years prior thereto had been, in the employ of defendant as superintendent of its department of construction, having power to employ and discharge men. His regular hours of employment as such superintendent were from 8 o'clock in the morning until 5 o'clock in the afternoon, during which time he was allowed from 12 o'clock m. to 1 o'clock p. m. to obtain and eat his lunch, which hour was at his own disposal. Some time prior to the accident the defendant, through its superintendent, Fagan, hired the horse and buggy from the livery stable of Holland and Kendall for the exclusive use of Fagan. The horse was known as the "superintendent's horse," and used almost exclusively by him. At the time Fagan hired the horse he was informed by the proprietors of the stable that he would have to be very careful with the horse because he would not stand without being hitched, and that it would be necessary to tie the horse at every place he stopped; at the same time a weight and hitching rope were supplied and placed in the buggy. Afterwards, at the request of Fagan, the proprietors of the stable furnished feed and a feed bag so that the horse might be fed at the noon hour. At the time the feed bag was given to the boy who was sent by Fagan for the horse, the boy was told to feed the horse with the bridle on and not to take it off. The residence of Fagan was on Turk street, some distance from the defendant's office, and it was his custom to take his lunch at his home, and, for the purpose of going and returning from his home, he used the horse and buggy, of which he had exclusive charge, with the knowledge and consent of defendant. A young man by the name of Arnold, who was in the employ of defendant, would usually call at the livery stable about 7 o'clock in the morning for the horse and drive it from the stable to Fagan's residence and leave it. Fagan would then, at his convenience, get into the buggy and drive the horse to defendant's office or other place of business where he desired to go. When Fagan's day's work was over he would drive the horse to his home, when it would be again taken charge of by Arnold, and returned to the livery stable about half past 6 o'clock. Fagan, as the superintendent of defendant, was intrusted with the care of the horse from the time it was left at his house in the morning until it was taken away by Arnold in the afternoon. No one else was intrusted with the horse, or given any directions as to its care and custody. If any one else used the horse and buggy during business hours they had first to obtain the consent of Fagan. Defendant never objected in any way or manner to Fagan using the horse and buggy to go to his lunch at the noon hour. On the day of the accident Fagan had been engaged in defendant's business at the Mill's building on Montgomery street, and about 12 o'clock, or a little after, he unhitched the horse from where it had been standing in front of defendant's office, got into the buggy and drove to his place of residence. He did this for the sole purpose of getting his luncheon. He arrived home at about a quarter past 12 o'clock, took the bridle off the horse's head before he had tied him, and, while getting the feed bag, or while about to adjust the feed bag, the horse, finding himself free, ran away, and hence the injuries to plaintiff.

Upon the above facts, we are of opinion that the defendant is liable, and the fact that the act of negligence was committed during the noon hour under the circumstances of this case does not relieve the defendant from responsibility. The rule is that the master is civilly liable for the negligent acts of the servant committed while in his service and within the scope of his employment; that is, the transaction of the master's business. It is also the rule that, when a servant acts independently, without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible for the negligence of the servant. These rules are well understood by the profession, but, like many other simple and plain rules, their application to the facts is sometimes very difficult. There are hundreds of cases in which the facts show the case to be on the border line, and some of them so close that the decision is at best an approximation. The question, generally, is whether the servant, at the very time of the alleged act of negligence, had departed from his employment, or whether he departed from or neglected a duty in the line of his employment. In the first case the principal is not responsible for the servant's acts, and in the second case he is responsible. The defendant took the exclusive charge of the horse from the time it left the stable until it was returned at night. The stable keepers had instrusted the defendant with its care and safekeeping. They had instructed defendant's servants to be careful with the horse, and not to take the bridle off when feeding it. It was, therefore, the duty of defendant to take such care of the horse as a reasonably prudent person would do under similar circumstances. It being the duty of defendant to care for the horse, that duty could only be performed by some person in defendant's employ. It was the duty of defendant to take care of the horse during the noon hour. Fagan could have delegated this duty to any one in the employ of defendant, or perhaps he could have left the horse in the stable during the noon hour, but he did not do either, but took charge of the horse himself. He, being the superintendent of defendant, took upon himself the care of the horse during the noon hour. If he had employed Arnold, or any other person, to take charge of the horse during such hour, and the negligent act had been done by such person, the defendant would be responsible. It is none the less so because done by the superintendent. It was the duty of Fagan, in the line of this employment, to care for the horse and feed it. He was the superintendent of defendant during the noon hour as well as during business hours. He could not depart from his duty of caring for the horse during the noon hour. He had not departed from his employment. He had not gone off on an independent mission of his own, but in feeding the horse was in the performance of a duty in the line of his employment. To hold otherwise would be to hold that, if the acts had occurred in precisely the same manner they did a minute before 12 o'clock, or a minute after 1 o'clock, the defendant would be liable, but would not be liable between 12 o'clock m. and 1 o'clock p. m. The young man, Arnold, probably had the same business hours as Fagan, yet, according to the respondent's theory, it would not have been responsible if the acts had occurred after 7 o'clock and before 8 o'clock a. m. while Arnold had charge of the horse, driving it to the residence of Fagan. Arnold had charge of the horse for defendant before and after the regular working hours. Fagan had charge of the horse for defendant in the vacation hour between the regular working hours.

The conclusion we have reached finds support in the authorities. In the case of Whitman v. Pearson, Law Journal Reports, vol. 37, p. 156, part 2, it appeared that the defendant was a contractor engaged in making a sewer for the vestry of G; one of his men, who was employed to take care of a horse and cart, and who had no right to go home to dinner or leave the horse and cart, took them to his house and left them outside whilst he was having his dinner; the horse ran away and damaged the plaintiff's railings. A verdict having resulted in favor of plaintiff, a motion for new trial was argued before the Justices. The Chief Justice, in sustaining the verdict, said: "With respect to the first point, the jury have found that the servant was acting in his employment, and I think there was sufficient evidence to warrant them in so doing. * * * Here the servant was employed to take care of the horse and cart, and was engaged in taking care of them when the mischief arose." In Sleath v. Wilson, 9 Car. & P. 607, the defendant contended that, at the time of the accident, the horse and carriage were being improperly used by the servant for purposes of his own, and that he was at the time not acting within the scope of his employment. The court held otherwise, and Mr. Justice Erskine said: "It is quite clear that, if a servant without his master's knowledge takes his master's carriage out of the coach house, and with it commits an injury, the master is not answerable; and on this ground: that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that, if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master in such case will be liable, and the ground is that he has put it in the servant's power to mismanage the carriage by intrusting him with it." In Noblesville, etc., Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224, the defendant contended that it was not responsible for the negligent act of the tollgate keeper in letting down the beam of the gate after 9 o'clock p. m. because his hours of employment were from 5 o'clock a. m. until 9 o'clock p. m. The court held otherwise, and in the opinion said: "There was, however, uncontradicted evidence showing that the gatekeeper was in sole charge of the toll house and gate at all times, and that he was the only agent or officer of the corporation who had control of that property. * * * It is very apparent in this case that the servant's duty did not terminate with gathering each day's toll, but that it extended to the control of the gate and its appliances, and if, while managing them for the master, he negligently inflicted an injury upon a traveler, who was free from fault, the rule of respondeat superior must prevail." In speaking of the liability of a defendant for the negligence of a driver while engaged in carrying a load of poles for himself the court said, in Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959, 49 Am. Rep. 796: "But here the wagon was intrusted, generally, to the driver, to be used entirely at his discretion." In Rahm v. Singer Mfg. Co., (C. C.) 26 Fed. 913, the court said: "In order to fix the responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was, at the time of the commission of the tort, engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable."

In the case at bar Fagan was taking his noon hour for rest and refreshment, but at the same time he was pursuing the line of his duty and the defendant's business in caring for and feeding the horse.

The order is reversed.

We concur: HARRISON, P. J.; HALL, J.

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4 Cal. App. 634

LEIST v. DIERSSEN et al. (Civ. 302.)

(Court of Appeal, First District, California. Dec. 28, 1906.)

1. TRIAL — FINDINGS BY COURT — CONSTRUCTION.

Findings by the court must be construed so as to uphold rather than defeat the judgment rendered thereon, and, for the purpose of supporting the judgment, they must be liberally construed, and any ambiguity must be resolved in favor of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 957–961.]

2. SAME.

For the purpose of resolving an ambiguity in a finding by the court so as to support the judgment, reference may be had to other findings, to the issues, and to the bill of exceptions containing the evidence.

3. SAME.

In an action by a trustee in bankruptcy for the value of chattels sold by the bankrupt, defendant, in his answer, denied that the bankrupt was the owner of the property, and alleged that the bankrupt had transferred the same to a third person, and annexed a copy of the bill of sale executed by the bankrupt to defendant which did not include a leasehold interest owned by the bankrupt. The bankrupt was the owner of a bakery and restaurant, together with a leasehold interest in the premises where the business was conducted and the furniture contained therein and the good will of the business. There was no evidence of the value of the leasehold interest. The bankrupt testified that the good will of the business was worth $3,000, and that the stock and fixtures were worth about $500. *Held*, that a finding that the bankrupt was the owner of the business together with a leasehold interest of the premises and the furniture contained therein and the good will of the business, and that the bankrupt sold the property "last herein described" to defendant, and that the reasonable value of the property so sold was $3,500, when construed in connection with the facts was a finding that the bankrupt sold the good will of his business and the furniture used in connection therewith, but did not sell his leasehold interest.

4. SALES—TRANSFER OF TITLE—VALUE NOT DETERMINED.

The execution by a seller of a bill of sale of chattels and the delivery of the chattels to the buyer vests the title in the buyer though the value of the chattels was not agreed on, for, in the absence of an agreement as to the value or the mode of ascertaining the same, the buyer is liable to an action for the value of the chattels.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 574–579.]

5. BANKRUPTCY—ASSETS—RECOVERY BY TRUSTEE.

Where a seller, after the delivery of chattels sold to the buyer without an agreement as to the price and before the price was ascertained, was adjudged a bankrupt, the trustee in bankruptcy was entitled to enforce the obligation of the buyer to pay the value of the chattels.

6. SAME.

The right of a trustee in bankruptcy to recover the value of chattels sold by the bankrupt without an agreement between him and the buyer as to the price is not affected by the fact that the bankrupt included the chattels in his schedule in bankruptcy, or by his omitting to name the obligation of the buyer to him to pay the value of the chattels as to part of his assets.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Charles J. Leist, trustee in bankruptcy of F. Siebrecht, against John Dierssen and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Pippy & Bahrs and F. J. & T. C. Castelhun, for appellants. G. H. Perry, for respondent.

HARRISON, P. J. Appeal from a judgment against the defendants for the value of certain personal property sold and delivered to them.

March 2, 1902, F. Siebrecht was the proprietor of, and engaged in conducting, the business of a restaurant and bakery in San Francisco, and was also the owner of a leasehold interest in the premises upon which the business was being conducted. He was at that time heavily indebted, and a few days before had made an assignment to the plaintiff, Leist, of the restaurant and the property connected therewith, and also an assignment to him of the said leasehold interest. These assignments were made merely by way of security for his creditors, and he continued to remain in the possession of the property and to carry on the business thereof. Leist thereafter, acting in behalf of his creditors and with his approval, had certain negotiations with the defendants herein for the sale to them of the said business, together with its good will and the said leasehold interest. While these negotiations were going on, all of the parties thereto became anxious lest the creditors of Siebrecht should levy an attachment upon the property and prevent its sale to the defendants, and on March 2d Siebrecht executed and delivered to the defendants a bill of sale of the restaurant and restaurant business, together with the good will thereof, and all the personal property contained therein and used in connection therewith, and thereupon gave them the possession of the same, which they still retain. The bill of sale expresses as the consideration therefor the sum of $10, but no valuation of the property or price for the sale was agreed upon between the parties. On the next day, when the defendants went to the place, the men who had been employed by Siebrecht expressed themselves as dissatisfied at not receiving their pay, and the place was closed to the public. March 5th Siebrecht filed his petition in bankruptcy, and on March 21st Leist was appointed by the court trustee of his estate.

At the trial herein the superior court found: "That on the 2d day of March, 1902, one F. Siebrecht was the owner of, in the possession of, and conducting and managing the business commonly known as 'Engleberg's Bakery and Restaurant,' at and in the premises Nos. 416 and 418 Kearny street in the city and county of San Francisco, together with the leasehold interest of the aforesaid premises, and the furniture contained in said premises and the good will of said business. That on or about said 2d day of March, 1902, said F. Siebrecht sold and delivered the property last herein described to the defendants John Dierssen and William Gropp. That the reasonable value of the property so as aforesaid sold and delivered was and is $3,500."

These findings are specified by the defendants as unsustained by the evidence, and, in support of their exception, they contend that there was no evidence that the leasehold interest was assigned to the defendants, or that the reasonable value of the property sold and delivered was worth $3,500. This exception by the defendants, and their argument thereon as to the sufficiency of the evidence to sustain the findings, rests upon a misconception by them of the language used by the court. In the first of the above findings the court designates the property of which it finds that Siebrecht was the proprietor on March 2d, and in enumerating the property gives the business commonly known as "Engleberg's Bakery" (with its location on Kearny street) and a leasehold interest in said premises, "and the furniture contained in said premises and the good will of said business," thus specifying the furniture and the good will as distinct species of said property; and in the succeeding finding finds that on that day Siebrecht sold to the defendants the property "last herein described." The use of this phrase clearly indicates that the court did not intend to find that the sale to the defendants included all of the property described in the previous finding, but only such portion as was included in the term "last herein described," and, while the finding is not entirely free from ambiguity, it is not for that reason to be so construed as to defeat the judgment rendered thereon. Findings are always to receive such a construction as will uphold rather than defeat the judgment rendered upon them, and, for the purpose of supporting the judgment, are to be liberally construed, and any ambiguity therein is to be resolved in favor of sustaining the judgment. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858. For the purpose of resolving any ambiguity therein, reference may be had to other findings of fact, and also to the issues which were before the court, and to the bill of exceptions containing the evidence upon those issues.

In their answer to the complaint the defendants denied that at the date of the bill of sale from Siebrecht to them he was the owner of any of the property named in the complaint—the same as that set forth in the first of the above findings—and alleged that prior thereto he had sold and transferred the said property to Leist, and that Leist was then the owner thereof. They also alleged that on that day Siebrecht executed to them a bill of sale of certain of said property—annexing a copy of this bill of sale to their answer—and that the leasehold interest was not included therein, and had never been transferred to them. Siebrecht's ownership of the property described in the findings was, therefore, a distinct issue from that of his ownership of the property which he had conveyed to them, and the different findings of the court are to be construed as referable to these distinct issues.

Upon the issue of Siebrecht's ownership the court found against the contention of the defendants, and upon the issue of their purchase of the property it found in accordance with the terms of the bill of sale annexed to their answer. There was no evidence offered upon this issue other than this bill of sale and the circumstances attending its execution and delivery, and it is, therefore, evident that, in its finding upon the issue of what property was sold by Siebrecht to the defendants, the court, by using the phrase "last herein described" did not intend to include the leasehold interest mentioned in the previous finding. This conclusion is corroborated by the finding of the court that the value of the property "so sold and delivered" was $3,500. There was no evidence of the value of the leasehold interest before the court, but Siebrecht testified that the good will of the business was worth $3,000, and that the stock and fixtures and other personal property was worth about $500 or $600. The finding of the court that the value of the property "so sold and delivered" was $3,500, relates to the property intended by the phrase "last herein described," and, being based solely upon evidence of the value of other property than the leasehold interest, confirms the conclusion that the court did not intend to include that interest as a portion of the property sold to the defendants.

By the execution of the bill of sale and the delivery of the property to the defendants the title thereto vested in them, and they became under an obligation to Siebrecht for its value. It was not necessary that its value should be ascertained and agreed upon before the sale could take effect. Property may be transferred by way of sale and delivery from its owner to another upon an agreement that the compensation to be paid therefor may be subsequently ascertained, and, in the absence of an agreement as to the mode of ascertaining the value, the purchaser will be liable to an action for its value. He cannot retain possession of the property and escape liability therefor upon the ground that its value had not been previously agreed upon. Prior to the commencement of this action, Siebrecht became a bankrupt, and was incompetent to agree upon its value, and the plaintiff herein as his successor became entitled to enforce against the defendants their obligation for its value.

The transaction between Siebrecht and the defendants, or their title to the property thus vested in them, was not affected by the fact that he subsequently included the property in his schedule in bankruptcy, or by his omitting to name their obligation to him as a part of his assets.

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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4 Cal. App. 622

DICKIE v. STEIGER. (Civ. 324.)

(Court of Appeal, First District, California. Dec. 20, 1906.)

1. Compromise and Settlement—Vacation—Fraud—Pleading.

Complainant alleged that he was induced to give defendant sole control of the output of lime and cement rock and clay from complainant's land for a term of 20 years, on defendant's representations that he would construct large works on the land, employing hundreds of men, and that complainant's income from the arrangement would be from $7,000 to $12,000 annually; that the representations were false; that defendant had no intention of performing them; that complainant, at the time the contract was made, was 62 years of age, infirm in mind and body, and unable to conduct his business affairs; that the agreement so recorded clouded complainant's title, which prevented a sale, and, in order to complete the sale, complainant was compelled to pay defendant $1,500 to procure a release of the contract, there being no sufficient time to sue to cancel the contract. *Held* that, in the absence of an allegation as to when defendant's improvements on the land were to be erected under the contract, or as to the time that had elapsed since the contract was made, the complaint was demurrable.

2. Same—Consideration.

A compromise of a doubtful claim and a desire to avoid a lawsuit is a sufficient consideration for the release of the parties' rights with reference to such claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 39, 40.]

Appeal from Superior Court, City and County of San Francisco; J. A. Hosmer, Judge.

Suit by A. A. Dickie against L. A. Steiger. From a judgment in favor of defendant, complainant appeals. Affirmed.

H. G. W. Dinkelspiel and E. M. Billings, for appellant. Lent & Humphreys, for respondent.

COOPER, J. This is an appeal from a judgment entered in favor of defendant, by default, plaintiff having declined to amend after an order made sustaining defendant's demurrer to the complaint. We conclude that the demurrer was properly sustained. The complaint states that plaintiff, being the owner of the premises described therein, in which were large and valuable deposits of lime or cement rock and clay, suitable for use in making Portland cement, entered into a contract in writing with defendant on the 5th day of November, 1900, whereby the defendant was given sole control of the entire output of said lime or cement rock and clay for the term of 20 years upon certain terms and conditions, which are not fully stated, but by which the plaintiff was to derive an income from a share of the profit of the said products of said land; that the contract was recorded with the county recorder of the county in which the land is situated and thus clouds the plaintiff's title; that defendant obtained the said contract by representing to the plaintiff that he and his associates were possessed of large means and desired to and would erect large factories thereon and employ hundreds of men, and that plaintiff's income under the arrangement would be the annual sum of from $7,000 to $12,000; that said representations and promises were false, and made with the intent to deceive and defraud the plaintiff, and with no intention on the part of defendant of performing them; that plaintiff at the time of entering into said contract was 62 years of age, infirm in mind and body, and unable to properly conduct his business affairs; that plaintiff afterwards found a purchaser for said property who was ready, able, and willing to purchase the same, but that the said agreement, so recorded, clouded plaintiff's title, and thus prevented a sale, and that defendant refused to release the plaintiff from said agreement; that, because of plaintiff's necessities and the fear of losing the contemplated purchaser, the plaintiff did not have time to bring a suit in the ordinary course to cancel said contract and remove the cloud from said title, and he was compelled to pay and did pay to defendant the sum of $1,500 to procure a release of said contract so that the sale might be consummated. Judgment was prayed for $12,000 damages, for general relief, and for costs.

While the complaint alleges that defendant did not perform his part of the contract and did not erect the factories and make the improvements he agreed to make, there is no allegation as to the time that had elapsed after the contract was made. In fact, the complaint wholly fails to state when such improvement or factories were to be erected. It is not even alleged that the improvements were to commence within a reasonable time, or that a reasonable time had elapsed. It may be true, so far as the complaint informs us, that the contemplated sale, under which the $1,500 was paid to obtain a release, and the payment of the $1,500, were made the day or the week after the contract had been made and recorded. Plaintiff alleges that, when the contract was made, he was unable to properly conduct his business affairs. The same might be said of the great majority of men. It is because of such fact that some men become wealthy, while others are always poor. It is not, however, alleged that at the time plaintiff paid the defendant the $1,500 and procured a release of the 20-year contract he was feeble in mind or unable to properly conduct his business affairs.

Without regard to the question as to the right the plaintiff might have had to come into a court of equity and obtain a decree canceling the contract which had been placed of record, he cannot, upon the allegations of his complaint, maintain this action. Defendant apparently had valuable rights under a contract in writing in regard to real estate running for 20 years. He had at least the right to claim that the contract was valid, executed upon sufficient consideration, and not obtained by any false or fraudulent representations. All these rights he surrendered in consideration of the $1,500 paid to him by plaintiff. Plaintiff now seeks to recover back the sum so paid without restoring to defendant the rights he released. It may be that the value of the contract to defendant was worth more than $1,500 and that, to avoid litigation and any appearance of wronging an old man, defendant concluded to compromise for the $1,500. It is the policy of the law to discourage litigation and to favor compromises and voluntary settlements. The compromise of a doubtful claim is usually valid and the mutual release of their respective rights by the parties to the controversy, and the desire to avoid a suit at law, are a sufficient consideration for such compromise. Courts cannot measure the mental capacity of every person who enters into a business transaction. There is as much difference in the mental capacities of parties to make contracts or enter into business transactions as in their weight, height, or features. There is not even an attempt made to allege that the plaintiff did not fully understand and know what he was doing when he paid the $1,500 and procured the release of the contract from defendant.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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150 Cal. 414

NEALE v. MORROW. (S. F. 4,008.)

(Supreme Court of California. Feb. 2, 1907.)

BILLS AND NOTES—ACTIONS—LIMITATIONS.

Act April 2, 1866 (St. 1865–66, p. 752, c. 546), providing for the incorporation of mutual insurance companies, provided that no company formed under the statute should write any insurance until it should have obtained a fund, to be known as the "Guaranty Fund," consisting of notes of solvent persons. It was provided that such notes were to be payable absolutely, and be negotiable and payable at such times as the directors should direct and that they should remain with the company until the net earnings of the company should have accumulated to a sum, which, with the capital stock, would be equal to the original amount of the guaranty fund and of the capital stock, and that, when such fund was attained, the notes remaining in the company's control should be surrendered. One of the notes provided that, five days after actual demand, the maker would pay, etc., and in an action on the note it was contended that the note was within the general rule that, where a demand is necessary to perfect a right of action on a note, and to set the statute of limitations in motion, such demand must be made within a reasonable time, not exceeding the statute of limitations provided for bringing such action, after the cause of action has accrued. *Held*, that the contention was untenable, and limitations commenced to run against the note after actual demand for payment made prior to the obtaining of the capital referred to in the statute; the note being a continuing security unaffected by any mere lapse of time before actual demand.

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Vincent Neale, as special administrator of the estate of James Laidley, deceased, against Robert H. Morrow, administrator of the estate of A. E. Head, deceased. From a judgment in favor of defendant, plaintiff appeals. Reversed, with directions to overrule a demurrer to the complaint and to allow defendant to answer.

Vincent Neale, pro se. Bishop, Wheeler & Hoefler (William Rix, of counsel), for respondent.

LORIGAN, J. This is an appeal from a judgment entered in favor of defendant after an order sustaining a demurrer to the complaint was entered. The action is founded on a promissory note made by A. E. Head, against whom the action was originally commenced, but who having thereafter died, the respondent as his administrator was substituted as defendant. It appears from the allegations of the complaint, necessary to be stated in order to discuss the point involved on this appeal: That said note was executed by said A. E. Head on January 6, 1868, and is as follows:

"Office of the California Mutual Life Insurance Co.

"$5,000. San Francisco, January 6th, 1868.

"Five days after actual demand, for value received, I promise to pay to the order of the California Mutual Life Insurance Company the sum of five thousand dollars, in U. S. gold coin, with interest at the then legal rate from and after such demand.

"A. E. Head."

That upon its execution said note was delivered to the said California Mutual Life Insurance Company. That said California Mutual Life Insurance Company was incorporated in the year 1867 under an act of the Legislature of the state of California, entitled "An act to provide for the incorporation of mutual insurance companies for the insurance of life and health and against accidents," approved April 2, 1866 (St. 1865–66, p. 752, c. 546). That, in pursuance of the requirements of sections 8 and 9 of said act, the company had a capital stock fully paid up in cash of $100,000, and it also had a guaranty fund of $250,000, consisting of 50 promissory notes of solvent persons for $5,000 each, payable in five days after actual demand, to said company or its order. That said A. E. Head was one of such notemakers, and the note herein sued on was one of such guaranty notes. That all said notes were executed and delivered in pursuance to the provisions of said act. That, after obtaining said guaranty fund, the company commenced to prosecute the business of life insurance. That the net earnings of the company never accumulated in cash or securities in which the net earnings were invested to the sum of $350,000. That said company made no profits and never acquired any net earnings over the amount required for paying and providing for its expenses, losses, and liabilities. That said guaranty fund never became discharged of its obligations. That in 1885 said life insurance company was declared insolvent, and upon proceedings had to that end it was by the court decreed, among other things, that said note of A. E. Head was an asset of said insolvent company, and directed it to be sold. That pursuant to said decree said note was sold to J. H. Dobinson, the agent of a syndicate of guaranty note makers who co-operated together to provide means to wind up said insurance company and liquidate its indebtedness. That said note of said Head was under direction of said syndicate transferred to the executors of the estate of one James Laidley, deceased, in settlement and extinguishment of a claim of $8,400 against the said insolvent corporation by the estate of said Laidley arising out of a policy of $10,000 issued by said insurance company payable on the death of said Laidley. That on the 22d day of September, 1888, payment of said note was actually demanded of said Head by the executors of said estate, and upon his refusal to pay this action was commenced September 28, 1888, and is now being prosecuted in behalf of said estate. The defendant demurred to the complaint on the ground that the cause of action on said note was barred by the statute of limitations. The demurrer was sustained by the superior court, and the validity of said order is the only point presented on this appeal from the judgment.

This case was here on appeal before (Neale v. Head, 133 Cal. 42, 65 Pac. 131, 576), after trial and judgment for the plaintiff. On that appeal it was urged, among other grounds for reversal, that the claim upon said note was barred by the statute of limitations; but, the case being reversed on other grounds, no disposition of that point was made. It is claimed by respondent, in support of the ruling of the lower court, that the general rule is, where a demand is necessary to perfect a right of action upon a promissory note payable on demand and to set the statute of limitations in motion, that such demand must be made within a reasonable time, which in no event can exceed the statute of limitations provided for bringing said action after the cause of action has accrued, and that, if such demand is delayed beyond that period, the right of action is forever barred. And applying the rule to the note at bar, it is insisted that, as such note provided for payment "after demand," such demand should have been made within the four-year period of limitation, and, not having been so made, the cause of action upon the note was barred when the complaint in this action was filed 16 years after the latest period for making such demand existed. Conceding this to be the general rule, it has only been applied in cases where the notes in question have been made payable at a given period "after demand." We have been pointed to no authority which has held that this rule is applicable to notes payable within a certain period "after actual demand." In fact, our attention has not been directed to any case where the language used in the note before us has ever come up for consideration or interpretation. The general rule of limitations asserted by respondent as applicable to the note at bar is formulated by the decisions supporting it in cases where a note is payable so many days "after demand" upon a presumption from lapse of time that a demand was made. But, certainly, as a matter of simple contract, the maker of a note could contract so that the maturity of his note payable so many days after demand should not be determined by presumption of law that a demand was made, but that it should only mature after actual demand—a demand in fact as contradistinguished from a presumptive one. And that this was the intention of the parties we think is apparent not only from the language used in the note, but from the situation of the contracting parties and the circumstances attending its making and delivery. It is a cardinal rule that in the interpretation of a contract every word used therein is to be given its full meaning and effect. And, in the construction of a written instrument in order to ascertain what was meant by the language used, the object in view and the circumstances surrounding the execution of the instrument are properly to be taken into consideration for that purpose.

Now, considering the situation and circumstances under which this note was executed: It was one of a number required to be given to the California Mutual Life Insurance Company in order to constitute a guaranty fund as required by the act under which the company was organized. It was given pursuant to the terms of the act, and the provision of the act, in as far as they bear upon such note, must be considered as written into the note itself. Neale v. Head, 133 Cal. 43–45, 65 Pac. 131, 576. Referring now to such provisions: The act provided that every company formed under it should have a capital stock of not less than $100,000, was prohibited from making any insurance until said amount was fully paid up in cash and until after it should have obtained a fund to be known as the guaranty fund of not less than $250,000, consisting of the promissory notes of solvent persons approved by its board of directors and by each other note-giver; no note of any one person to exceed $5,000. Such notes were payable to the company, or its order, and at such time or times, in such modes and in such sums, and with or without interest, as the board of directors should prescribe. Such notes were to be payable absolutely, and at all events at the company's option, were negotiable, and might be indorsed and transferred or converted into cash, or otherwise dealt with by the company at its discretion, without reference to any contingency of losses, expense, or otherwise. It was provided that such notes, or the proceeds thereof, should remain with the company as a fund for the better security of its dealers, should be assets of the company liable for all its debts, obligations, and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings of the company, over and above its expenses, losses, and liabilities, should have accumulated, in cash or securities in which the net earnings had been invested, to a sum which, with the capital stock, would be equal to the original amounts of the guaranty fund and of the capital stock, and that thereupon the said sum of the capital stock should become and remain the fixed capital of the company, etc. It was further provided that when this fixed capital was attained all notes of the fund remaining in the company's control should be surrendered to the makers thereof, respectively, or other parties entitled to receive the same, but that until such time no guaranty note should be withdrawn from the fund, unless another note of equal solvency should be substituted therefor, and not then unless with the unanimous approval of the board of directors then in office, and of all the other parties liable on the rest of the notes comprising the guaranty fund. It was also provided that the company should allow a commission of 5 per cent. per annum on all such guaranty notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon at the rate of 12 per cent. per annum until repaid by the company. As we say, it was under the provisions of this act, and for the purpose of assisting in creating the guaranty fund thereby required, that the note in controversy was given.

Now, we think it clear when these provisions of the act are carefully considered that, if we assume, as is contended by counsel for respondent, that the language of the note making it payable "after actual demand," is of no more legal force than if it read simply "after demand," still, even so construing the note, the act itself provides within what time such demand may be exercised, which is at any time prior to the acquisition by the company of a fixed capital. This act is of equal dignity with the general statute of limitations. The Legislature could have expressly provided that the time within which demand might be made on such guaranty notes might be at any time between the date of their execution and before a fixed capital was obtained by the company. It will not be pretended that, in the face of such a provision in the act, the statute of limitations which would ordinarily apply to notes payable at a given time "after demand" would apply to a note so payable given under the provisions of the act in question. But, while the act contains no direct provision, such as we have suggested might have been inserted in it, still it is obvious, when we consider the general scope and purpose of requiring these notes and the provisions relative to them, that this was what was contemplated and intended by providing that these guaranty notes should be payable at the option of the company. Under the act it was intended that these notes should constitute a continuing guaranty fund which should remain intact for the protection of the policy holders and other creditors of the company until a fixed capital was acquired, when the makers were to be relieved from responsibility and the note surrendered. Until that time it was intended that the fund as represented by these notes (unless at the option of the company previous payment on them should be required) should constitute an inviolable fund to be resorted to when necessary to pay any claims, payment of which they were executed to secure. There is nothing in the statute requiring the company to sue upon them every four years, nor any provision requiring that they should be renewed within that period. Under the act no duty is imposed upon the company to have them renewed—replaced by new notes. On the contrary, as indicating that the original notes, as far as any acts of the company are concerned, shall at its option remain in the fund and under the control of the company, it is expressly provided, that, until a fixed capital is acquired, no guaranty note shall be withdrawn from such fund unless another note of equal solvency shall be substituted therefor, and not then unless by unanimous approval of the board of directors and all the other parties liable on the rest of the notes in the fund. This provision evidently was intended to apply in cases where a guarantor of the fund desired to substitute another guarantor in his place, and is the only way provided in which release, prior to the acquirement of a fixed capital, could be obtained by any guarantor from his continuing guaranty. In this regard it may be suggested, too, that as the purpose to be attained by requiring these guarantied notes to be made was to protect the policy holders and other creditors until the fixed capital was attained, this protection could be best afforded by providing that the notes should be a continuing guaranty until that time, rather than to require them to be renewed, or sued on, every four years, matters which the directors of the company might, to the injury of the fund, neglect to do. Neither could anything be attained by suing upon these notes every four years. All that could be accomplished would be to convert good securities into cash, and thereby substitute a guaranty cash fund for a guaranty note one; and this to the disadvantage of the company, because, while it was paying but 5 per cent. commissions per annum on the notes under the act, it would be paying under the same act 12 per cent. interest to the makers of them on the money collected, and might so have to do for possibly many years before the guaranty fund would be required for any purpose, if it would be required at all. The act certainly contemplated nothing of this kind. In fact, it contemplated that this guaranty note fund might never be called on, and that it would ultimately be relieved by the attainment of a fixed capital, at which time the notes themselves would be surrendered. When a fixed capital, which would relieve these notes, could be attained, would necessarily be problematical. It might be accomplished in a few years, or it might take many years to do so, or it might not be achieved at all. It might also take many years before any necessity would arise for calling on the guaranty fund at all. The liability of the company, considering the nature of its business, would principally be for death losses, any great number of which could not reasonably be anticipated for many years subsequent to the execution of these notes, or such as did occur might be paid from other resources of the company without calling on the guaranty note fund. In contemplation of the uncertainty as to the time when this guaranty fund might be required, if at all, as it was to be created for the benefit mainly of policy holders whose claims might not accrue for many years, it was intended by the act that these guaranty notes should constitute a continuing guaranty fund; such notes to be payable at the option of the company to be exercised at any time prior to the establishment of a fixed capital provided for in the act.

As these notes must be construed in the light of these provisions, it follows, as the act conferred upon the company the option of demanding payment of them at any time before a fixed capital was required, that, when the note in question was executed providing for payment after demand, it was intended by the parties that such demand might be exercised by the company at any time prior to the acquirement of a fixed capital. The terms used in the note were inserted in harmony with the provisions of the act so that the option there given to the company might be exercised at its pleasure at any time prior to that event. In this regard the act, as the Legislature had a right to provide, furnished its own provision when the statute of limitations should commence to run against these guaranty notes, which was after demand for payment made prior to obtaining such capital. Until such demand the statute of limitations could not operate. Under this view, as the company had not acquired a fixed capital when demand was made on the note at bar, the statute of limitations had not run when this action was commenced. Aside, however, from a consideration of the terms of the note, under the provisions of the act requiring its execution and declaring the purpose and effect thereof, we are satisfied that, under the rule for interpreting contracts, which requires full force and effect to be given to every word used therein with a view of determining the meaning and intention of the parties, that the statute of limitations would not commence to run until demand in fact—an actual demand—was made for payment of the note.

It is claimed by respondent that the word "demand" implies itself an actual demand, and hence the word "actual" may be treated as redundant. Under this contention the word "actual" would have no meaning. It was, however, used by the parties, and we think sufficient reason is apparent why it was used, and used deliberately. It was used not only as characterizing the nature of the demand for payment which should be made, but as determining the time within which interest should begin to run upon the note, because it is provided therein that "five days after actual demand" the principal sum shall be paid "with interest at the then legal rate from and after such demand." And it is readily perceivable why actual demand was provided for. The insurance act required these notes to be payable at the option of the company. It was further provided that these notes might be negotiated by the company; that it might indorse or discount them at any time that it saw fit to do so. When the form of notes to be given under the act was under consideration by the board of directors, it was doubtless then well understood that, when a note was made payable simply "on demand," no demand need be made at all, and that the statute of limitations commenced to run from the date of the note; likewise that, though a demand was necessary to protect a right of action on a note payable so many days "after demand," yet, in order to bind an indorser of such note, such demand must be made within a reasonable time. They knew also that as to the payee in such a note the rule contended for here by respondent would apply, namely, that from the lapse of a reasonable time a demand would be presumed; such reasonable time usually being determined by the analogy of the statute of limitations. With a knowledge of the law as applied to these forms of notes, the corporation doubtless wished to avoid its application by providing a different form. With this end in view, the word "actual" was used. By using it both the maker and the payee intended that neither the rule that a note payable "on demand" was payable immediately, nor that, to bind an indorser on a note payable after demand, the demand should be made within a reasonable time, should apply as to these notes. As the insurance act provided that these notes should be negotiable, it was intended to secure the freest negotiability at any time the company might desire to negotiate them. It was contemplated that, at any time before a fixed capital was achieved, they might be readily convertible into money. This ready negotiability could be best attained by making the notes payable at a given period after "actual damand," because as an indorser the company would then be liable to the holder until he chose to make actual demand for payment, without any question possibly arising as to whether the demand was, or was not, made within a reasonable time.

It was also intended by this form of note requiring "actual demand" to prevent, as to the payee, the indulgence of any presumption of demand from lapse of time. In effect, by the use of the word "actual," as distinguished from the word "presumed," it was intended by the parties as to these notes that no presumption of demand having been made on it should be indulged in; that it was to be continuing security which would be unaffected by mere lapse of time before actual demand, and that it should not mature until actual demand for payment of it was made. Under these views the demand made for the payment of this note was in time, the statute of limitations was no bar to the action commenced on it, and the demurrer should have been overruled.

The judgment is reversed, with directions to the lower court to overrule the demurrer and allow the defendant to answer.

We concur: HENSHAW, J.; McFARLAND, J.

7 Cal. Unrep. 254

Ex parte GOLDMAN. (Civ. 199.)

(Court of Appeal, Third District, California. March 7, 1906.)

1. HABEAS CORPUS—GROUNDS OF REMEDY—PROCEEDINGS REVIEWABLE — COMMITMENT UNDER INDICTMENT.

A person imprisoned under an indictment which does not charge a public offense may obtain his discharge on an application for a writ of habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 24.]

2. CRIMINAL LAW—PARTIES TO OFFENSES—ACCESSORIES—STATUTES—CONSTRUCTION.

Pen. Code, § 32, defining accessories as those who after knowledge of the commission of a felony conceal it from the magistrate or protect the person charged with the crime, states the common-law rule that a person must know that he is assisting a felon or else he cannot be charged as an accessory, and the mere neglect to inform the authorities that a felony has been committed is not sufficient, the word "conceal" in the statute including some affirmative act on the part of the person looking to the concealment of the felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 72, 92–95.]

3. OBSTRUCTING JUSTICE—CONCEALING EVIDENCE—INDICTMENT—SUFFICIENCY.

An indictment alleging that accused after and with knowledge that a third person had stolen certain property concealed the property stolen and concealed from the magistrate the commission of the felony, states no offense under Pen. Code, § 135, punishing concealment of evidence about to be introduced, because it fails to state the purpose of the act.

4. INDICTMENT — REQUISITES — ELEMENTS OF OFFENSE.

Where an act may fall within the definition of several offenses, according to the purpose with which it is done, it is essential to the statement of any offense that the purpose be set forth.

5. RECEIVING STOLEN GOODS—INDICTMENT—SUFFICIENCY.

An indictment alleging that accused, after and with knowledge that a third person, had stolen certain property, concealed the property, and concealed from the magistrate the commission of the felony, states no offense under Pen. Code, § 496, punishing the receiving of stolen property.

6. INDICTMENT—ACCESSORIES.

An indictment charging that accused after and with knowledge of the commission of a felony concealed its commission from the magistrate does not charge accused with being an accessory within Pen. Code, § 32, defining accessories as those who after knowledge of the commission of a felony conceal it from the magistrate, as it does not allege the acts constituting the offense.

Application of Edward Goldman for a writ of habeas corpus. Petitioner discharged.

F. G. Ostrander and Frank H. Farrar, for petitioner. E. H. Hoar, Dist. Atty., for respondent.

McLAUGHLIN, J. The petitioner was indicted by the grand jury of the county of Merced for the crime of "being an accessory to the commission of a felony." The particular circumstances of the offense charged are set forth in the indictment as follows: "That said Edward Goldman on or about the 20th day of January, A. D. nineteen hundred and six, * * * (after and with full knowledge that one Ross Dunn theretofore, at, and in said county of Merced, and on or about the 18th day of January, A. D. 1906, had willfully, unlawfully, and feloniously taken, stolen, and carried away from the freight depot of the Southern Pacific Company in the city of Merced, ten sacks of Alfalfa seed of the value of $227.50; * * * and said alfalfa seed being at the time it was so taken, stolen, and carried away the personal property of one W. C. Dallas) did willfully, unlawfully, and feloniously conceal the property stolen as aforesaid, and did conceal from the magistrate the commission by said Ross Dunn of said felony."

It is contended in behalf of the petitioner that the indictment does not charge a public offense, and hence that his imprisonment is unlawful. In answer to this contention it is argued (1) that habeas corpus is not the proper proceeding for the determination of the question involved; (2) that the offense is charged in the language of section 32 of the Penal Code, and therefore the indictment is sufficient. It is the settled rule in this state that defects or irregularities in an indictment will only be reviewed on appeal from the judgment, but, if the facts alleged do not constitute a public offense, habeas corpus will lie. In Matter of Corryell, 22 Cal. 183; Ex parte Harrold, 47 Cal. 130; Ex parte Maier, 103 Cal. 479, 37 Pac. 402, 42 Am. St. Rep. 129; Ex parte Williams, 121 Cal. 331, 53 Pac. 706. Our inquiry in the present proceedings must, therefore, be confined to the single question whether the indictment charges the commission of a public offense. If the indictment only contained the general accusation that the petitioner had committed a felony "by being an accessory to the commission of a felony," it would, undoubtedly, be wholly insufficient and void. This proposition is too plain to require elaboration or citation of authorities. We must, therefore, examine the facts alleged, in order to determine whether the acts or facts detailed constitute the offense designated in the general charge. The attorneys for the people defend the indictment on the ground that 'it sufficiently appears therefrom that the petitioner concealed his knowledge of the commission of the offense of grand larceny from a magistrate. This defense is equivalent to an admission that the prisoner should be discharged. Knowledge of the commission of a felony is, and always has been, necessary to charge a person as an accessory. Intent is an essential element of all crimes, and a person could hardly intend to conceal the commission of a crime, or render assistance to a criminal, when he was wholly ignorant of the commission of an offense or the participation of the person assisted. Hence the language, "after full knowledge that a felony has been committed," found in section 32 of the Penal Code, is but the statement of an essential prerequisite to guilty concealment, protection, or assistance. In other words, it is but a reiteration of the common-law rule that a person must know that he is assisting a criminal, or else he cannot be charged as accessory. While the existence of such knowledge was an essential ingredient of the offense at common law, still the mere neglect to disclose it or inform the authorities that a felony had been committed did not constitute the person maintaining such silence an accessory. Bishop, Criminal Law, vol. 1, § 694; Am. & Eng. Ency. of Law, vol. 1, p. 268; Blackstone Commentaries, p. 37, n. 25, 120. Section 32 of the Penal Code is but a codification of the common-law rule or definition, and hence the Supreme Court of this state has pointedly said: "The word 'conceal,' as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory." People v. Garnett, 129 Cal. 366, 61 Pac. 1115. An examination of the original record in that case shows that the information contained a statement of the particular affirmative acts constituting the concealment from the magistrate, but did not contain the name of the magistrate. This portion of the information was upheld, and the cause was remanded for a new trial upon that issue. It was in passing upon the sufficiency of the information in this regard that the language quoted was used; and hence the contention that it is obiter dicta cannot be sustained. Viewed as dictum, however, it is sustained by the overwhelming weight of authority in the United States and England, and commends itself to our reason as a correct statement of the law.

Upon first impression it seemed to me that the averment that petitioner concealed the property stolen, with knowledge of the theft, might be sufficient to charge him as an accessory. But this averment is so plainly separated from any charge of concealment that we cannot, even by inference, construe the indictment as charging that the concealment of the property was for the purpose or with the intent to conceal the commission of the crime from the magistrate. The decisions in this state and elsewhere seem to hold that receiving or concealing stolen property constitutes an entirely different offense. Section 496, Pen. Code; People v. Hawkins, 34 Cal. 182; People v. Stakem, 40 Cal. 601; People v. Fagan, 98 Cal. 234, 33 Pac. 60; Bishop, Criminal Law, § 699; Am. & Eng. Ency. of Law, vol. 24, p. 48. Then, too, such concealment might have been for the purpose denounced as criminal in section 135 of the Penal Code. Where an act mala prohibita may fall within the definition of several offenses, according to the purpose with which it is done, it is essential to the statement of any offense that the intent or purpose of the act be set forth. While it was not contended in argument that the indictment could be sustained on the ground just discussed, we have nevertheless examined the point, with the result above indicated. There was and could be no pretense that the petitioner was charged or could be convicted under section 496 of the Penal Code, and hence we pass to the consideration of the vital and most difficult question involved.

The indictment charges that petitioner, after and with full knowledge of the commission of the felony, did conceal its commission from the magistrate, and the question arises whether this bald statement is sufficient to charge petitioner as an accessory. The argument before us clearly indicated that the sole intention was to charge a concealment of the commission of the felony by mere silence or withholding of knowledge from a magistrate. While we would, perhaps, be justified in accepting this construction, which must result in the discharge of the prisoner, we deem it our duty in this kind of a proceeding to determine whether any construction placed upon the language used would support a judgment against the petitioner as accessory to the crime committed by the other party named. In People v. Perales, 141 Cal. 583, 75 Pac. 171, the defendant was charged with an assault by means likely to produce great bodily injury, and the court said: "When, however, the words or terms used in the statute have no technical or precise meaning which of themselves imply the offense, or when the particular facts or acts which shall constitute it are not specified, but from the general language used many things may be done which may constitute an offense, it is then necessary in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction."

This rule thus clearly stated has obtained in California for more than 50 years, and, even if we had the right, we would have no inclination to change it. People v. Neil, 91 Cal. 468, 27 Pac. 760; People v. McKenna, 81 Cal. 160, 22 Pac. 488; People v. Washington, 36 Cal. 674; People v. Schwartz, 32 Cal. 165; People v. Wallace, 9 Cal. 32. To charge a person with murder, robbery, grand larceny, or being accessory to the commission of either crime would obviously be the statement of a legal conclusion. And an averment that a party concealed the commission of an offense is as obviously the statement of a mere abstract legal proposition. The indictment must show on its face the acts or facts from which the conclusion flows. The concealment of a crime "necessarily includes the element of some affirmative act," and the particular affirmative act constituting the offense must be stated in the indictment, to the end that the court and defendant may know, independently of the conclusion stated, that such act constitutes an offense against the law. If this were not so, then it would be sufficient in all cases to charge an offense in the naked language of the statute, and this has never been, is not now, and in reason never can be the law. The wisdom and justice of the rule concretely stated in People v. Perales, supra, could have no more complete vindication than is afforded by the case before us. The whole tenor of the argument for the people in this proceeding was that the concealment consisted of withholding knowledge of the commission of the felony from a magistrate, and we have seen that mere silence or failure to disclose such knowledge did not constitute one an accessory at common law and does not have that effect under the Code.

It follows that the petitioner is entitled to be discharged from custody, and it is so ordered.

We concur: CHIPMAN, P. J; BUCKLES, J.

(150 Cal. 114)

PEOPLE v. CONNESS. (Cr. 1,274.)

(Supreme Court of California. Dec. 21, 1906.)

1. PROSTITUTION—PLACING OR LEAVING WIFE IN HOUSE OF PROSTITUTION.

St. 1891, p. 285, c. 206, providing that any man who places, or procures any other person to place, his wife in a house of prostitution, or connives at or permits the placing of his wife in a house of prostitution, shall be guilty of a felony, not only makes it a felony for a husband to place his wife in a house of prostitution for the purpose of prostitution, but also makes him guilty of an offense for allowing her to remain in such a house for the purpose of engaging in an innocent occupation therein.

2. CRIMINAL LAW—EXCESSIVE PUNISHMENT—STATUTES—VALIDITY.

St. 1891, p. 285, authorizing a sentence of from three to ten years in the state prison for allowing one's wife to remain in a house of prostitution, is not in conflict with the Constitution, prohibiting the infliction of cruel and unusual punishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3304-3309.]

3. PROSTITUTION—PLACING OR LEAVING WIFE IN HOUSE OF PROSTITUTION—INFORMATION—SUFFICIENCY.

An information alleging that accused "did willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving" of his wife "in a house of prostitution, * * * and did then and there willfully, unlawfully, and feloniously allow and permit his said wife to remain in said house of prostitution," sufficiently charges the crime created by St. 1891, p. 285, c. 206, punishing any man who places or leaves his wife in a house of prostitution, etc.

4. SAME—EVIDENCE—INSTRUCTIONS.

Where, on a trial of a husband charged with placing and permitting his wife to remain in a house of prostitution, there was evidence that he was anxious to have her leave the house, and that he tried in various ways to induce her to do so, the refusal to charge that, though the wife resided in a house of prostitution and the husband knew it, it was still the duty of the jury to permit no presumption to be raised against the husband, and, if no other facts were established, the husband should be acquitted, was error, especially where the instruction of the court implied that the husband could be guilty, though he did not wish his wife to remain in a house of prostitution, and had had nothing to do with her going there.

5. CRIMINAL LAW—APPEAL—DISCRETION OF TRIAL COURT—CROSS-EXAMINATION.

The question of restricting the cross-examination of a witness, with respect to questions as to whether or not he had previously talked with certain persons about his testimony, is within the discretion of the trial court, not reviewable on appeal in the absence of a clear abuse thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3064.]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Thornton D. Conness was convicted of crime, and he appeals. Reversed, and remanded for new trial.

Everts & Ewing and Thompson & Prince, for appellant. U. S. Webb, Atty. Gen., and Geo. W. Jones, Dist. Atty., for the People.

SHAW, J. The information in this case charges that the defendant did "willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving of one Mary L. Conness, who was then and there the wife of him, the said Thornton D. Conness, in a house of prostitution, known as the 'Diamond Palace,' situate at the corner of Tulare and E Streets, in the city of Fresno, and did then and there willfully and unlawfully and feloniously allow and permit his said wife to remain in said house of prostitution; contrary," etc. The defendant was tried and convicted on this charge, and was sentenced to a term of six years in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

The first point presented on the appeal from the judgment is that the information does not charge a public offense. The defect asserted is that it fails to aver that the acts of the defendant were done with the intent, on his part, that his wife should devote herself to prostitution while she was in the house in which he had placed her and permitted her to remain. It is argued that a woman may be in a bawdy house as a cook, seamstress, or housemaid without herself engaging in the practice of prostitution, and that the statute, according to what is claimed to be its true effect and purpose, does not forbid a husband to place or leave his wife in such a house, or to allow her or permit her to remain therein, unless she there becomes a prostitute, nor unless he intends that she shall do so. The information follows the words of the statute, which is as follows: "Any man who by force, fraud, intimidation, threats, persuasions, promises, or any other means, places or leaves, or procures any other person or persons to place or leave his wife in a house of prostitution, or connives at, consents to, or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state prison for not less than three years nor more than ten years." St. 1891, p. 285, c. 206.

There is nothing in the language of this statute which expresses the idea that the wife must be placed or allowed to remain in the house for the purpose of having her engage in prostitution therein. If such element constitutes a necessary part of the offense, it must be read into the statute by some process of constructive interpretation. We do not think it was so intended. The fact that no words expressing that idea are inserted in the statute, when a very few words would have sufficed for that purpose, is a strong indication of the legislative intent that the offense should be complete without it. It is, indeed, conclusive on that point, unless there is something in the nature of the acts described as constituting the offense, or in the circumstances attending them, which requires the court, in construing the language, to disregard the ordinary meaning of the words and add a thought not expressed thereby—something which makes its literal meaning so absurd or unreasonable as to compel the conclusion that the Legislature could not have so intended it. Nothing producing this effect appears. There is, it is true, no moral turpitude in the occupation of cook, seamstress, or housemaid. All are honorable vocations which every female has a legal right to pursue, and they are entirely consistent with virtue, chastity, and refinement. But it by no means follows that it would be absurd or unreasonable, or an undue restriction to the right of labor, to forbid a husband from placing or leaving his wife in such a place, or from allowing her to remain there for the purpose of engaging in such innocent occupation. It would not be unreasonable or absurd, or an undue restriction of personal liberty, to forbid all persons from remaining in a bawdy house, nor to forbid any person from allowing, or permitting another to remain there, in the sense in which the words "allow" and "permit" are used in this statute.

A bawdy house is a place of the utmost moral pollution and social degradation. It is a well-known fact that such places, though perhaps to some extent inevitable, are among the most serious and threatening of the dangers to the physical and moral well-being of the human race. A sound public policy requires that their existence and continuance should be discouraged, discountenanced, and prevented by all possible legal means. This is the avowed policy of the law. By the Penal Code it is made a misdemeanor to keep such a place, or to reside therein (section 315); or to let an apartment or tenement knowing that it is to be used for such purpose (section 316); or to admit a minor of either sex thereto for any purpose whatever, or for any parent or guardian of such minor to sanction, or connive at, the admission of a minor to any such house or to any room thereof (section 309); or, by invitation or device, to prevail upon any person to visit such a house, regardless of the purpose of such visit (section 318); or for any person having messengers for hire to send any minor engaged in such work to serve any inmate of such house, or to enter the same (section 1389); or, except in the case of a California Indian, to live in or about such house for any purpose (section 647). The provision that a husband shall not allow or permit his wife to remain in a house of that character, even to engage in an innocent or otherwise useful occupation therein, is in complete harmony with these restrictions, and is entirely consistent with the public policy which they are intended to enforce. There are good reasons for the view that the Legislature intended the statute to be effective according to its literal import. Vice is contagious, and environment is usually potent in forming or influencing character. It is almost impossible that a chaste woman should long remain in such vile surroundings without herself becoming vile. No woman, decent at heart, would submit to it for a moment, except from the direst necessity. It may have been the purpose to protect married women from exposure to such influences by forbidding the assent of a sordid or vicious husband to her presence there for any purpose. Again, it is inconceivable that a husband would, with a willing mind, assent that his wife should become an inmate of a house of ill fame for any purpose, unless he intended, or expected, that she should be a prostitute therein. Any claim that she was there for any decent purpose would, in the vast majority of cases, be the merest pretense to cover the real purpose. The exceptions would be so few and so unworthy as to require no consideration or protection from the law. Nevertheless, owing to the depraved character of those who would usually be the only persons cognizant of the facts, and the inherent difficulties of obtaining other than inferential evidence of the facts of intent and of actual prostitution, it would be difficult to prove them to the satisfaction of a jury beyond reasonable doubt if they were made necessary to constitute the crime. And yet both facts would almost invariably exist in every such case, where the relations between the spouses were harmonious. Proof of the facts that a wife inhabits a house of ill fame, and that the husband consents, or willingly suffers it, would create a strong inference, almost amounting to a presumption, that she is unchaste, and that he intends that she shall be. To require averment of these facts, which practically always accompany those mentioned in the statute, would not only tend to some extent to encourage such places by permitting married women to work therein, but, by making convictions much more difficult in every case, it would also often serve to defeat the purpose of the statute, so far as it was really intended to prevent a vile husband from profiting by the prostitution of his wife. The Legislature may have believed that such purpose could best be accomplished by the absolute inhibition of a life by the wife in such a place with the assent of the husband, even for an innocent purpose, or, at least, by providing that his intentions as to her conduct while remaining therein should be immaterial in averring or proving the offense.

It may be suggested that the making of such acts a felony, with the severe punishment of 10 years' imprisonment in the state prison, which the law authorizes, puts it out of harmony with the other statutes above referred to, which make acts of similar character misdemeanors only, with a comparatively slight punishment. This inconsistency, conceding it to be such, is purely a matter of legislative judgment and discretion; and it does not render the literal effect of the statute under consideration so unreasonable or absurd as to require a different interpretation. The degree of the offense and the severity of the punishment to be imposed are subjects for the legislative determination, and usually have but little bearing on the question of the interpretation of the law, but are to be considered chiefly upon the question whether or not the punishment is so severe that it violates the prohibition of the Constitution against the infliction of cruel and unusual punishment. In view of the evils which the statute aims to suppress, and the large discretion of the legislative department of the state in such matters of policy, it cannot be said that this statute is in conflict with this provision of the Constitution.

We are of the opinion that the information sufficiently charges a public offense, under the statute above quoted, and that it is not necessary in a prosecution for such offense to allege or prove either that the wife followed the practice of prostitution after becoming an inmate of the house, or that the husband intended that she should. It is freely admitted that there may be cases where a wife may visit such a house with the consent of her husband and in which he would not be guilty of any offense under this statute; as, for instance, if she goes for charitable purposes, or to induce the inmates thereof to reform. No difficulty would be found in disposing of such cases, even if we may imagine that some prosecutor will be inveigled into charging such a person with crime, or foolish enough to do so with full knowledge of the circumstances. It would be a case for the application of the old rule whereby a surgeon who attended to the duty of bleeding a sick person in the streets was held to be not guilty of a violation of the law which in express terms made it a crime to let blood in the street.

The following instruction was asked by the defendant and refused by the court: "You are further instructed that if you find from the evidence, beyond all reasonable doubt and to a moral certainty, that the defendant in this case was a married man, that his wife resided in a house of prostitution, and that this said defendant knew that she was residing therein, it is still your duty to permit no presumption of law from these facts to be raised against this defendant, and, if no other facts are established in this case except the foregoing, it is your duty under the law to acquit this defendant." We are of the opinion that the defendant was entitled to have this instruction given. There was much evidence in his behalf to the effect that he was anxious to have her leave the house, and that he tried in various ways to induce her to abandon the life she was leading. A good deal of it was not of a character to inspire belief. But this was a matter within the exclusive province of the jurors, and it may be that, if they had been instructed as requested, they would have considered that there was a reasonable doubt that the defendant had anything to do with the presence of his wife in the house, or of his willingness that she should remain therein, or that they would have been in such reasonable doubt in regard to whether any facts were established, except that she was his wife and that she resided in a bawdy house with his knowledge. If such was their view of the evidence, they should have returned a verdict of acquittal. The statute is in the disjunctive, and it declares that, if the husband shall "allow" his wife to remain in a house of prostitution, he is guilty of a felony. The word "allow" here means more than mere "abstinence from prevention," as the court below defined it in an instruction given to the jury. It has almost the identical meaning of the word "permit," also used in the statute. It implies some sort of assent on the part of the husband. There must be some active wish, or, at least, willingness, in his mind, after he has knowledge of her presence in the house, that she should continue there—something more than mere indifference to her whereabouts, or passive sufferance in a case where the circumstances do not call upon him to interfere with her conduct. Where he does not, directly or indirectly, place or leave her in the house, or connive at, consent to, or permit of her going there (using the word "permit" in the same sense which we attribute to the word "allow"), he must, to some extent, be an accomplice in her remaining there after he has knowledge of the fact. The defendant was entitled to an affirmative statement from the court such as that contained in the instruction refused. There is nothing in the instructions given which could serve as a substitute for this instruction. On the contrary, the definition of the word "allow" given by the court implies that the defendant could be guilty, although he did not wish his wife to remain in a house of prostitution, had nothing to do with her going there, and was a party to her being there only by reason of the fact that he took no active steps to remove her therefrom. The instruction, as asked, is rendered somewhat confusing, and certainly less clear, by the interpolation of the phrase, "it is still your duty to permit no presumption of law from these facts to be raised against this defendant." Although this statement is technically true, it might well have been eliminated from the instruction. It does not, however, in connection with the other parts of the instruction, render it erroneous as a whole.

Complaint is made that the court unfairly restricted the cross-examination of the witnesses for the prosecution by refusing to allow general questions as to whether or not they had previously talked with certain persons about their testimony. This is a subject upon which the trial court has much discretion, and usually its exercise of the discretion will not be interfered with on appeal. In the present case it did not appear that counsel had in view the disclosure of any specific statement of the witness inconsistent with his testimony, or of any declaration or conduct affecting his motive, or showing interest or bias. It appeared that the questions were asked without definite aim, and in the mere hope that by repeated questions something of value to the defendant might be elicited. The court properly refused to allow such a course. A trial is not had for the purpose of allowing the defendant an opportunity to discover evidence in his behalf, but to enable him to produce such evidence as he may desire. If counsel, in good faith, had the expectation that the questions would elicit impeaching testimony, they must or should have known something of its character, and they should have stated to the court specifically what they expected in that regard. The court may, in its discretion, allow such questions without a previous declaration, where it appears that the declaration may serve to warn an unfair witness in time to allow him to prepare his answer, but it may also refuse to do so, in its discretion. There must be a very clear and flagrant abuse of this discretion, and a positive and apparent injury therefrom, to justify this court in reversing a case on account of it.

Many other exceptions are noted in the record and discussed to some extent in the briefs, but they are of slight importance, and we deem it unnecessary to consider them.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; SLOSS, J.

(150 Cal. 185)

LEVISON v. BOAS. (S. F. 3,947.)

(Supreme Court of California. Jan. 7, 1907.)

1. PAWNBROKERS—WHO ARE PAWNBROKERS.

Under Pen. Code, § 338, declaring that every person who carries on the business of pawnbroker, by receiving goods in pledge for loans at a greater rate of interest than 10 per cent. per annum, except by authority of a license, is guilty of a misdemeanor, one is a pawnbroker who carries on the business of receiving goods in pledge for loans, exacting interest for the loans.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Pawnbrokers, § 2.]

2. SAME.

One is no less a pawnbroker because making loans on pledges of no other kinds of goods than jewelry and diamonds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Pawnbrokers, § 2.]

3. SAME.

One carries on the business of pawnbrokers so as to be subject to regulations of such business, though at the same time and place he conducts other branches of business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Pawnbrokers, § 2.]

4. SAME.

One is no less a pawnbroker because he requires pawnors to execute notes or chattel mortgages in connection with the transaction, whether or not he relies exclusively on the goods received, as, under Civ. Code, §§ 2924, 2987, 2988, every contract by which possession of personal property is transferred as security, only, is a pledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Pawnbrokers, § 2.]

5. SAME—FAILURE TO COMPLY WITH REGULATIONS—EFFECT ON CONTRACT.

Contracts of pledge made with a pawnbroker are void where he does this business without a license, for which, under Pen. Code, § 338, he is guilty of a misdemeanor, and fails to make prescribed entries of his transactions in a register, for which, under section 339, he is also guilty of a misdemeanor.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Louis O. Levison, receiver, against J. Boas. Judgment for defendant. Plaintiff appeals. Reversed with instructions.

M. B. Kellogg, Francis J. Heney, and C. A. S. Frost, for appellant. Lucius L. Solomons, for respondent.

HENSHAW, J. Plaintiff is the receiver of the insolvent copartnership of Schumacher & Co. While the firm of Schumacher & Co. was transacting its business as diamond and jewelry merchants one of the members of the firm, on behalf of the firm, at various times borrowed money from the defendant, pledging with him, as security for the loans, diamonds and other jewels and articles of jewelry. After his appointment the receiver made demand upon defendant for a restoration and return of the pledges upon the ground that defendant was, and was acting as, a pawnbroker, and that, because of his violations of the laws of the state and of the municipality of San Francisco in the conduct of his business as pawnbroker, the contracts were void. He therefore insisted that the pledges should be returned, and that defendant should be relegated to the position of a general creditor. Upon the refusal of defendant to accede to this demand, the receiver, with permission, of course, brought suit. The suit was submitted for decision upon an agreed statement of facts, judgment passed for defendant, and the receiver appeals.

There being no controversy over the facts, the questions to be resolved are two: First, under the facts, was defendant a pawnbroker? Second, if a pawnbroker, did his unquestioned failure to comply with the statutes of the state and the ordinances of San Francisco concerning pawnbrokers render void his contracts with Schumacher & Co.?

The word "pawnbroker" has been variously defined as "any person whose business or occupation it is to take or receive, by way of pledge, pawn or exchange, any goods, wares or merchandise, or any kind of personal property whatever, as security for the payment of money loaned thereon." Anderson's Law Dictionary, page 759. "One who makes a business of loaning money for interest, and receives personal property in security for the payment of the same." English Law Dictionary, page 607. Or, again: "A pawn is a pledge to a pawnbroker, or person who keeps a shop for the purchase or sale of goods, and takes goods by way of security for money advanced thereon." 2 Rapalge & Lawrence Dictionary, page 940. Our Penal Code, section 338, declares that: "Every person who carries on the business of pawnbroker, by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent. per annum, except by authority of a license, is guilty of a misdemeanor." Under our law, therefore, one is a pawnbroker who carries on the business of receiving goods in pledge for loans, exacting an interest for those loans. If the rate of interest which he exacts exceeds 10 per cent. per annum, he is guilty of a misdemeanor if he conducts his business without first procuring a license so to do. Analyzing these definitions for the better understanding of the facts of this case which are to follow, it becomes apparent that, to constitute a person a pawnbroker, two requisites must be established. First, the person must receive goods in pledge for loans at a rate of interest; and second, this must be his business, or a well-defined part of his business. A single transaction, or an occasional loan, would not establish that a person "carried on the business of pawnbroker." The stipulated facts as to defendant, Boas, may be summarized as follows: For more than 30 years last past he has maintained an office in the city and county of San Francisco for the transaction of business as a money lender, and during all of said time was generally known to the public to be engaged in the business of lending money at his said office, upon mortgages on real estate, upon mortgages upon personal property, and upon assignments of life insurance policies, and upon assignments of public warrants, and upon unsecured notes from merchants reputed to be solvent, "and as a part of his regular business was likewise generally known to the public to be there receiving jewelry and diamonds in pledge for loans, but not to be receiving any other class of goods, wares or merchandise in pledge for loans." He paid a municipal license as a money broker, and the sign above his place of business was either that of "Broker" or that of "Money Broker," the sign being changed at various times. The respondent, neither at the time of the making of the loans, nor at any time, had a license to carry on or conduct the business of pawnbroker. The interest charged upon the loans exceeded 10 per cent. per annum. In making the loans the defendant relied solely upon the diamonds and jewelry so pledged with him as security for his debt, giving no weight or consideration whatever to the responsibility or nonresponsibility of the copartnership firm of Schumacher & Co., or of either of its partners. Nor did he at the time of making the loans deliver to the partnership, or to any person on its behalf, a written copy of any entry made by him, or by any person in his behalf, in a register kept by him for that purpose, in the English, or in any other, language, showing the date, duration, amount, or rate of interest of such loan, or showing an accurate description of the property so pledged, or showing the name or residence of the pledgor, as required by sections 338 and 339 of the Penal Code, and by certain municipal ordinances of the city and county of San Francisco. During all of this time the ordinances of the city and county of San Francisco required every keeper of a pawnbroker's shop or office to pay a license of $31 per quarter, and required that every person engaged in the business of pawnbroker should keep a book in which should be entered at the time, in the English language, a true and accurate description of every article purchased by them, the name and residence of the vendor, the amount paid, the date and hour of purchase, and that such book should be exhibited upon request of any police officer of the permanent police force of the city. A violation of the terms of these ordinances was declared a misdemeanor, punishable by fine or imprisonment, or both. The city and county of San Francisco is given power to license and regulate pawnbrokers and to enact regulations to protect the public in dealing with them, to fix the amount of the license and to impose fines, penalties and forfeitures for the violation of such ordinances. Pol. Code, § 4408, subds. 7, 8, 14, 15; Municipal Corporation Act, § 64, subd. 16; Gen. Laws 1903, p. 666; Charter of the City and County of San Francisco, art. 2, c. 2, § 1, subds. 1, 16; article 8, c. 4, § 7; St. 1899, pp. 248, 249, 329, c. 2.

Under this state of the law and of the facts, was defendant a pawnbroker? Unhesitatingly it is answered that he was. He loaned money upon personal property pledged or pawned with him. He loaned this money upon the security of the pledge and pawn. He charged and collected upon these loans a high rate of interest, exceeding 10 per cent. per annum. He did all of these things continuously, and as a part of his regular business, at a fixed place of business, and the doing of these things—the carrying on of this business—was publicly known. That he limited his operations to certain classes of goods, namely, jewels and jewelry, does not militate against this conclusion. No one would hesitate to say that one who, as a regular business, received in pledge or pawn second-hand clothing, loaning money upon it at usurious rates of interest, was a pawnbroker. Yet the kinds of jewels, and, still more, the kinds of manufactured products known as jewelry, are vastly greater than the kinds of second-hand garments. So that the mere limiting of a dealer's sphere of operations to one or another of a particular class of goods is not at all the test of the character of his business.

Nor was his business any less that of a pawnbroker because at the same time and at the same place he conducted another business, or branches of his business, which were not of this character. A question identical in principle arose in City of Los Angeles v. Loan, etc., Co., 109 Cal. 396, 42 Pac. 149, where the defendant incorporated to do a trust and safe deposit business and general banking business, had a savings department in which term savings deposits were received, and insisted that it was not taxable as a savings and loan corporation upon its term deposits. The trial court held that the deposits in question should not be assessed or treated as the property of the bank, but should be taxed with the safe deposits as ordinary commercial deposits. But this court held that the fact that the loan company was engaged in a general banking business, and a safe deposit business, in addition to that of receiving savings deposits, did not exempt it from taxation as a savings bank upon its savings deposits. After setting forth that the corporation was conducting different kinds of business, it declared: "Our conclusion is * * * that, as to the part of its business in controversy, it was de facto a savings corporation, and that the taxes in question were properly levied and assessed." When making such contracts of pledge or pawn becomes, in whole or in substance, part of the business of a man, his trade, his occupation, his means of obtaining a livelihood, or of making or adding to his fortune, he becomes a pawnbroker within the meaning of the law.

Nor was respondent the less a pawnbroker because he required the pledgor or pawnor to execute a promissory note or chattel mortgage in connection with the transaction. First, because it is admitted that reliance was placed upon the pledge; and second, because the transactions, no matter what force the respondent may have thought attached to his notes and chattel mortgages, were, under our law, pledges, and nothing else. "Every contract by which the possession of personal property is transferred as security only, is to be deemed a pledge." Civil Code, §§ 2987, 2988. "Every transfer of an interest in property * * * made only as security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is to be deemed a pledge." Civil Code, § 2924. The very fact that the respondent took possession of the property as a pledge, and relied upon his possession as a pledge, negatives the conception of a chattel mortgage. This precise question arose in Minnesota, and the same contention was made. It was disposed of by the Supreme Court of that state as follows: "We are also of the opinion that the evidence justified the trial court in finding that the defendant was conducting the business of pawnbroker. The evidence does not consist wholly, as counsel claims, of the two loans. There was evidence of admission of defendant, or her admitted general agent, that those loans were but samples of the kind of business which she was conducting, and that she was in the habit of lending money on watches, stocks, time checks, or any other kind of security, but that she thought she was not required to obtain a license because she issued no tickets, but took notes and chattel mortgages from the borrowers. In the instance referred to it was admitted that the articles taken as security were deposited with her, and the transactions were none the less a loan of money on pawn or pledge, because she took a chattel mortgage on the article deposited." City of St. Paul v. Lytle, 69 Minn. 1, 71 N. W. 703.

It being thus established that defendant was a pawnbroker, and it being admitted that, in the conduct of his business, he neither procured the license required by law, nor observed the regulations prescribed by the statutes of the state and by municipal ordinance for the conduct of the business of pawnbroker, there is presented the second question: What legal consequences followed this dereliction in the matter of these contracts of pledge? And first, as having to do with the question, it is to be noted that the business of a pawnbroker is one which has always been regarded as subject to police regulation for the benefit of the public, and to prevent frauds upon it. Thus, touching a pawnbroker act, the Court of Common Pleas of England said: "It is quite evident that the statute was passed not only for the purpose of protecting the numerous parties who borrow money on small pledges, but also the public, against frauds committed on third persons, the real owners of goods, by pledging their property without their consent." Ferguson v. Norman, 5 Bing. New Cases, 76. "The business (pawnbroker), therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations." Grand Rapids v. Braudy (Mich.) 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472. And again, says the Supreme Court of Missouri: "The city may not only regulate, but suppress, pawnbrokers, or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license from its authorities for that purpose, which may be granted or withheld at pleasure. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation." St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577. See, also, Ex parte Lichtenstein, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713.

In the consideration which is to follow, therefore, it is to be borne in mind that we are not dealing with a harmless and legitimate business requiring no regulation, and which, if licensed at all, could be licensed only for purposes of revenue. We are dealing with a business which is, and always has been, subject to police regulation, and which is unlawful if not conducted under the provisions, restrictions, and requirements of the law. The present case presents, then, the question of a statute drafted in the plain exercise of the police power, requiring the doing of certain things, and imposing a penalty for their nonperformance. Is a contract made without observance of the terms of such statute valid or void? It is, of course, undisputed that a contract in violation of a statute is void, and no difficulty can arise in such a case. More trouble has been experienced by the courts where the case has been one in which there has been no express prohibition of the act, but where a penalty for the performance or nonperformance has been imposed. A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it by fixing a penalty for the performance or omission thereof. As to the effect of such implied prohibitions there was much divergence of opinion upon the part of the English judges, and this difference of view found its way into conflicting and irreconcilable decisions of the courts of our different states. Thus, in Brown v. Duncan, 10 B. & C. 93, the action was on a guaranty for sales of liquor, which had been distilled without a license, under a statute requiring a license and affixing a penalty. It was held that these were mere revenue regulations, and that a breach did not render the trade so illegal as to prevent a recovery for sales. This case was distinguished from the case of Law v. Hodgson, 2 Campbell, 147, which was an action for the value of bricks of dimensions smaller than that required by statute, which statute affixed a penalty for violation. The statute declared merely that bricks shall be made of such dimensions. Lord Ellenborough said: "The first section of this statute absolutely forbids such bricks to be made for sale. Therefore, the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law, and he shall not be permitted to maintain an action for their value." The distinction declared in Brown v. Duncan was that the statute in Law v. Hodgson was designed to protect the public, while that in the case before them was a mere revenue regulation. The influence of these and other like decisions, appealing, as they have, with differing force to the judges of our state courts, has led to much confusion of decision; a confusion, however, which the learned decision of the Supreme Court of the United States in Harris v. Runnells, 53 U. S. 79, 13 L. Ed. 901, should do much to eliminate. But it is to be noticed that every case from every court recognizes that, when a statute has been made for the protection of the public, a contract in violation of its provisions is void. Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Griffith v. Wells, 3 Denio (N. Y.) 226; Cope v. Rowlands, 2 Mees. & W. Rep. 149; U. S. Bank v. Owen, 27 U. S. 526, 7 L. Ed. 508; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 693, 38 L. Ed. 578; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Jackson v. Shawl, 29 Cal. 267; Johnson v. Simonton, 43 Cal. 242.

As has been pointed out, sections 338 and 339 of our Penal Code make every person carrying on the business of a pawnbroker, except by the authority of a license, guilty of a misdemeanor; also every person carrying on such business, if he fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, an accurate description of the property pledged, and the name and residence of the pledgor, and to deliver to the pledgor a written copy of such entry, and to keep an account in writing of all sales made by him. It has also been shown that these provisions are, one and all, enacted under the police power for the regulation of the business and the protection of the needy and improvident, and of the general public against oppression and fraud. It has further been shown that, where a statute, designed for the protection of the public, prescribes a penalty, that penalty is the equivalent of an express prohibition, and that a contract in violation of its provisions is void. "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." Coppell v. Hall, 74 U. S. 542, 19 L. Ed. 244; Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31. Where the contract is void, the right of the pledgee to hold the property, which right depends upon a valid contract, is, of course, lost. Hilgert v. Levin, 72 Mo. App. 48. It follows in this case, therefore, that these contracts are void, that the lien is lost, and that the judgment should be for plaintiff, unless, as respondent contends, the contracts in this case are severable, as in Jackson v. Shawl, 29 Cal. 267. Jackson v. Shawl held that where a pawnbroker had loaned money upon property pledged, and the borrower had contracted to pay him more than 4 per cent. interest per month, the borrower could recover possession of the property by tendering the principal and 4 per cent. per month interest, 4 per cent. being the maximum charge permitted to pawnbrokers. The act did not provide that the contract was void, but only that the lender rendered himself liable to a forfeiture of the excess, in a separate suit to be brought for that purpose. It is to be noticed that the illegality of the contract in Jackson v. Shawl went only to the excess of interest charged, and this court applied the general and liberal principle fully recognized by the law, that, when any matter, void even by statute, be mixed up with good matter which is entirely independent of it, the good part shall stand and the rest be held void. But, in the case at bar, the illegality and the prohibition goes to the whole substance of the contract. It is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception. It is, in this respect, identical with the pawnbroker case of Ferguson v. Norman, 5 Bing. New Cases, 76. In that case a tailor had become bankrupt, but, prior to his bankruptcy, pawned certain goods with the defendant pawnbroker. The English law required the insertion in the books of the pawnbroker of the name of the pledgor and of his residence, with street, place, or square, and whether or not the pledgor was housekeeper or lodger, and required the pawnbroker to make these entries before advancing money. The pawnbroker inserted as pledgor the name of Reeves instead of Bullock, the tailor, gave his residence as Pimlico instead of Haymarket, failed to enter any street, place, or square as his place of residence, and, though Bullock was a housekeeper, entered him in many cases as a lodger. The court said: "A distinction may easily be drawn as to those duties imposed on the pawnbroker which are entirely collateral to the individual contract, and it would be too much to say, because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void. However, when we look at the present section, the case is extremely simple. * * * This, therefore, being the object and intention of the Legislature, and the requisites being such as are to be performed at the time of, and previously to, entering into the contract, I think the contract must be held to be void, notwithstanding there are specific penalties for the omission of such requisites. * * * And it comes around to this, that, if the contract be void, the lien is void also, and I see no ground on which the right of the pawnbroker to resist this action can be set up."

For the foregoing reasons, the judgment is reversed, with instructions to the court to enter judgment for plaintiff as prayed for.

We concur: McFARLAND, J.; LORIGAN, J.

150 Cal. 195

PEOPLE v. McCUE et al. (S. F. 3,888.)

(Supreme Court of California. Jan. 8, 1907. Rehearing Denied Feb. 4, 1907.)

1. HIGHWAYS—OBSTRUCTION — PUBLIC NUISANCE.

By the express provisions of Civ. Code, §§ 3479, 3480, and Pen. Code, § 370, anything unlawfully obstructing the free passage or use in the customary manner of a public highway is a public nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417–422.]

2. SAME—PROCEEDINGS TO ABATE NUISANCE.

Act March 15, 1899, St. 1899, p. 103, c. 88, authorizes the district attorney of any county in which a public nuisance may exist to begin a civil action in the name of the state to abate the same. *Held*, that the fact that other remedies may exist for the abatement of a public nuisance consisting of the obstruction of a public highway does not affect the power in such regard conferred on district attorney by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 430–431.]

3. TRIAL — TRIAL BY COURT — FINDINGS OF FACT—INCONSISTENT FINDINGS.

It is only where the probative facts found are necessarily in conflict with the ultimate facts found that the former can prevail over the ultimate facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 946, 947.]

4. SAME—FACTS AND CONCLUSIONS.

In an action by the people to abate an obstruction in a highway, the complainant alleged certain probative facts but alleged that the street was a public highway, and the court, in addition to finding the probative facts alleged, found, under the "findings of facts," that the street was a public highway. *Held* that, though the former facts found did not show that the street was a public highway, such fact was of no avail to defendant on appeal, as the latter finding of the court was a finding of an ultimate fact and could not be treated as a conclusion of law or as a mere general conclusion of fact from the specific facts previously found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 946, 947.]

5. Appeal and Error—Presumptions—Evidence.

A failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, is no ground for reversal unless it be shown by statement of facts or bill of exceptions that evidence was submitted in relation to such issue.

Department 1. Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by the people against J. S. McCue and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

H. V. Morehouse, J. E. Alexander, and M. C. Dufficy, for appellants. Thomas P. Boyd, Dist. Atty., for the State.

ANGELLOTTI, J. This action was brought by the district attorney of Marin county in the name of the people of the state, to abate, as public nuisances, obstructions maintained by defendants in certain alleged public highways of said county. As to certain of said alleged public highways, judgment was given in favor of plaintiff, declaring the same to be public highways, and the obstructions thereon maintained by defendants to be public nuisances, directing the removal of said obstructions by defendants, and enjoining defendants from maintaining on said highways any obstruction which would interfere with the right of the public to use the same as public highways. Defendants have appealed from this judgment on the judgment roll alone.

By express provision of statute, anything which unlawfully obstructs the free passage or use, in the customary manner, of a public highway is a public nuisance. Civ. Code, §§ 3479, 3480; Pen. Code, § 370. See, also, Siskiyou Lumber, etc., Co. v. Rostel, 121 Cal. 511, 513, 53 Pac. 1118; Marini v. Graham, 67 Cal. 130, 7 Pac. 442; Lewiston Turnpike Co. v. S. & W., etc., Co., 41 Cal. 562, 564. Under the express provisions of the act of March 15, 1899, authorizing the district attorney of any county in which a public nuisance may exist to bring a civil action in the name of the people of the state to abate the same (St. 1899, p. 103, c. 88), the district attorney was empowered to commence and maintain this action without any previous order of the board of supervisors directing him to so do. The act requires him to bring such an action when directed by the supervisors, and authorizes him to do so on his own motion and without any order to that effect whenever he deems such action proper. The fact that other remedies may exist for the abatement of such public nuisances as obstructions of public highways cannot affect the power in this regard conferred upon the district attorney by the act of March 15, 1899.

The main argument for reversal of the judgment is based upon the contention that the probative facts alleged in the complaint and found by the trial court do not show that the alleged public highways are, in fact, public highways, and in support of this contention learned counsel urge that such probative facts tending to show a dedication of such highways by defendant to the public and acceptance of the same, are not sufficient to establish a dedication and acceptance. If we assume this to be true, we do not see how it can avail defendants on this appeal. Independently of the probative facts alleged, it was in terms unconditionally alleged in the complaint "that each and all of such streets are public highways." The trial court, in addition to finding certain probative facts, found as a fact, in express terms and unconditionally, "that each and all of said streets are public highways." This was undoubtedly a finding of the ultimate fact. Bequette v. Patterson, 104 Cal. 282, 285, 37 Pac. 917. Defendants claim that this finding must be treated as a conclusion of law based upon the probative facts found, or as a mere general conclusion of fact from the specific facts previously found, but the record does not warrant us in so considering it. It is contained in the "findings of fact," as distinguished from the "conclusions of law," and therefore does not fall within the rule declared in such cases as Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161; Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 538, 39 Pac. 922, and Niles v. City of Los Angeles, 125 Cal. 572, 578, 58 Pac. 190, where it was sought to treat a purported conclusion of law as a misplaced finding of fact. In those cases, it was plain, on the face of the record, that the alleged finding was merely what it purported to be, viz., a conclusion drawn by the court from the facts previously found. Nor is there anything on the face of the finding under discussion to indicate that it was simply a conclusion from the probative facts previously found, and herein this case differs from such cases as People v. Reed, 81 Cal. 70, 76, 22 Pac. 474, 15 Am. St. Rep. 22, and Geer v. Sibley, 83 Cal. 1, 23 Pac. 220. In People v. Reed, supra, the finding was "that, by the acts, facts, and matters above found and recited, said premises above referred to" were dedicated, etc., and it was held that this must be considered as a mere conclusion, the court saying: "This finding is based upon the other facts found. It recites in terms that 'by the acts, facts, and matters above found, said premises were by said parties dedicated.' It may be that, if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed." The situation was practically the same in Geer v. Sibley, supra.

In the case at bar, as we have seen, the finding did not purport to be drawn as a conclusion from anything previously found, and was in no way argumentative in form, and it is only by indulging in surmise or conjecture that we could hold it to have been so drawn. This we are not permitted to do for the purpose of disturbing the judgment of the trial court. It is elementary that, if findings of fact are reasonably susceptible of such a construction as will support a judgment, they must receive that construction rather than one that will not so support it. Nor is there anything in the findings of probative facts that is at all necessarily inconsistent with the finding under discussion. All of those probative facts may be true and the finding under discussion also be true. It is well settled in this state that a clear, specific finding of the ultimate fact must prevail over findings of probative facts, where there is no necessary conflict between the probative facts found and the finding of the ultimate fact. Thus, in Smith v. Acker, 52 Cal. 217, it was claimed, upon an appeal on the judgment roll alone, that, in view of probative facts found, the finding as to ownership of land could not be sustained. After stating that the transcript did not show clearly that the numerous probative facts found were all the probative facts shown by the evidence, the court said: "It has been held that, where facts are found from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as a finding of the ultimate fact. But, when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the principal finding." The same ruling was made in Frazier v. Crowell, 52 Cal. 399, 402, where there was no necessary conflict between the finding of ultimate fact and the findings of probative facts. The same rule was declared in Gill v. Driver, 90 Cal. 72, 27 Pac. 64, where it was assumed that the probative facts found were insufficient to support the judgment, the court saying: "Ultimate facts were found which do support the judgment; and they are not questioned, nor could they be, without bringing up the evidence in a statement or bill of exceptions." The same rule has been adhered to in several later cases. See Perry v. Quackenbush, 105 Cal. 299, 305, 38 Pac. 740; Rankin v. Newman, 107 Cal. 602, 608, 40 Pac. 1024; Com. Bank v. Redfield, 122 Cal. 405, 408, 55 Pac. 160; Brown v. Mutual Reserve, etc., Ass'n, 137 Cal. 278, 70 Pac. 187. It is only where the probative facts found are necessarily in conflict with the ultimate fact found that the findings of probative facts can prevail over a clear and express finding of ultimate fact. See Howeth v. Sullenger, 113 Cal. 547, 551, 45 Pac. 841. It is, therefore, clear that the finding under discussion must be treated as a finding of the ultimate fact of public highway, and must be held to be sufficient on that point regardless of the question as to the sufficiency of the probative facts found. It follows that the findings sufficiently support the judgment. In the absence of a bill of exceptions or statement showing the evidence, the question as to the sufficiency of the evidence to sustain the finding cannot, of course, be considered.

Complaint is made that the trial court failed to find upon certain affirmative allegations made in the answer, such as that the alleged streets were never accepted or used by the public, that the board of supervisors had refused to accept the same, and that the board of supervisors had abandoned the same as public highways. If it be conceded that any of these matters are not sufficiently embraced in the finding of public highway already discussed, it does not appear that any evidence was introduced in support of such allegations. It is well settled that a failure to find upon some issue made by the answer, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue. See Roberts v. Hall, 147 Cal. 434, 439, 82 Pac. 66; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. 840; Bliss v. Sneath, 119 Cal. 526, 529, 51 Pac. 848; Rogers v. Duff, 97 Cal. 63, 69, 31 Pac. 836.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(150 Cal. 209)

CUMMINGS v. STROBRIDGE LAND SYNDICATE et al. (S. F. 4046.)

(Supreme Court of California. Jan. 8, 1907.)

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—RECORD.

A guardian appropriated a sum of money belonging to his infant ward and made a note to the ward and executed a mortgage upon land owned by the guardian to secure the note. The mortgage was filed, but subsequently, desiring to borrow more money, he caused an acknowledgment of satisfaction of the mortgage to be entered, signing the acknowledgment as guardian, whereupon he executed a note and mortgage on the land to another person in consideration of a loan, and thereafter the guardian made various sales of parcels of the land, and there was never any settlement between the guardian and ward. *Held*, that the ward, after his majority, was not entitled to a foreclosure as against those who had purchased on the faith of the record, since, if the ward had an undisclosed lien on the property, so much of the moneys that the purchasers paid as might be necessary to clear the lien was taken by the guardian as money of the ward, and, if he thereafter misappropriated it, the purchasers would be protected against the consequences.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 583–600.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Ralph W. S. Cummings against the Strobridge Land Syndicate and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

John S. Chapman, Johnston & Jones, Stanton L. Carter, Platt & Bayne, and H. H. Walsh, for appellants. Coldwell & Borland and N. C. Coldwell, for respondent.

HENSHAW, J. This is an action to foreclose a mortgage alleged to have been given by the defendant Sayle to plaintiff on the 15th day of November, 1881, to secure the payment of a promissory note made by Sayle at the same date. The amount of the promissory note was $2,000. A trial was had, resulting in judgment for plaintiff in the sum of $16,480.50, and for a decree of the sale of the mortgaged premises. The motion for a new trial was denied, and certain of the defendants appeal from the judgment and from the order denying their motion.

The salient facts of the case are these: Sayle, who was a practicing lawyer, married the mother of the plaintiff, who was then an infant about a year old. He was appointed guardian of the person and estate of the infant, and there came into his possession as such guardian of the estate the sum of $2,000. He continued to act as guardian, and the court finds that he remained such guardian until the 16th day of May, 1901, at which time the child attained its majority; but, in fact, there was never any settlement of Sayle's account as guardian, nor was there ever anything done in reference to the guardianship and he was never discharged. Immediately upon, or shortly after, receiving this $2,000 belonging to his infant ward, Sayle, who was the leading witness for the plaintiff, declares that he "borrowed" the money. The fact appears to be that he appropriated it to his own use without any order of court—in brief, embezzled it. He testifies he made a promissory note to his ward, then about a year and a half old, in the sum of $2,000, and executed a mortgage upon land which he owned, securing this note. He filed the mortgage with the county recorder of Fresno county, where the land was situated, and paid the fees for the filing, and delivered the promissory note to his wife, who was the mother of the plaintiff. None of these transactions, it is perhaps needless to say—neither the "borrowing" of the ward's money, nor the giving of the note and mortgage—was done by the authority of, or had the sanction of, the court. About a year afterwards, desiring to borrow more money, he caused to be entered upon the margin of the record an acknowledgment of full payment and satisfaction of the mortgage and the debt thereby secured, signing it "Ralph Wardlaw Cummings, by C. G. Sayle, his duly acting and qualified guardian." This was signed and acknowledged by him on the 24th of October, 1882. Upon the same day that this release was made he gave a note and mortgage to one Baird for $2,000, and received the money therefor. He says that he did not receive the $2,000 in gold coin from Baird on that day for Ralph Cummings, and he did not receive the $2,000 on that day to satisfy the mortgage; that he received it a few days afterwards from Mr. Baird. He did not tell Mr. Baird when he borrowed the money that it was the boy's; that he was doing it as part of the business of the plaintiff. He did tell Mr. Baird, when asked if he had put anything on the property, that he had put a $2,000 mortgage on it in favor of his boy, and told him also that he could control it, and that it would not bother his mortgage, if he would let him have the money and let his mortgage go on record. Baird only agreed to let him have the money upon his acknowledgment of payment and satisfaction of the mortgage to Ralph Cummings. Baird refused to have a second mortgage, and his mortgage was taken as a first mortgage, upon condition of the payment and satisfaction of the mortgage already on the property. He had intended to replace the canceled mortgage of his ward by placing a second mortgage upon the same property in favor of the ward. He did not, however, do this. Years afterwards he made another mortgage to the ward upon another piece of property, to secure the same indebtedness. A satisfaction of the Baird mortgage was entered on March 13, 1884, and on the same day Sayle mortgaged the same land to the predecessor in interest of defendant, Mary J. Blasingame, for $3,000. Subsequent to these transactions he sold the land in parcels to different purchasers for its full value; that is to say, there was never any reduction of the purchase price because of the existence, or supposed existence, of any mortgage upon the property in favor of the plaintiff. The years passed and the ward grew to the age of majority. During this time he lived with his stepfather, and was supported by him. There has never been any settlement of guardianship accounts, and it has never been determined whether Sayle is indebted to his ward, or whether, upon the other hand, the ward's estate is liable to him. Sayle filed a verified petition in insolvency during the ward's minority and made no mention of the mortgage which in this action is claimed to be subsisting and in full force against the property. The mortgage note, indeed, is not produced. Sayle explains that this was carelessly burned up by him in the destruction of some worthless papers when he was changing his law office. The plaintiff himself is not a witness in the case to testify as to any of these matters—as, for example, whether or not there was any sum due him from his guardian—because, manifestly, if his guardian had, in fact, settled with him for this money so borrowed 20 odd years ago, equity would not permit the enforcement of the mortgage. And, more than this, not only is the plaintiff not a witness, but the suit seems to have been instigated and brought by his mother and stepfather. Thus, Mrs. Sayle, wife of Sayle, testifying as to a certain fact, says that she discovered it "in San Francisco when I started this suit." Many more circumstances could be pointed out, but these are sufficient to show that the action, while appealing to the equitable side of the court for the enforcement of a ward's rights, is one wholly without equity. The contention of plaintiff is that the guardian had no power or authority, without the order of a court, to have released the mortgage, and that the mortgage stands as a valid and subsisting lien upon the property; that, while it is true that the purchasers paid full price for the property, and that, upon the record, the mortgage to plaintiff had been released, yet these facts are not sufficient in defense, because they were put upon notice that the guardian could not release the mortgage except upon payment of the money and order of court. This was the view which the trial court adopted, and judgment passed for plaintiff accordingly.

Some interesting questions are here presented, the determination of which would unquestionably prove extremely embarrassing to plaintiff's case. Thus, plaintiff begins his proofs with a showing of this borrowed money by his guardian and the making of the so-called note and mortgage to him—the ward. But a note and mortgage, to be of any validity whatsoever, must be legal contracts, and to every contract there must be two parties. An infant of a year old is plainly incapable of contracting, and it may be seriously doubted, under the circumstances here disclosed, with the additional fact that one of the contracting parties stood in the confidential relation of guardian to the other, whether any contract could be said to exist at all. Certainly, if Sayle had been indicted for embezzlement, his declaration that he had borrowed the money from his ward, and by contract had given a note and mortgage to that infant ward, of the tender age of one year, would scarcely be held to fill the measure of a valid defense. But, aside from this and other like questions with which the case abounds, one proposition is determinative of the matter and upon it this decision may rest. Assuming or conceding that the note and mortgage as given to the ward were valid so as to incumber the land, assuming also and conceding that the release of this mortgage was without authority of the court, conceding, also, that the witness Sayle does endeavor, though shufflingly and evasively, to have it appear that he did not pay over to his ward the money which he received from the Baird mortgage, the fact remains that equity itself, under such circumstances as those here disclosed, makes such payment in pursuance of its maxim that it will regard as done that which ought to have been done. When the money for the release of this mortgage came into Sayle's hands, it was, in equity, the ward's money, and any improper use which Sayle thereafter made of it was but a second embezzlement of the ward's funds. So, too, as to the innocent purchasers (the defendants here) who paid full value for their property. If they, in honest ignorance of the situation, paid full value for property which, so far as the record went, was clear of any incumbrance to this minor ward, and if in fact the ward had some undisclosed lien upon the property, so much of the moneys that these purchasers paid as might be necessary to clear this lien was taken by the guardian as money of the ward, and, if the guardian thereafter made further misappropriation of it, the purchasers are protected against its consequences. This principle is plainly and elaborately enunciated in Hadley v. Chapin, 11 Paige's Chancery (N. Y.) 245, and, if many more cases enunciating the same principle may not be cited, it may be said that few have had the temerity to maintain actions such as the one at bar, and that no cases can be found upholding a contrary doctrine.

It becomes unnecessary to consider the many other objections advanced by appellants, both to the rulings of the court in admitting and rejecting evidence, and to the sufficiency of the evidence to sustain the judgment, because the proposition which we have enunciated is determinative of the case, for which reason the judgment and order appealed from are reversed as to all of the appealing defendants.

We concur: McFARLAND, J.; LORIGAN, J.

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150 Cal. 201

JOHNSON v. TAYLOR et al. (S. F. 4,077, 4,013.)

(Supreme Court of California. Jan. 8, 1907.)

1. TAXATION—TAX SALES—NOTICE TO REDEEM—VALIDITY OF TAX DEED.

Pol. Code, § 3785, as amended by St. 1891, p. 133, c. 121, provides that, when property sold for taxes was not redeemed within the statutory time, the collector should make a deed to the purchaser or his assignee, provided such purchaser or assignee within 30 days prior to the expiration of the period of redemption, or 30 days before applying for a deed, had served on the owner of the property or the occupant a written notice as to the time of redemption, or when the purchaser would apply for a deed. *Held* that, where property was sold for taxes in July, 1894, a conveyance to the purchaser, without any notice of the expiration of the period of redemption having been given, was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1407–1409.]

2. CONSTITUTIONAL LAW — RETROSPECTIVE LAWS—STATUTES—RETROACTIVE OPERATION —REDEMPTION FROM TAX SALE.

St. 1895, p. 327, c. 218, and Pol. Code, § 3785, as amended, required the tax collector to make a deed of delinquent property to the state, if it was not redeemed within five years; the provision for notice of intention to apply for a deed previously contained in such section being eliminated. Section 3780 was also amended so as to provide that redemption might be made within five years from the date of purchase or at any time prior to the entry of the sale of the land by the state, and declared that section 3785, as amended, should apply to all tax deeds thereafter made, whether the sale had previously taken place or not. *Held*, that such sections as amended imposed different and more onerous conditions on the right to redeem property from tax sales, and that, in so far as it was attempted to give them a retroactive effect and make them applicable to prior sales, they were void.

3. QUIETING TITLE — CROSS-COMPLAINT—OBJECTIONS—WAIVER.

Where, in an action to quiet title, plaintiff did not attack certain cross-complaints filed by the defendants, praying that title be quieted in them, either by demurrer or by motion to strike, but plaintiff answered such cross-complaints and went to trial on the merits, he waived his right to object that such cross-complaints were not a proper method of procedure in such action.

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by T. L. Johnson against John Taylor, as administrator, and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Thomas, Pemberton & Thomas, for appellant. Mannon & Mannon, for respondents.

SLOSS, J. The plaintiff brought this action to quiet title to certain land in Mendocino county. The defendants answered, denying the plaintiff's title, and filed cross-complaints setting up title in themselves and praying that their title be quieted as against the plaintiff. Judgment went for the defendants, granting them the affirmative relief sought by them. The plaintiff's motion for a new trial was denied, and he now appeals from the judgment and from the order denying his motion for a new trial.

Defendants are the heirs and successors in interest of W. H. Johnson, and it is admitted that they are the owners of the land, unless W. H. Johnson's title was divested by certain tax proceedings culminating in a deed from the state of California to the plaintiff. The land in question was assessed to W. H. Johnson for the year 1893, and was sold to the state for nonpayment of taxes on July 7, 1894. The tax collector executed a deed to the state on July 7, 1899, and a deed was executed to the plaintiff by the tax collector, acting under the authorization of the state controller, on May 3, 1902. On account of some irregularities in the original deed to the state, an amended deed to the state was executed on April 8, 1902. Pol. Code, § 3805b; St. 1901, p. 651, c. 215.

At the trial the defendants interposed various objections to the introduction in evidence of these instruments. The objections were sustained, and the appellant, upon the appeal from the order denying his motion for a new trial, seeks to review these rulings. If any of the objections made were good, the evidence of the tax proceedings was properly excluded. We are satisfied that the respondents are correct in their contention that there is at least one fatal objection to the validity of the tax deeds to the state, and it will be unnecessary therefore to consider the other objections. In 1894, when the sale of the property was made, the Political Code provided that, if property sold for nonpayment of taxes was not redeemed within the time allowed by law, the tax collector must make to the purchaser, or his assignee, a deed of the property, providing, however, that such purchaser, or his assignee, must, 30 days previous to the expiration of the time for such redemption, or 30 days before he applies for the deed, serve upon the owner of the property, or upon the person occupying it, a written notice showing, among other things, when the right of redemption will expire, or when the purchaser will apply for a deed. And it was provided that no deed should be issued by the tax collector until this notice should have been given, and an affidavit filed with the tax collector showing that it had been given. Pol. Code, § 3785, amended in 1891, by St. 1891, p. 134, c. 121. Section 3780 of the same Code provided that a redemption might be made by the owner or any party in interest within 12 months from the date of the purchase, or at any time prior to the filing of the affidavits and the application for a deed, as provided for in section 3785. St. 1891, p. 133, c. 121. As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785 (Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573), and one relying on a tax deed was bound to establish the giving of such notice as a part of his proof of title. (Miller v. Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229; Reed v. Lyon, 96 Cal. 501, 31 Pac. 619; Walsh v. Burke, 134 Cal. 594, 66 Pac. 866). Furthermore, this court has held, in San Francisco, etc., Land Co. v. Banbury, 106 Cal. 130, 39 Pac. 439, that the requirement of giving notice applied as well to the state as to a private purchaser. In the case at bar there was no proof of any such notice having been given, and it would follow, if the case is to be decided on the law as it existed when the sale was made, that the plaintiff failed to establish that any title ever passed from W. H. Johnson to the state.

The appellant contends, however, that the validity of the deed is to be determined by the provisions of law existing at the time such deed was made, rather than at the date of sale. Between 1894, when the sale took place, and 1899, when the deed was executed, the law relating to redemption from tax sales and the execution of tax deeds was materially altered. In 1895 the Legislature passed a series of amendments to the Political Code, changing the entire scheme of tax sales. Since 1895 it is provided that all property sold for delinquent taxes shall be sold to the state, and no sales to private purchasers are permitted, as they were prior to the time of these amendments. Section 3771 (St. 1895, p. 377, c. 218). By section 3785, as then amended, the tax collector is required to make a deed to the state if the property is not redeemed within the time (five years) allowed by law for its redemption. The provision for notice of intention to provide for a deed was eliminated from section 3785. Section 3780 was at the same time amended so as to provide that a redemption might be made within five years from the date of the purchase or at any time prior to the entry or sale of the land by the state. And the land became subject to such entry or sale immediately upon the filing of the tax collector's deed with the proper officer. Pol. Code, §§ 3788, 3897.

To apply section 3785, as amended, to sales made before the amendment went into effect, would undoubtedly give the amendment a retroactive effect. Whatever may be the general rule as to construing sections of the Code so as to prevent their having a retroactive effect (Pol. Code, § 3), the Legislature has, in this instance, declared plainly its intent that the amendment to section 3785 should apply to all tax deeds thereafter made, whether or not the sale had already taken place. It appears that the Legislature, in 1895, enacted two different amendments to section 3785 of the Political Code. They are substantially similar so far as the points already noted are concerned. One was approved February 25, 1895, and the other March 28, 1895. The latter, after setting forth the provisions for the making of a deed by the tax collector to the state, in the event the property is not redeemed within the time allowed by law, contains the following language: "In all cases where land has heretofore been sold to the state for delinquent taxes, the deed therefor shall be made to the state within one year after this act takes effect; provided five years shall have elapsed after the date of such sale." In view of this provision, it cannot be doubted that the Legislature intended to make and did make section 3785 apply to cases of sales made prior to the adoption of the amendment, and such amendment must therefore be given a retroactive effect, unless some constitutional right would be violated by giving it such effect.

Ordinarily "the right of redemption from a tax sale must be governed by the law in force at the time of the sale. It cannot be affected by subsequent legislation." Black on Tax Titles, § 175. In Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194, this court said: "The question here, however, is: Can the Legislature, after a tax sale, lawfully amend the law so as to provide new and more onerous conditions to the right to redeem than those which existed when the sale was made? We think this question is answered in the negative by the elementary writers and by the adjudicated cases." In support of this conclusion the court cites Cooley Const. Lim. (6th Ed.) p. 353; Black on Tax Titles, supra; Blackwell on Tax Titles (5th Ed.) § 729; Negus v. Yancey, 22 Iowa, 57; Goenen v. Schroeder, 8 Minn. 387 (Gil. 344); Robinson v. Howe, 13 Wis. 341; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Moody v. Hoskins, 64 Miss. 468, 1 South. 622; Caruthers v. McLaran, 56 Miss. 371; Wolfe v. Henderson, 28 Ark. 304. In the Teralta Case the court quotes the following from Merrill v. Dearing, 32 Minn. 479: "The right of property acquired by the purchaser at this sale and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor." Accordingly, it was held in the Teralta Case that the Legislature could not constitutionally, as to past tax sales, pass a law increasing the penalties to be paid on redemption. See, also, Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177, in which the court said: "The redemption of land so sold to the state is governed by the law in force at the date of the sale." If Tuolumne Red'n Co. v. Sedgwick, 15 Cal. 517, and Moore v. Martin, 38 Cal. 428, are inconsistent with these views, they must be regarded as overruled by later cases. See Welsh v. Cross, 146 Cal. 621, 630, 81 Pac. 229, 106 Am. St. Rep. 63.

We think the principle of Teralta Land Co. v. Shaffer is decisive of the case at bar. Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time. It lasted at least one year, and would last indefinitely thereafter, until 30 days after the purchaser should give the notice required by the statute. As was said in Railroad Company v. Mecartney, 104 Cal. 616, 38 Pac. 448: "It is provided (Pol. Code, § 3780) that a redemption may be made within 12 months from the date of the purchase, or at any time prior to the filing of certain affidavits and the application for the deed. 'Or' may be read 'and,' for it is evident that all the recited events must happen before the owner will be deprived of his right to redeem." To change a right of redemption which lasts indefinitely until the performance by a third party of some act which may or may not be performed, to a right limited by the expiration of a definite period of time, is a substantial change in the right. And while, under the amendments of 1895, the right of redemption does not end absolutely with the expiration of the five years, it does end, without any notice to the owner, as soon as the state sees fit to dispose of the land. Under the old law the owner could rest secure until he received notice of intention to apply for a deed. He then had 30 days in which to redeem. Under the new law his right of redemption could be cut off at any moment after the expiration of the statutory period, without any personal notification to him.

Again, the rights of the owner are injuriously affected in another respect, if the amendment is permitted to operate on past sales. Under the old law, not only does his right to redeem continue until after he has received the statutory notice, but no deed can issue to the purchaser until such notice has been given. By the amendment, the state receives its deed at once on the expiration of the five years. Such deed, when duly acknowledged or proved, is primary evidence of the regularity of the assessment, of the equalization, of the levy of taxes, of the nonpayment of taxes, of the sale, of nonredemption, of the execution of the deed by the proper officer, and is conclusive evidence of the regularity of all other proceedings from the assessment to the execution of the deed. Pol. Code, §§ 3786, 3787. Furthermore, such deed transfers to the state "the absolute title to the property described therein." Pol. Code, § 3787. It is not necessary here to decide whether or not the Legislature has the power to alter the rules as to burden of proof of facts recited in deeds already executed—a question on which the authorities are in conflict. See Strode v. Washer, 17 Or. 50, 16 Pac. 926; Smith v. Cleveland, 17 Wis. 556; Marx v. Hanthorn (C. C.) 30 Fed. 579; Tracy v. Reed (C. C.) 38 Fed. 69. Cf. Emeric v. Alvarado, 90 Cal. 444, 465, 27 Pac. 356. But certainly there can be no doubt that there is a material distinction between the position of a delinquent taxpayer before a deed divesting his title and having the probative force given by sections 3786 and 3787 has been executed, and his position after the execution of such deed, even though a right of redemption may remain in him for a time. And the conclusion follows that a law which authorizes the making of a deed at a fixed time, where, under the law in force at the date of sale, a deed could not be made until 30 days after the giving of notice by the purchaser, is a change which affects the substance of the owner's right, rather than one which goes merely to the remedy.

There is a marked distinction between this case and Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172, relied on by the appellant. In that case there had been a tax sale under a law which allowed a fixed period of time for redemption. After the sale the law (Pol. Code, § 3785) was amended by the insertion of the provision above discussed requiring the purchaser to give 30 days' notice of his intention to apply for a deed, and extending the time for redemption until such notice was given. The court held, following Curtis v. Whitney, 13 Wall. 68, 20 L. Ed. 513, that this amendment was effective as to all applications for deeds made after the amendment. The ground upon which this was put was that it did not, as against the purchaser, extend the time for redemption. Such purchaser could still obtain his deed at the expiration of 12 months, provided he took the steps required by the statute. It rested entirely with him whether or not he chose to take these steps. It is argued that the case at bar is the converse of the Oullahan Case; that, if it be not an invasion of the purchaser's right to require him to give 30 days' notice in order to cut off the right of redemption, it is no invasion of the owner's right to take away the provision of notice. But the cases are not analogous. As was stated by this court in Allen v. Allen, 95 Cal. 187, 30 Pac. 213, 16 L. R. A. 646, in speaking of the ruling in Oullahan v. Sweeney: "This requirement (i. e. that of notice) was a mere incident to the right of the purchaser to receive a deed. It merely prescribed the manner in which he should proceed to demand the deed to which he was entitled." There was, as to him, simply a change in the procedure which he must follow in order to get his deed. But the situation of the owner, who is deprived of the notice, is different. Under the law as it stood at the date of sale he had 30 days after the service of notice in which to redeem, and during these 30 days he was the owner of the land, subject only to the lien of the state for taxes. After the amendment dispensing with the requirement of notice, his right of redemption ended, without notice to him, at a time very different from, and possibly earlier than, the time when it would have expired under the old law. And, as has been pointed out, his title was divested at the expiration of a fixed, instead of an indefinite, period. That these circumstances worked a substantial change in the rights which the owner had at the date of the sale seems clear.

Inasmuch as the plaintiff failed to prove the giving of the required notice, neither deed operated to convey W. H. Johnson's title to the state, and all of the instruments offered by plaintiff were properly excluded. This disposes of the appeal from the order denying a new trial.

On the appeal from the judgment it is urged that the court erred in granting to the defendants the affirmative relief asked by them in their cross-complaints. This contention is based on the view, expressed several times by this court, that in an action to quiet title a cross-complaint by a defendant who claims title in himself is not necessary. Wilson v. Madison, 55 Cal. 5; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637. If these cases have not been overruled, their authority has, as to the point under discussion, been seriously impaired by Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713. Furthermore, no objection seems to have been raised in the court below to the mode of pleading. The plaintiff did not attack the cross-complaints either by demurrer or by motion to strike out. He answered and went to trial on the merits. Under these circumstances, we think he should be held to have consented to the method of procedure which was followed, and that he cannot now be heard to make this objection, even if it could be conceded that there is any merit in the objection itself.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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150 Cal. 252

FIREMAN'S FUND INS. CO. et al. v. PALATINE INS. CO. et al. (S. F. 3,613.)

(Supreme Court of California. Jan. 10, 1907. Rehearing Denied Feb. 7, 1907.)

1. INSURANCE—FIRE POLICIES—CONSTRUCTION—PROPERTY COVERED.

Plaintiffs' policies on a printing plant insured certain typesetting machines, etc., in terms, and defendants' policies covered "printing presses, stereotype machinery, and other fixed and movable machinery, implements, tools, furniture, and fixtures contained in the building of the insured," which policy also provided that the insuring company should not be liable under its policy for a greater proportion of any loss than the amount thereby insured would bear to the whole insurance covering the property. *Held*, that defendants' policies should be construed to cover the typesetting machines, and that both plaintiffs and defendants were bound to contribute to the payment of damages caused to such machines by fire.

2. SAME—RIGHTS OF INSURED—EXTENT OF RECOVERY.

Where several policies covering the same property provided that the insurer should not be liable for a greater proportion of any loss than the amount covered by the policy should bear to the whole insurance on the property, each policy was a separate, independent contract of insurance, on which the insured could only recover such proportion of the loss as the particular insurer was liable for under such provision.

3. SAME—EXCESS PAYMENTS—RECOVERY—CONTRIBUTION.

Where several policies covered the same property, and each contained a proportionate liability clause, each contract was separate and independent, so that the payment by one of the insurers of a larger amount than it was bound to pay did not affect the liability of the other insurers for their proportion of the loss nor give to the insurer so paying a right to recover the excess from the other insurers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1502, 1503.]

4. SAME — ADJUSTMENT — APPORTIONMENT OF LOSS—CONTRACT—MISTAKE.

Plaintiffs and defendants insured the property of a publishing company under policies, all of which in fact covered certain typesetting machines with other property. After loss, the insurers jointly authorized an adjuster to adjust the loss with the insured and to apportion the same among the insurers as their policies might require. The adjuster fixed the total loss by agreement with the insured, and then on the mistaken theory that defendants' policies did not cover the typesetting machines, so apportioned the loss that plaintiffs were compelled to bear a larger proportion thereof than they were legally bound to do. *Held*, that the adjustment and apportionment constituted a new agreement, on which plaintiffs were liable to the insured for the amount apportioned against them, and hence plaintiffs were entitled to recover their excess payments from defendants.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Fireman's Fund Insurance Company and another against the Palatine Insurance Company and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Goodfellow & Eells, for appellants. Van Ness & Redman, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment for defendants entered upon the sustaining of a general demurrer to plaintiffs' complaint, and the refusal of plaintiffs to amend.

This action was one brought by two insurance companies against six other insurance companies, all of which companies, both plaintiffs and defendants, had insured by their several policies certain property of the Standard Publishing Company, also a defendant, against loss by fire. The policies issued by plaintiffs in terms covered "five typesetting machines, with fixtures and appurtenances thereunto belonging, contained in the said building of the said insured," and the policies issued by defendant companies in terms covered "printing presses, stereotyping machinery, and other fixed and movable machinery, implements, tools, furniture and fixtures contained in the building of the said insured." The policies of plaintiffs were each for $2,500, and the policies of the defendant companies were each for smaller amounts. Each policy contained a provision to the effect that the insuring company should not be liable under its policy for a greater proportion of any loss than the amount thereby insured should bear to the whole insurance covering said property. The property having been "damaged or destroyed" by fire, plaintiff and defendant companies "jointly authorized an adjuster of losses to act as their agent in adjusting and settling the loss with the defendant Standard Publishing Company." This adjuster, on behalf of the insurers, agreed with the insured that the total loss was $4,373.68, and that the loss on the typesetting machines was $2,859, and the loss on the other property $1,514.68. Upon the supposition and theory, induced "by inadvertence and mistake," that the policies of defendant companies did not by their terms cover the typesetting machines, said adjuster agreed with the insured, on behalf of all the companies, that plaintiffs would pay the whole loss thereon, viz., $2,859, and the defendant companies would pay, each in proportion to the amount of its policy, the loss on the other property, viz., $1,514.68. Upon the same supposition and theory, proofs of loss against all the companies were thereupon prepared by the adjuster, and executed and presented by the insured in accord with the terms of said agreement. The defendant companies forthwith paid the amounts stated in said proofs of loss and claimed from them, and received from the insured releases in full of all liability in respect of said loss. The typesetting machines were machinery contained in the building of insured, and it is claimed that they were covered by the description of property insured contained in the policies of the defendant companies, and that such companies were liable to the insured for a proportionate part of the loss thereon. Neither plaintiffs nor insured knew of the mistake of the adjuster at the time of the payment by and release of defendants, nor until a long time thereafter. Upon discovery of the facts, plaintiffs demanded of defendants that the adjustment be reformed, and that they contribute to the payment of the loss upon the typesetting machines, which they refused to do. It is alleged that thereafter "the plaintiffs were compelled to and did pay the said insured," the whole of the loss on said typesetting machines, $2,859, each paying one-half, and the defendants have not contributed or paid plaintiffs any portion thereof.

This is the case made by the complaint. Upon these facts, plaintiffs asked that the adjustment be set aside and reformed, that an accounting be had between plaintiffs and defendants in respect to the amount of said loss and the moneys paid and which should be paid by the several plaintiffs and defendants, respectively, and that defendant companies be required to pay plaintiffs such proportion of the loss on the typesetting machines as was due the insured from them under the terms of their respective policies. We think there can be no doubt, under the allegations of the complaint, that the policies of the defendant companies, by their terms, covered the typesetting machines. There can be no question as to the fact that if plaintiffs' policies had not been issued at all, the broad terms of defendants' policies would necessarily have included not only the property specifically mentioned, but also all other fixed and movable machinery contained in the building of insured, for it is so expressly declared thereby. The language could not have been more inclusive. The mere fact that plaintiffs' policies were limited in terms to a portion of the property not specifically mentioned in defendants' policies, and only included in the general designation of machinery, does not authorize us to exclude from defendants' policies property coming clearly within their provisions. There was no connection between the contracts of plaintiffs and defendants. Each of the companies had a separate, independent contract with the insured, which must be separately construed. Defendants' contracts were clear and free from ambiguity so far as the descriptions of property insured were concerned, and must be read according to their terms, regardless of the manner of description used in other contracts to which defendants were not parties.

Defendants' policies, therefore, covered not only the property other than typesetting machines, but also, concurrently with those of plaintiffs, covered such machines. Under the pro rata clause contained in all the policies, each of the insurers, plaintiffs and defendants, was originally liable to the insured for such proportion of the loss on such machines as the amount of the insurance thereon bore to the whole of the insurance covering the same. Plaintiffs have, therefore, in paying to insured the whole amount of the loss on the typesetting machines, paid not only the amounts for which they were liable under their policies, but also the amounts for which defendants were liable under their policies. If this were all, whatever might be said as to moral reasons in favor of the reimbursement of plaintiffs by defendants, plaintiffs would have no legal cause of action against defendants. It is well settled that there is no right of contribution among insurers whose policies contain such a clause. Each of the contracts of insurance is entirely separate and independent of all the others. Each insurer is liable directly to the insured for its proportion of the loss, and the insured can recover from any insurer only such proportion of the loss as it is liable for under the terms of its policy. The payment by one of such insurers of a larger amount than it is bound to pay in no way affects the liability of the other insurers for their proportion of the loss, and gives the party so paying no right to recover the excess so paid from the other insurers. See 4 Cooley's Briefs on Laws of Ins. 3099, 3108, 3862; Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386; Good v. Buckeye, etc., Co. (Ohio) 2 N. E. 420.

We are of the opinion, however, that the contract made by the insurers for the payment of the loss materially changed the situation. The insurers came together for the purpose, both of determining the amount of loss, and apportioning the same among themselves as their policies might require. It was immaterial whether they did this each by its own agent, or by a common agent jointly authorized to act for all. Having determined the total amount of loss satisfactorily to the insured and to themselves, they jointly agreed with the insured as to the respective amounts each insurer should pay. It was entirely immaterial to the insured in what proportion the various insurers paid, as long as the aggregate amount paid equaled the total loss. The insured was at liberty to accept whatever apportionment of liability the insurers jointly proposed, regardless of its own views as to whether thereunder each company was paying its proper proportion. If the insured was satisfied with the apportionment made, that was a matter which only concerned the insurers among themselves, and it is immaterial whether or not the insured believed each company was paying its proper proportion. Any mistaken theory of the insured in that behalf would not affect the validity of the settlement as to it, so long as it was satisfied therewith. It had the right to accept the joint proposition of the insurers as to the amount each should pay, and when it accepted it, the adjustment and apportionment of liability constituted as to it a new agreement, upon which it was entitled to rely, and upon which a separate action might have been maintained against each insurer for the amount it had promised to pay thereunder. See Stockton, etc., Works v. Glens Falls Ins. Co., 98 Cal. 557, 569, 33 Pac. 633. In view of the allegations of the complaint, we can conceive of no defense that could have been successfully made by plaintiffs here to an action by the insured against them, based on such agreement jointly made by all the insurers, and relying upon which the insured had made his demands against the various insurers, and had released the defendants upon payment by them of the amounts agreed upon as to them. Solely by reason of that agreement (which as to apportionment was one among the insurers, as well as one with the insured), plaintiffs were compelled to pay to insured amounts for which they were not liable under their policies, and for which defendants were liable. This burden was imposed upon them by the agreement to which all the insurers were parties, and, according to the allegations of the complaint, was entirely the result of inadvertence and mistake on the part of all the insurers. It was the intention of all the insurers to apportion the liability among themselves in accord with the terms of the respective policies, and it was inadvertently and mistakenly supposed and assumed by all the insurers, in the person of their common agent, that defendants' policies did not cover the typesetting machines, and for that reason alone the whole loss thereon was apportioned to plaintiffs. Solely in consequence of this mutual mistake on the part of the insurers, plaintiffs were compelled to pay the insured moneys for which they were not liable under their policies and for which defendants were liable. We know of no good reason why relief may not be obtained against the defendants from the results of such a mistake, entirely independent of any doctrine of assignment, contribution or equitable subrogation, and none, in our opinion, is given in the brief of learned counsel for defendants. As said by their counsel, plaintiffs, according to their complaint, have a standing in equity as original parties to a contract entered into under mutual mistake of all the parties, to be relieved from the unjust and inequitable burden to which they have been subjected through such mistake, and to be restored, so far as they can be without injury to innocent persons, to the position they would have occupied had it not been for such mistake.

We are of the opinion that the complaint sufficiently states a cause of action as against a general demurrer.

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

150 Cal. 272

JACKS v. DEERING. (S. F. 4,029.)

(Supreme Court of California. Jan. 10, 1907. Rehearing Denied Feb. 7, 1907.)

MORTGAGES — FORECLOSURE—MENTAL CAPACITY OF MORTGAGOR.

In a suit to foreclose a mortgage it was found that, when she executed the mortgage, the mortgagor was a person of unsound mind, "but was not entirely without understanding," and that "she did not have sufficient mental capacity to understand the nature, purpose, and effect of the transaction"; that she lived two years thereafter; that there was full consideration for the mortgage; that the mortgagee acted in good faith; that the mortgagor's daughter represented her as being fully capable to transact business; that her attorney, who, after her death, became her administrator, was informed of the transaction at the time; and that no attempt at a rescission was ever commenced. *Held*, that the case was not within Civ. Code, § 38, providing that a person "entirely without understanding" has no power to contract, but within section 39, providing that a contract of a person of unsound mind, but not "entirely without understanding," is subject to rescission, so that the mortgagor was entitled to foreclosure.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by David Jacks against Charles J. Deering, administrator. Judgment for plaintiff. Defendant appeals. Affirmed.

Jackson Hatch and James H. Deering, for appellant. Bishop, Wheeler & Hoefler and Bishop & Hoefler (William Rix, of counsel), for respondent.

HENSHAW, J. This is the second appeal. The first appeal will be found reported in Jacks v. Estee, 139 Cal. 507, 73 Pac. 247, Mr. Estee having died, and Mr. Deering having been substituted as administrator in his place.

Some of the facts are set forth in the opinion above cited. Others will be noticed as may be necessary. Section 38 of the Civil Code provides: "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or for the support of his family." Section 39 of the same Code provides: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission of this act." Upon the trial of the case the judge made the following finding touching the mortgagor's mental soundness: "That Maria T. Divine, on June 1, 1896, the time when she executed the promissory note and mortgage to the defendant, was over the age of 85 years; that she was then, and for several years prior thereto had been, physically very infirm; that at the time of the execution of the promissory note and mortgage her mental capacity had become greatly impaired, such impairment having commenced and continued several years prior to that time; that she was then a person of unsound mind, but was not entirely without understanding, nor has her incapacity been judicially determined; that at the time of her execution of the said promissory note and mortgage she did not have sufficient mental capacity to understand the nature, purpose and effect of the transaction in which she was engaged, or of the promissory note and mortgage; that from that time until her death the impairment of her physical and mental capacities continuously increased." The court also found: "That Maria T. Divine lived for about two years after the execution and delivery by her of the said note and mortgage, and that she did not at any time after the execution and delivery of said note and mortgage, exercise, or attempt to exercise, the right of rescinding said note or mortgage. That within a few days after the date of the note and mortgage, Morris M. Estee was informed of the fact that said note and mortgage had been executed and delivered by Maria T. Divine to plaintiff, and at such time he also knew the mental condition of Maria T. Divine; and at the time of his appointment as administrator, he well knew the fact of the execution and delivery by Maria T. Divine of the said note and mortgage to plaintiff, and all the facts concerning that transaction, and the mental condition of the said Maria T. Divine at the time of such transaction, and that the plaintiff had satisfied and canceled the said note and mortgage of Lillie T. Sparks. That, from the date of the appointment of Morris M. Estee as such administrator, there was no offer or attempt on his part as such administrator to rescind the said note and mortgage."

Appellants invoke the law of the case, and insist that, notwithstanding the findings here made, the case is identical with that presented upon the former appeal, where it was held that, under the findings, the note and mortgage did not constitute a contract, by reason of the mental incapacity of the mortgagor. In this, however, appellants are in error. It will be noted that the discussion in Jacks v. Estee recognizes the failure of the court to find whether or not Mrs. Divine was "entirely without understanding" and declares "the findings do not go so far as this," but find only her incapacity to understand or comprehend the particular transaction in question. In the absence of this finding it will be noted that the language of the learned commissioner is not couched in terms of a judicial decision but is limited to "inferences" and "suppositions." It declares that the question is "whether it may be inferred from the findings taken together that it was the intention of the court to find a general incapacity in the intestate." An inference which might be drawn from a given finding cannot be allowed to stand against an express finding to the contrary of the inference. The opinion further declares that the finding of incapacity "seems necessarily to imply her incapacity to understand such transactions in general." Again, it is said, "There is, indeed, a finding that Mrs. Divine was not insane," and "this seems to be in conflict with the findings we have been considering," "but we must suppose," etc. Thus the discussion in Jacks v. Estee was addressed to a condition of the record not here existing, to a record which contained no findings upon a matter as to which the record appealed from here is full and complete. It is apparent that the learned trial judge, with sections 38 and 39 of the Civil Code, and the discussion of the findings upon the first appeal all before him, made the findings above set forth, for the very purpose of relieving from the necessity of any speculation, supposition, or implication as to the exact facts and the meaning thereof which he meant to declare. And the findings as now presented are not only essentially different from those upon the former appeal, but forbid in their direct completeness the need of supposition and implication. The finding that Mrs. Divine did not have sufficient mental capacity to understand the nature, purpose, and effect of the transaction stands consistently with the added finding that she was not entirely without understanding on the particular matter of the contract. There is here not only no conflict in the findings, but no lack of harmony in the court's utterances. The declaration is in the conjunctive, that she did not understand the nature, purpose, and effect. Had she been entirely without understanding, the finding should have been, and, drawn by so learned a judge as he who tried this case, would have been, in the disjunctive, and would have declared that she understood neither the nature nor purpose nor effect. As announced by the court, the declaration is consistent with a partial understanding, with the statement that she might have known fully the nature and purpose and might not have fully understood the effect, or that she might have understood, though imperfectly, the nature, purpose and effect. This being so, the findings bring the case within the purview of section 39, where a rescission was necessary. There is no question in this case but that the mortgagee parted with full value for his mortgage, surrendering and canceling, as he did, the promissory note secured by a mortgage of Mrs. Sparks, the daughter of Mrs. Divine, and paying additionally the sum of $221.55. The good faith of the mortgagee and his ignorance of Mrs. Divine's condition is not only established, but it is shown that Mrs. Sparks represented her mother as being fully capable to transact business. Moreover, Mr. Estee, an attorney at law and the legal adviser of Mrs. Divine, was at once made aware of the transaction. Mrs. Divine lived for some time afterwards, and, upon her death, Mr. Estee became administrator of her estate. Neither during her lifetime nor after her death was any attempt at a rescission ever made.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J; McFARLAND, J.

150 Cal. 238

POLLITZ et al. v. WICKERSHAM. (S. F. No. 3,990, 4,356.)

(Supreme Court of California. Jan. 9, 1907. Rehearing Denied Feb. 4, 1907.)

1. Exceptions, Bill of—Settlement—Service—Default—Belief.

Code Civ. Proc. § 473, provides that the court may relieve a party from a judgment, order, or other proceeding taken against him because of his mistake, surprise, or excusable neglect, where the application for relief is made within a reasonable time, and in no case exceeding six months. *Held*, that where defendant's bill of exceptions was not served in time through excusable neglect, and the bill came up for settlement within a few days after the expiration of six months from the time defendant should have served her proposed bill, and after six months from the day it was actually served, at which time plaintiffs objected to the settlement of the bill because it had not been served in time, the mere reservation of plaintiffs' objection at the time of service did not constitute "a proceeding," within the statute; and that defendants were entitled to apply for relief at the time the objection based on their default was presented to the court in the proceeding for settlement or within a reasonable time thereafter.

2. Appeal — Order Granting New Trial — Review.

Where one of the grounds specified in the notice for a new trial was insufficiency of the evidence, and the order granting the motion was general, it would be assumed on appeal, in favor of the order, that it was granted for insufficiency of the evidence, if it could have been legally granted on that ground, regardless of any reason stated in the opinion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772–3776.]

3. New Trial—Insufficiency of Evidence—Conflicting Evidence.

A trial judge is not bound by the rule as to conflicting evidence on appeal, in determining an application for a new trial; but it is his duty to grant such application if he is not satisfied with the verdict or findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 144, 145.]

4. Appeal—Presumptions—New Trial.

Where the evidence was such that it would have supported findings in favor of the party against whom the decision was given, and the trial court granted a motion for a new trial made on various grounds, including insufficiency of evidence, without in terms excluding such ground, the Supreme Court on appeal is bound to presume that the court changed its opinion as to the effect of the evidence, and reached a conclusion on the hearing of the motion favorable to the applicant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772–3776.]

5. New Trial—Findings—Review.

On an application for a new trial for insufficiency of evidence, the trial court, in determining whether the assailed findings were sufficiently supported by the evidence, was not required to accept as true other findings of fact not assailed by specification of insufficiency, which facts were such as to make the findings assailed mere conclusions of law.

6. Gaming—Purchase of Stocks on Margins—Power of Sale.

Plaintiffs were employed as the agents of defendant's testator to purchase certain stock for him, and to advance the purchase price; he agreeing to repay that amount with commissions and interest. Testator deposited with plaintiffs, as security for such payment, 350 shares of stock which he then held, and it was also agreed that plaintiffs should hold the stock purchased as further security. *Held*, that such facts were sufficient to justify a finding that plaintiffs were thereby authorized to sell the stocks at any time in order to protect themselves against a decline in value, and that the contract therefore constituted a purchase of stocks on margins, in violation of Const. art. 4, § 26.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 19–27.]

7. Evidence—Admission Against Interest—Claims Against Estate.

A verified statement of claim against a testator's estate is not in the nature of a pleading in an action, and is admissible against the claimant as an admission against interest, where a different claim is subsequently filed on which an action against the executor is based.

8. Executors—Claims—Variance.

A claim filed against testator's estate alleged that testator agreed to repay to plaintiffs certain advances made by them in the purchase of certain stock and the usual commissions for the purchase within 90 days from the date of the agreement, with interest on the amount thereof from the date of the advance until paid at 6 per cent. per annum. The court found that there was no agreement as to the time of payment, nor as to interest. *Held*, that such variance between the claim and complaint and the proof was not material.

9. Gaming—Margins—Recovery of Advances—Complaint.

Plaintiffs' claim against testator's estate alleged that testator employed plaintiffs as his agents to purchase certain stock for him, they to advance the purchase price, which he agreed to repay within 90 days, with commissions and interest; that testator deposited with plaintiffs, as security for the payment, 350 shares of stock, and agreed that plaintiffs should hold the stock purchased as further security. The claim also alleged the delivery of all the stock in pledge. *Held*, that such claim for advances, etc., on its face did not show as a matter of law that the contract was a gambling transaction in margins, prohibited by Const. art. 4, § 26.

10. Executors and Administrators—Claims Against Estate.

A claim against an estate is not required to state the facts with the preciseness and detail required in a complaint, and the sufficiency of such claim is not to be tested by the rules applicable to pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 811.]

11. Pleading—Variance—Amendment.

Plaintiffs sued testator's executrix to recover certain advances made by them in the purchase of certain stock for testator, alleging that the latter agreed to repay the same, with commissions and interest, within 90 days. The court found that there was no agreement as to the time of payment, nor as to the payment of any interest, and that, on the day succeeding that on which the stock was purchased and delivered to testator, he voluntarily and without any request on plaintiffs' part deposited the stock so purchased and certain additional shares as security for the advancement. *Held* that, though the variances between the complaint and the proof were such as to have actually misled defendant in maintaining her defense on the merits, they were not such as to constitute a failure of proof, and hence plaintiffs might properly have been granted an amendment on terms as provided by Code Civ. Proc. § 469.

12. Appeal—Disposition of Cause—Reversal—New Trial.

Where the Supreme Court on appeal was satisfied that the judgment was erroneous, but the record was insufficient to enable the court to determine the ultimate rights of the parties, it was authorized on reversal, by Code Civ Proc. § 53, to order a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4604–4612.]

Department 1. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Edward Pollitz and others, as copartners, against Mary C. Wickersham, as executrix. From a judgment denying plaintiffs any relief, and from an order granting defendant's motion for a new trial, plaintiffs appeal. Judgment reversed. Order granting new trial affirmed.

Heller & Powers, Edmund Tauszky, and A. A. Moore, for appellants. Lippitt & Lippitt and Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

ANGELLOTTI, J. This action was one brought by plaintiffs, who were stock brokers, to obtain a decree adjudging that the estate of Frederick A. Wickersham, deceased, is indebted to them in the sum of $33,514.55 with interest, for moneys advanced by them in the purchase for said Wickersham of 500 shares of the stock of the Honokaa Sugar Company, a corporation, and 500 shares of the stock of the Paauhau Sugar Plantation Company, a corporation, and directing the sale of said stock, together with 350 other shares of the Honokaa Company belonging to Wickersham, all of which was alleged to be held in pledge as security by plaintiff, and the application of the proceeds to the debt, and adjudging the payment in due course of administration of any deficiency that may remain after such sale. The original answer contained denials of the allegations of the complaint as to the transaction between plaintiffs and defendant's intestate, but contained no affirmative defense. It, however, included allegations "by way of cross-complaint, and asking for affirmative relief," to the effect that the transaction between the parties was one for the purchase and sale of shares of stock of corporations "on margin, or to be delivered at a future day," and therefore one within the prohibition contained in section 26 of article 4 of our Constitution, where it is decleared that: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Judgment was asked by defendant declaring the agreement to pay made by Wickersham null and void, and for the recovery of the 350 shares of stock held as partial security. By her second amended cross-complaint, the same matters were set up; defendant's prayer, however, being simply for the return of the 350 shares, and damages for the detention thereof. Plaintiffs by answer denied the allegations of the cross-complaint in this regard. The findings of the trial court were in favor of plaintiffs upon all the issues made by complaint, answer, cross-complaint, and the answer thereto, except upon the single issue as to the presentation to the executrix by plaintiffs before action of their claim against deceased. As to this issue, the trial court included in its findings a copy of the claim actually presented, and concluded therefrom that "the facts proven by plaintiffs herein and found by the court do not correspond with the claim presented by plaintiffs to defendant, and that there is a material variance between the facts as set forth in said claim and * * * in the complaint, and the facts proven by plaintiffs and found by the court." On this ground alone, judgment was given that plaintiffs take nothing; the judgment also being that defendant take nothing by her cross-complaint. Defendant moved for a new trial of the issues of fact arising upon her second amended cross-complaint and the answer of plaintiffs thereto, and an order was made granting such motion. Plaintiffs appeal from that portion of the judgment denying them any relief, and also from the order granting defendant's motion for a new trial. The appeal from the judgment is upon the judgment roll alone, and the appeal from the order is before us upon the judgment roll and a bill of exceptions procured by plaintiff to be settled upon the granting of the motion.

We shall first consider the appeal from the order granting a new trial. By the bill of exceptions settled for use on this appeal, it is made to appear that the grounds of motion for a new trial were such as could be presented only by a bill of exceptions or statement on motion for a new trial, and the notice of motion stated that the motion would be made solely on the bill of exceptions. If defendant's bill of exceptions which was used upon the hearing of the motion could not properly be considered thereon, no reason for a new trial was made to appear, and the order should be reversed. Defendant's proposed bill of exceptions was not served until some days after the expiration of the time prescribed by law. Plaintiffs, at the time of such service, reserved the objection that the bill was served too late. The bill came up for settlement on December 5, 1904, which was a few days after the expiration of six months from the time defendant should have served her proposed bill, and one day after the expiration of six months from the time of actual service thereof, June 4, 1904. Plaintiffs objected to the settlement on the ground that the bill had not been served in time. Defendant thereupon made by affidavits a showing for relief, on the ground of excusable neglect, under section 473, Code Civ. Proc., which was met by a counter affidavit on the part of plaintiffs. The trial court ruled that the default of defendant in preparing and serving the bill was due to excusable neglect, and that a sufficient case had been made to entitle her to relief, and thereupon settled the bill. Objection to the use of the bill was subsequently made on the hearing of the motion for a new trial, and overruled.

The showing as to excusable neglect was such that it cannot be held that the trial court erred in relieving defendant from the effect of her default, if it then had the power to grant such relief. Section 473, Code Civ. Proc., providing that the court may relieve a party "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," in terms limits the cases in which such relief may be granted to those wherein the application for relief is made within a reasonable time, and in no case "exceeding six months after such judgment, order, or proceeding was taken." As already noted, the application here was not made until more than six months after defendant's default, and the actual service of the bill. It is claimed by plaintiffs with much force that the application was in fact for relief from her failure to serve the bill in time, and, such failure having occurred more than six months before the application, the court was without power to grant the relief. We find, however, that this court has given a different construction to the statutory provision. In holding that relief may be given, under section 473, Code Civ. Proc., from the effect of the failure to take in time a necessary step in the matter of procuring a bill to be settled, this court, basing its conclusion upon the fact that, under the statute, relief can be had only "from a judgment, order or other proceedings taken against" a party, has said that the relief sought is from some proceeding taken by the adverse party based upon the default, or from some order of the court based thereon. Thus, in Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, the first case in which section 473, Code Civ. Proc., was declared applicable to such matters, it was held that the objection made to a settlement of a proposed bill, on the ground that it was not served in time, was a step in the action to obtain the interposition of the court, which amounted to a proceeding against the appellants within the letter and spirit of the section, and that it is from this proceeding that the appellants asked and the court had power to grant relief. In Banta v. Siler, 121 Cal. 414, 53 Pac. 935, the application was for relief from an order refusing to settle the statement on objection made thereto, and this court affirmed the action of the trial court in granting such relief, and settling the statement. These cases give a construction to the statutory provision that we would not feel justified in departing from, to the prejudice of a litigant who has relied thereon. We see no reason why one who finds himself in default in such a matter may not anticipate the objection or proceeding to be taken against him based thereon, and make his application for relief at once (see Vinson v. Los Angeles Pac. R. Co. [Cal. Sup.] 82 Pac. 53); but, in view of the decisions above cited, we do not feel warranted in holding that the application comes too late, if made at the time the objection based on the default is presented to the court, or within a reasonable time thereafter. We are satisfied that the mere reservation of their objection by plaintiffs at the time of the service of the bill did not constitute a "proceeding" within the meaning of the statute. We conclude, therefore, that the bill of exceptions was properly settled, and entitled to be considered on the motion for a new trial.

The order granting the motion for a new trial was in general terms, not purporting to exclude any particular ground specified in the notice. One of the grounds specified in the notice was insufficiency of the evidence to justify the decision. If, upon the record before us, a new trial could have been properly granted upon that ground, we must assume in favor of the order that it was granted for that reason, regardless of any reason stated in the opinion of the trial court. See Schnittger v. Rose, 139 Cal. 656, 659, 73 Pac. 449; Ben Lomond, etc., Co. v. Sladky, 141 Cal. 619, 621, 75 Pac. 332; Weisser v. S. P. Co. (Cal. Sup.) 83 Pac. 439. "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence, as is this court." Condee v. Gyger, 126 Cal. 546, 547, 59 Pac. 26; Churchill v. Flournoy, 127 Cal. 355, 362, 59 Pac. 791. Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom the decision was given, and the trial court grants a motion for new trial made upon various grounds, including that of insufficiency of evidence, without in terms excluding such ground in its order entered on the minutes, we must presume, in favor of such order, "that the court changed its opinion as to the effect of the evidence, and reached a conclusion upon the hearing of the motion, favorable" to the party making the motion. Condee v. Gyger, 126 Cal. 546, 548, 59 Pac. 26. As a matter of fact, the opinion of the trial judge filed upon the decision of the motion shows that such was the case here. It is the reason given by the learned judge for such change that counsel for appellant vigorously assail.

The real question in dispute between the parties on the issues made by the cross-complaint and the answer thereto was as to whether the transaction between plaintiffs and Wickersham, upon which each party based its action, was one prohibited by the constitutional provision hereinbefore quoted, and therefore void. The specifications of insufficiency of evidence contained in the bill of exceptions sufficiently assailed the material findings in this regard. In determining the question as to whether the assailed findings were sufficiently supported by the evidence, the trial court undoubtedly had the right to consider all the evidence given upon the trial, including that given on behalf of plaintiffs in support of their claim. That evidence as to the nature of the transaction between the parties was as available to defendant in support of her cross-action involving the same transaction, as it was to plaintiffs in support of their action, and she had a perfect right to rest her claim thereon if she so desired.

Nor do we understand that, as urged by plaintiffs, the trial court, in the determination of the question as to whether the assailed findings were sufficiently supported by the evidence, was required to accept as true certain other findings of probative facts not assailed by specification of insufficiency, which probative facts were not such as to make of the findings assailed mere conclusions of law rather than findings of the ultimate facts. The question as to the sufficiency of the evidence to support the assailed findings is to be determined solely from the admissions of the pleadings and the evidence given upon the trial.

Coming to a consideration of these matters, we find sufficient ground for sustaining the action of the lower court in granting a new trial. The evidence was such as to warrant the trial court in concluding that the facts were in no material respect different from those in Parker v. Otis, 130 Cal. 322, 330, 62 Pac. 571, 927, 92 Am. St. Rep. 56, where the transaction was pronounced to be similar to that involved in Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393, Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362, and kindred cases, and therefore prohibited by the constitutional provision. The facts, as briefly stated by this court in that case, were as follows: "Plaintiff paid to defendants certain money, accompanied by an order to purchase certain stocks. Defendants went into the stock board, bought and paid for these stocks in full at the market rate. Defendants then credited plaintiff with the money paid by him [which was always less than the amount paid for the stocks by defendants, or, in other words, was but a margin of the cost], and by agreement held the stock as security for their commissions, advances, and for the accumulating interest thereon, with the power to sell the stocks to protect themselves against a decline in value. Defendants did not keep the particular stocks purchased, but had others of like character, and could and would have delivered a like number of shares to plaintiff upon full payment of all balances due at the time upon demand. Defendants acted only as agents of plaintiff, and had no interest in the stocks beyond their commissions, advances, and the agreed interest." In the case at bar, Wickersham did not pay any portion of the purchase price, but his deposit of the 350 shares of stock as collateral security had the same effect, and afforded the necessary margin. See Cashman v. Root, 89 Cal. 373, 378, 379, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482. It is said that plaintiffs here did not have power to sell the stocks at any time to protect themselves against a decline in value, and that therefore one of the essential elements of a sale on margin was absent. We are of the opinion that the evidence was such as to fully warrant the inference that such power to sell was present. Plaintiffs' contention to the contrary is based entirely upon the theory that Wickersham had become the owner of the 1,000 shares, and as such owner had delivered the same in pledge; but the evidence was not such as to compel the court to accept such theory. According to the evidence of one of plaintiffs' witnesses, Wickersham had stated to him that, after the stock had depreciated, he had gone to plaintiffs and told them not to sell him out, and that they had promised that they would not, thus indicating his understanding of their agreement to be that they had the power to sell. There was nothing in the testimony of plaintiffs' witnesses, as to statements made by Wickersham to them as to his transaction with plaintiffs, to compel a conclusion contrary to that reached by the court below on the motion for a new trial. The creditors' claim based on this transaction first presented by plaintiffs to defendant's executrix for allowance, verified by the oath of one of the plaintiffs, stated the facts in such a way as to clearly and necessarily bring the transaction within the constitutional prohibition, and this, as we shall presently show, was competent evidence of admission against interest.

Plaintiffs rely on Maurer v. King, 127 Cal. 114, 59 Pac. 290, as establishing that in this case there was no contract for the delivery of stock at a future day; but we cannot see that the case is in point. In part payment of the purchase price for certain real property, one Smith had delivered to Maurer 1,000 shares of the stock of a mining company at 50 cents per share, making $500 thus paid, and, to save Maurer from loss on the stock, guarantied in writing that it would be worth that sum inside of two years from date, and, if Maurer held it for two years and so requested, he (Smith) would take it from him and pay him for it at that rate. This guaranty was upheld. It was said that there was here no contract prohibited by the letter of the constitutional inhibition, nor any attempted evasion thereof, but a simple guaranty that property delivered in payment at a fixed price would be worth that price within two years, and, if not worth it, that the party delivering it would take it back, and pay the amount in cash. It is manifest that the case in no degree assists plaintiffs.

It is not necessary for us on this appeal to go further than to hold that the evidence was such that it would have sufficiently supported findings in favor of defendant upon the question as to the nature of the transaction between plaintiffs and Wickersham. As to this, we have no doubt.

It is earnestly claimed that the creditors' claim first presented by plaintiffs to defendant for allowance was not admissible as evidence of admission against interest on the part of plaintiffs. After the rejection of this claim by defendant, a second claim in different terms was presented, and it was this claim that was in fact relied upon by plaintiffs on the trial of the action. The verified statement as to the nature of the transaction contained in the first claim was undoubtedly opposed to the claim made by plaintiffs on the trial. Ordinarily, where one has made statements opposed to the claim he asserts in an action, these statements are admissible against him as admissions against interest. Their force as admissions may be impaired, and perhaps entirely destroyed, by explanation of the circumstances under which they were made; but they are admissible, and are to be considered in connection with such explanations as may be made concerning them. We know of no principle under which the claim could be held inadmissible here. Plaintiffs seek to bring the case within the rule established in this state to the effect that, where a party to an action amends a pleading, statements in the superseded pleading cannot be used as admissions against interest on the part of the person making them. See Mecham v. McKay, 37 Cal. 154, 165; Ponce v. McElvy, 51 Cal. 222; Wheeler v. West, 71 Cal. 126, 128, 11 Pac. 871; Ralphs v. Hensler, 114 Cal. 196, 198, 45 Pac. 1062; Miles v. Woodward, 115 Cal. 308, 316, 46 Pac. 1076. This rule, the soundness of which has been disputed elsewhere (see 2 Wigmore on Evidence, § 1067), has never been held applicable, except as to statements in a pleading in an action, which have been omitted by amendments made thereto, and we can see no good reason for extending it. Clearly, a creditor's claim against an estate is in no sense of the word a pleading, nor is there any such thing known to our law as the amendment of such a claim. The fact that such a claim must be presented prior to the institution of an action against an estate is entirely immaterial. The case is simply that of one who has presented a bill or demand embodying certain statements as to the facts upon which it is founded, and who subsequently seeks to maintain an action utterly inconsistent with the facts he has heretofore asserted. We can conceive of no good reason why the general rule as to the admissibility of evidence of admissions against interest was not applicable in the case of the claim under discussion.

From what has been said, it follows that the order granting the new trial must be affirmed.

As to the appeal from the judgment: We are unable to agree with the learned judge of the trial court in his conclusion that there was such a veriance between the facts as set forth in the second claim presented against the estate and in the complaint, and the facts proven by plaintiffs and found by the court, as to preclude a recovery. There was no substantial variance between the facts set forth in the claim and those alleged in the first count of plaintiffs' complaint. It was alleged therein that Wickersham agreed to repay to plaintiffs the advances made by them in the purchase of said stock, and the usual commissions for the purchase, within 90 days from the date of the agreement, with interest on the amount thereof, from the date of the advance until paid, at the rate of 6 per cent. per annum, and the court found that there was no agreement as to the time of payment, and no agreement as to the payment of any interest. These variances between the complaint and the findings are not claimed to be material.

The claim and complaint allege the transaction between the parties to have been fully had on March 5, 1901, and substantially allege the transaction to have been that plaintiffs were employed by Wickersham as his agents to purchase the stock for him, they to advance for him the purchase price, which he agreed to repay within 90 days with commissions and interest; and that he deposited with plaintiffs as security for the payment his 350 shares of stock; and that it was agreed that plaintiffs should also hold the 1,000 shares of stock purchased by them as security. The complaint further alleged the delivery of the 1,350 shares in pledge. The trial court found that the 1,000 shares were ordered by Wickersham on March 5, 1901, and on that day purchased and delivered by plaintiffs to Wickersham, they advancing the purchase price; and that Wickersham then agreed to repay said amount and broker's commissions; and that, on the next day, he voluntarily and without any request on the part of plaintiffs, deposited as security his 350 shares, and then agreed with plaintiffs that they should also hold the 1,000 shares purchased as additional security, and thereupon delivered to plaintiffs the whole 1,350 shares in pledge. The court further found that Wickersham purchased the stock in good faith as an investment, and that it was contemplated between the parties that Wickersham would soon pay his indebtedness and take up the stock. It is claimed by defendant that, if the findings of the court show a state of facts upon which plaintiffs could recover at all, it was due solely to the facts stated therein which were not alleged in the claim—that the allegations of the claim taken alone, not stating the elements of fact which took it from the operation of the constitutional prohibition already discussed, showed a case within that prohibition, and therefore that the claim was void on its face. We are unable to assent to the proposition that the claim presented established by its allegations its own invalidity, and this, undoubtedly, was the view of the trial court in overruling a general demurrer to the complaint, stating substantially the same facts as those stated in the claim. The claim read fair enough upon its face, not stating facts which necessarily put it under the ban of the Constitution. Whether the transaction was, in fact, in contravention of the constitutional provision, was a question of fact that could only be determined by a consideration of the circumstances under which it was had, and the conduct of the parties in reference thereto (see Kullman v. Simmens, 104 Cal. 595, 599, 38 Pac. 362), and plaintiffs were not required to show those circumstances in their claim. It is not required that a claim against an estate should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should, of course, as said in McGrath v. Carroll, 110 Cal. 79, 83, 42 Pac. 466, 468, "sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it," and this, we think, the claim in question did. Undoubtedly, the cause of action established by the findings is precisely the cause of action attempted to be set out in the claim and in the complaint. By all, the claim asserted was one for money advanced by plaintiffs to the use of Wickersham, which he had agreed to repay. The case came fully up to the requirements of the rule declared in Lichtenberg v. McGlynn, 105 Cal. 47, 38 Pac. 541, McGrath v. Carroll, supra, and kindred cases, to the effect that a plaintiff can recover only upon the claim which has been presented and rejected, and cannot recover upon any other cause of action. See, also, Thompson v. Orena, 134 Cal. 26, 66 Pac. 24.

Even if the variances between the allegations of the complaint and the proof were such as to have actually misled the defendant to her prejudice in maintaining her defense upon the merits, they could not be held to be such as to constitute the case one of failure of proof under section 471 of the Code of Civil Procedure, and full and adequate remedy could have been afforded both parties by an order of amendment of the complainant upon such terms as might be just. Section 469, Code Civ. Proc. It cannot be held that the facts actually found by the court showed a transaction within the constitutional inhibition.

We have discussed the points made by defendant in support of the judgment, and are of the opinion that the same are not sustainable. In reversing the judgment we are satisfied that a new trial of the issues made by the complaint and the answer should be ordered. That the power to so order a new trial under the circumstances here existing is vested in this court there can be no doubt. See Code Civ. Proc. § 53; Schroeder v. Schweizer, etc., 60 Cal. 467, 471, 44 Am. Rep. 61; Merrill v. First Nat. Bank, 94 Cal. 59, 29 Pac. 242. This is eminently a proper case for the exercise of that power. It would be a most peculiar and unjust conclusion of this action, should it be finally adjudged herein that plaintiffs should recover a balance due them upon the contract between them and Wickersham, on the theory that the contract was valid, and that the defendant should recover property of Wickersham held by plaintiffs as security for the performance of the same contract, upon the theory that the contract was void, and yet such might be the result were we to order judgment for plaintiffs on the findings. The real question is as to the nature of the transaction had between plaintiffs and Wickersham, and the final determination of that question must settle all the claims involved in this action. The case here is precisely like that of Schroeder v. Schweizer, etc., supra, in that the respondent, obtaining judgment on the findings as they stood, was not called upon to except to them in the lower court or to bring up the evidence by bill of exceptions to show that they were not sustained thereby. Unless this court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same.

The portion of the judgment appealed from is reversed, and the cause is remanded for a new trial, with leave to the parties to amend their respective pleadings as they may be advised. The order granting defendant's motion for a new trial of the issues arising upon defendant's second amended cross-complaint and the answer of plaintiffs thereto is affirmed.

We concur: SHAW, J.; SLOSS, J.

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150 Cal. 229

MEBIUS & DRESCHER CO. v. MILLS et al.

(S. F. 3,842.)

(Supreme Court of California. Jan. 9, 1907.)

1. TRIAL — INTRODUCTION OF EVIDENCE — RENEWAL OF OFFER AFTER AMENDMENT—NECESSITY.

Where the trial court refused to admit in evidence the contract upon which plaintiff sued, treating it as void, and, in granting plaintiff leave to amend its petition, declared that no change in pleading could affect the court's construction of the contract, plaintiff's submission of the case to the jury without renewing his offer to introduce the contract after the amendment of its complaint did not preclude it from basing error on the exclusion.

2. CORPORATIONS—AUTHORITY OF OFFICERS—WRITTEN CONTRACTS—PROOF OF SIGNATURE —NECESSITY.

Where plaintiff corporation sued upon a contract executed by its president, and no issue was raised as to his authority to sign it, plaintiff's demand for performance of the contract was sufficient ratification to make proof of its signature unnecessary.

3. SALES—CONTRACTS—CONSTRUCTION—INTENT OF PARTIES.

A memorandum reciting that plaintiff had "bought of" defendants 750 tons of salt could not be treated as an executed contract, where it appeared from the whole contract and the circumstances surrounding its making that the writing was intended as an executory contract.

4. CONTRACTS—RULES OF CONSTRUCTION—FAVORING VALIDITY.

As between two permissible constructions, that which establishes a valid contract shall be preferred to that which does not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]

5. SALES — CONTRACTS — CERTAINTY AND MUTUALITY.

A contract for the sale of 750 tons of salt was not void for uncertainty or want of mutuality because the buyer the right to order any one or all of the nine different grades specified in the contract.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Mebius & Drescher Company against Reginald Mills and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. F. Williamson, Wm. E. Kleinsorg, and Albert M. Johnson, for appellant. Walter M. Willett, Louis Titus, H. M. Wright, and Franklin P. Bull, for respondents.

HENSHAW, J. Plaintiff sued defendants individually and as copartners, doing business under the name of the "Russell & Mt. Eden Salt Company," for damages for breach of contract for failure to deliver salt in accordance with the demand of plaintiff, under the terms of a written contract between the two parties. Trial was had before a jury. The preliminary proofs were made and the contract offered in evidence. The court refused its admission upon the ground of its incompleteness and uncertainty, treating the writing as an executed contract of sale. Plaintiff contended that the contract should be construed as an executory contract of sale, or as an option of purchase, which option had become effectively binding upon defendants by subsequent orders for the delivery of salt made upon defendants within the time prescribed in the contract. It sought and obtained leave to amend its complaint by showing the specific orders for salt which it had made upon defendants pursuant to its agreement, and the court permitted these amendments to be made. In so doing, however, the court declared that no change in pleading could affect its construction of the contract, which it regarded as void for uncertainty. Upon this, the case was submitted without a second offer of the contract, and the jury, under instructions from the court so to find, gave its verdict for defendants, and plaintiff appeals.

Certain preliminary and minor objections are presented by respondents, viz., that the principal question, that of the construction of the contract, cannot here be considered, for the reason that after the amendment to the complaint the contract should have been offered in evidence again, and that this was not done, and that upon the condition of the pleadings at the time when the contract was offered the court's ruling was correct. A second offer of the contract would have been vain and superfluous under the declaration of the trial judge, that no amendment to the pleadings could affect his construction of the contract. The law does not require the doing of vain things, and a second offer, under the circumstances disclosed in the record, was not necessary.

Of the objection that the contract when offered was not proved to have been signed by the president of plaintiff corporation, it is sufficient to say that the execution of the contract was sufficiently proved against the defendants, who were the parties sought to be charged. No issue was raised as to the authority of the president to sign, though his authority is alleged in the complaint, and the demand upon the part of plaintiff corporation for a fulfillment of what they conceived to be the terms of the contract was a sufficient ratification to have made proof of the original signing by plaintiff unnecessary. Upon the question of a variance between the allegations and proofs touching the partnership, if it be conceded that such variances exist, a question which it is not necessary to decide, and which is therefore not decided, this would not have justified the summary withdrawal of the case from the consideration of the jury by the instruction to find for the defendants which was given them by the court. It would have been for the jury, after all, to say whether plaintiff should have failed because of the asserted variance. Moreover, the case was taken from the jury, as has been said, by the refusal of the court to admit in evidence the contract, which was vital to appellant's case, and by its subsequent instruction to the jury to find for the defendants. The paramount question in the case, therefore, is the construction of the paper writing between the parties. Plaintiff's business was that of a merchant selling salt and other merchandise. Defendants were manufacturers and sellers of salt. Upon June 23, 1900, the parties entered into the following agreement:

"San Francisco, Cal., June 23rd, 1900.

"Mebius & Drescher Co., Sacramento, Cal.

"Bought of the Russell and Mount Eden Salt Company, Dealers in Salt of All Kinds. A. L. Lundy, Manager. 226 Clay St.

"Salt Works,
"Alameda County, Cal.

"Capacity, 15,000 tons per annum.

"Subject to sight draft if not paid when due.

"750 tons of salt.

Table Salt in Bales any size..........	$1.02½
Dairy Salt in 50-lb Cotton sacks......	7.00
Im't. Liv. Salt Wellington Brand 50's..	9.25
" " " " " 100's..	8.75
" " " " " 230's..	8.25
Half Ground Salt 50's................	4.25
" " " 100's..............	4.00
Coarse Salt 50's......................	3.90
" " 100's.....................	3.65

"The above prices are f. o. b. Sacramento, excepting such quantities as the buyers may direct shipped by rail from Hayward Station, in which case a rebate of 75 cents per ton will be allowed.

"All the above salt to be ordered shipped before January 1st, 1902. The sellers are to be allowed a reasonable time for making shipment. Shipments are to be made in not less than 100-ton lots, excepting from Hayward station in car-load lots.

"The Russell and Mount Eden Salt Co.,
"By A. L. Lundy, Manager.

"Accepted:
"Mebius & Drescher Co.,
"By P. C. Drescher, President."

Upon the 18th day of December, 1900, plaintiff demanded of the defendants the delivery of 111 tons of table salt under this agreement, offering to pay therefor the rate specified in the above contract. On the 15th day of May, 1901, plaintiff made further demand upon defendants for 639 tons of table salt, then and there offering to pay at the rate specified in the above contract. Defendants refused to comply with these demands, or to fill any part of the order. Plaintiff then served notice that upon such refusal they would be compelled to purchase the salt in open market, and would hold defendants responsible for the difference between the contract price and that which they were compelled to pay. These facts present the gist of the present action. As has been said, the trial court insisted upon treating the agreement as an executed contract of sale, void for uncertainty and lack of mutuality, and refused to regard it from any other view point, or to consider it at all in connection with the subsequent demand made by plaintiff, within the time limited in the memorandum, for a delivery of certain specified quantities of salt, bought at the price and in the manner and under the terms set forth in the agreement. In this we think the court was misled into taking too narrow a view of the question, and, in particular, in considering itself bound to treat the contract as an executed contract of sale by reason of the statement contained therein, "Mebius & Drescher Company bought of the Russell and Mount Eden Salt Company 750 tons of salt." While it is true that parol evidence may not be permitted to vary the terms of a written contract, it is equally true that in construing a contract all parts of it are to be considered, and the circumstances surrounding its making to be regarded, with a view of arriving at the true intent of the parties. Nor, again, is it the name which parties may give to their contract which determines its character. That is to be determined from a critical inspection and analysis of the whole instrument. So, reading this instrument, it becomes apparent that it does not evidence a completed sale, in which case it would be open to the objections of uncertainty and lack of mutuality which the court put upon it, but that, at the most, it was an executory contract of sale, and, at the least, an option of purchase, good until withdrawal, and binding if the option were exercised before withdrawal. Treated as an executory contract of sale, plaintiff had bound itself to take 750 tons of salt. It had until January 1, 1902, in which to select the kinds of salt which it would use, the prices thereof being fixed, and defendants, upon the other hand, had bound themselves to supply this salt at those prices as delivery of the same should be demanded during the time fixed. Certainly this is a perfectly reasonable contract for a salt merchant to enter into with a salt manufacturer. If Mebius & Drescher failed to take 750 tons of salt of specified kinds by January 1, 1902, it would have been the right of the Russell & Mt. Eden Salt Company, since there had been a failure to exercise the choice which was vested, to have insisted upon their taking such kind and quality of salt as would have been most advantageous to them. And Mebius & Drescher, under such circumstances, could not have been heard to complain if they were hurt by their own remissness in exercising the right of choice which had been given to them. Upon the other hand, the Russell & Mt. Eden Salt Company clearly bound themselves to furnish 750 tons of salt under orders of not less than 100-ton lots, at prices fixed by their agreement, of any or of all the kinds set forth in the memorandum. It was therefore competent and proper for Mebius & Drescher to have ordered salt of several different kinds, or, depending upon the condition of the market and their opportunity to make advantageous sales, to have ordered all of the salt of one kind, as they did. Nor of this could the defendants be heard to complain, since, if they had not been willing to furnish all the salt of one or another quality, it was a perfectly simple matter for them to have had the contract so declare, and to have provided a maximum amount of each quality which could be ordered. So much for the contract as an executory contract of sale. And Mebius & Drescher, having exercised their right of selection within the time limited by contract, it became the clear duty of the defendants to ship to it the 750 tons of table salt ordered in accordance with the terms of the contract.

But, treating the contract as a mere option, the legal effect is no different. As an option of purchase, it held good until withdrawn, and became binding upon acceptance. The acceptance was evidenced by the demand for the shipment of salt and the offer to pay, all in accordance with the terms of the contract, and it is not pretended that there was any withdrawal before this acceptance. There are thus, at least, two permissible constructions of this contract, which may be said fairly to express the meaning of the parties, and which make it, in the eye of the law, a valid and binding instrument. If it even be conceded that the third construction, that of an executed contract of sale, which the trial court adopted, is equally permissible, then must be invoked the familiar rule of construction that as between two permissible constructions, that which establishes a valid contract shall be preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. The uncertainty as to the quality and quantity of salt which might be ordered under the contract is not the uncertainty which renders such contracts invalid. The maximum amount was fixed by the order. There was no uncertainty in that sense as to quantity. It is uncertainty of this latter kind, where it cannot be determined whether it was a pound or a thousand tons, a peck or a million bushels, that have justly been held to render contracts unenforceable in law. But here the maximum amount which the seller could be called upon to deliver, and the purchaser be called upon to take, was absolutely fixed, and it may not be said that, because a certain play of discretion as to quality was allowed within that limit, this discretion introduced an element of uncertainty which would invalidate the contract. Reduced to simpler terms, if a man should say to a seller, "I will take from you three dozen pocketknives of one or all of three described kinds," the price for each kind being specified, "but I want you to agree to give me a week in which to determine which of the kinds I will select," it would come with some astonishment to a merchant to be told that such an agreement was void in law for uncertainty. It is probably safe to say that a million of such transactions take place every month throughout the country without question or the possibility of question as to the legality of the agreement. The agreement is at once relieved of uncertainty when the choice is exercised, and such contracts come directly within the letter as well as the spirit of the maxim embodied in our Civil Code (section 3538). "That is certain which can be made certain."

In summing up upon this matter, therefore, we hold this contract to be an executory contract of sale, containing no elements of uncertainty which would render it invalid and imposing a mutuality of engagement upon the parties to it. It does not fall within the sweep of the condemnation of contracts such as that in Cold Blast Co. v. Kansas City, etc., Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, where there was no specification as to the quantity to be delivered, and which was a mere offer to deliver certain materials at prices stated. The court held there that there was no mutuality, and that there was a vital uncertainty in terms, in that it could not be determined what was the quantity contemplated to be delivered. In Crane v. Crane Co., 105 Fed. 869, 45 C. C. A. 96, the principles to be invoked in construing contracts such as this, are well set forth, but the vice in the contract there reviewed was the vice of lack of mutuality; there being no agreement to purchase. In American Oil Co. v. Kirk, 68 Fed. 791, 15 C. C. A. 540, the court expresses the conclusive objection to the contract in the following language: "The time of ordering as well as the quantity was left wholly to the wish of one party, who might drag it over a hundred years." And so, without prolonging the discussion, the same distinction will be found to obtain in all cases upon which respondents rely. Upon the other hand, and as showing that contracts of the nature of the one here in suit, are enforceable in law, and that damages for their breach may be recovered, reference may be made to Great Northern Ry. Co. v. Witham, L. R. 9 C. P. 16; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Cherry v Smith, 39 Am. Dec. 150; Robson v. Miss. Riv. Logging Co. (C. C.) 43 Fed. 371; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Nat. Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

For the foregoing reasons, the judgment and order appealed from are reversed and the cause is remanded.

We concur: McFARLAND, J.; LORIGAN, J.

150 Cal. 214

EARLE v. SUNNYSIDE LAND CO. et al.

(S. F. No. 3,666.)

(Supreme Court of California. Jan. 8, 1907.)

1. MORTGAGES—RIGHT TO FORECLOSE.

To secure a balance due a trust company, a land company executed a trust deed covering certain land, whereby it agreed to use reasonable diligence to sell the land, and from the proceeds pay the balance due. *Held*, in a suit to foreclose the trust deed, that an agreement in the deed on the part of the trust company to look for its payment only to the proceeds of such sales does not bar its right to seek or enforce payment in any other way after the land company has failed to make the sales within a reasonable time, and has violated its agreement to use reasonable diligence in making sales.

2. SAME—MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

A trust deed which gave the grantor a right to sell land at prices not less than those designated in a schedule in the deed, and providing that he use reasonable diligence to make sales, could not be construed to give him an arbitrary power to fix prices which would make any sales impossible, and would for an indefinite time prevent the accomplishment of the purposes of the trust.

3. SAME—PRIORITIES—ASSIGNMENT.

Where two parties base their claims on the same trust deed, but one has, as assignee of an agreement and the holder of a note, rights superior to another, his rights are in no wise affected by the fact that the note passed through the hands of the other party, since the other party was not required by the transaction to surrender any part of the security for the claim assigned to it.

4. SAME—EQUITABLE MORTGAGES.

A written agreement entered into by parties to make certain property a security for past indebtedness and for future advances, and upon the faith of which both parties have acted in making and accepting payments and advances, constitutes an equitable mortgage or lien upon the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 44, 57, 58.]

5. SAME—FORECLOSURE—DECREE FOR SALE.

On the foreclosure of a trust deed on certain land, which provided that defendant could sell the land at prices not less than those designated in a schedule in the deed, it was not necessary for the court, in decreeing sales of the land, to direct that the sales be made at figures not less than the minimum prices set forth in the trust deed, since the provision for minimum sales fell with provisions authorizing the defendant to make the sales, and the court could direct a sale in any just and equitable manner.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John B. Earle against the Sunnyside Land Company and others. From a judgment for plaintiff, defendant land company appeals. Affirmed.

Mullany, Grant & Cushing, for appellant. Warren Olney, Jesse W. Lilienthal, Warren Olney, Jr., Page, McCutchen & Knight, Page, McCutchen, Harding & Knight, James L. Crittenden, N. D. Anderson, E. S. Pillsbury, Wm. H. Chapman, Maguire & Gallagher, Bishop & Wheeler, Chas. S. Wheeler, Wilson & Wilson, Charles W. Willard, and Edgar D. Peixotto, for respondents.

SLOSS, J. On January 5, 1891, Leland Stanford conveyed to James P. McCarthy a tract of land containing 589.03 acres, situate in the outskirts of the city of San Francisco. In consideration of the transfer, McCarthy gave Stanford four promissory notes, two for $50,000 each and two for $112,500 each, and secured the payment of the notes by a mortgage of the land conveyed.

On the 1st day of April, 1891, McCarthy conveyed to the Sunnyside Land Company about 200 acres of said tract; the portion so conveyed being known as "The Sunnyside." The consideration for this conveyance was the agreement of the Sunnyside Land Company to pay $400,000, $100,000 of which was paid in cash and $300,000 was secured by a mortgage upon the 200 acres so conveyed. The Sunnyside Land Company thereupon had "The Sunnyside" surveyed and divided into blocks and lots, which were delineated upon a map of "The Sunnyside," filed in the recorder's office. On July 6, 1891, McCarthy conveyed to William M. Fitzhugh the undivided one-half of the indebtedness due him by the Sunnyside Land Company and of the mortgage given to secure the same. On the 5th day of February, 1892, there was executed by the Sunnyside Land Company, as party of the first part, James P. McCarthy and William M. Fitzhugh, as parties of the second part, and the California Title Insurance & Trust Company, as party of the third part, an instrument in writing, which is referred to in the record as "Trust No. 1." Briefly stated, this agreement, certain provisions of which will be set forth more in detail hereafter, provided that the mortgage of $300,000 given by the Sunnyside Land Company to McCarthy was canceled, and all the lands embraced therein, excepting those which had been sold by the Sunnyside Land Company, were bargained, sold, and conveyed by the land company and by McCarthy and Fitzhugh to the California Title Insurance & Trust Company upon these trusts: That the Sunnyside Land Company should proceed with due diligence to make sales of said tract of land at such prices and upon such terms as it should deem advisable, but in no case under certain minimum prices which were set forth in the instrument, and when purchasers should be found the said title insurance and trust company and the said Sunnyside Land Company should make a deed of the property sold, and the proceeds of the sales, less 7½ per cent. thereof, which should be retained by the land company to cover the expenses of advertising and selling, should be received by the title insurance and trust company, and applied by it in payment of the Stanford mortgage, and then in payment of the balance due McCarthy and Fitzhugh on the canceled mortgage. After the payment of the foregoing amounts, together with certain expenses incidental to the discharge of the trust, reconveyance should be made to the Sunnyside Land Company of all the lands not sold. It was provided by this instrument, as it had been provided by the mortgage from the Sunnyside Land Company to McCarthy, that the land company should not be required to make payment of any part of the moneys so owing by it from any source other than from sales of the said tract of land. The title insurance and trust company was authorized to make advances to pay claims affecting the property covered by the instrument, and was given a first lien security upon "The Sunnyside" for the repayment of all such advances, with interest. The title insurance and trust company, however, did not obligate itself to make such advances. The land company was given the option of making payments at any time from other sources than from sales.

On January 3, 1893, there was due and payable to Stanford $81,523.24 on account of one of the notes given by McCarthy. Stanford demanded payment of the amount due, and neither McCarthy nor Fitzhugh nor the Sunnyside Land Company was able to make payment. Under these circumstances the title insurance and trust company, and certain other persons interested, agreed to advance $31,523.24, and the title insurance and trust company, at the request of the Sunnyside Land Company, McCarthy, and Fitzhugh, induced Wells, Fargo & Co. to advance $50,000, making the $81,523.24 required to discharge the Stanford indebtedness. At the time of the advance of the $50,000 by Wells, Fargo & Co. an agreement was entered into by the Sunnyside Land Company, as party of the first part, Wells, Fargo & Co., as party of the second part, California Title Insurance & Trust Company, as party of the third part, McCarthy and Fitzhugh, as parties of the fourth part, and the Stanford Addition Land Company (successor in interest of McCarthy and Fitzhugh in part of the lands purchased by McCarthy), as party of the fifth part. This instrument provided that, in consideration of the advance by Wells, Fargo & Co., the Sunnyside Land Company agreed to pay Wells, Fargo & Co. or order the sum of $50,000 within three months, with interest at the rate of 10 per cent. per annum, and further agreed that the said $50,000 should be used to discharge the lien of the Stanford mortgage as to "The Sunnyside," and that Wells, Fargo & Co. should be subrogated to the rights of Stanford under the said mortgage, and should have the first lien upon said real property, and upon all property and proceeds of the securities and evidences of debt received by the California Title Insurance & Trust Company under trust No. 1. The Sunnyside Land Company executed its promissory note to Wells, Fargo & Co. for $50,000, in accordance with this agreement. Wells, Fargo & Co. paid Stanford the said $50,000, and Stanford released the lien of his mortgage upon "The Sunnyside."

Thereafter sales were made of lands belonging to the Sunnyside Land Company in accordance with the provisions of trust No. 1, and from the proceeds of these sales payments were made to Wells, Fargo & Co. until, on March 29, 1897, the balance due was reduced from $50,000 to $15,900. At that time Wells, Fargo & Co. was insisting upon payment and threatening a foreclosure under its agreement of January 3, 1893, and in order to prevent such foreclosure suit, at the request of the Sunnyside Land Company, the California Title Insurance & Trust Company paid Wells, Fargo & Co. said $15,900, and took from Wells, Fargo & Co. an assignment of the indebtedness due under the agreement of January 3, 1893. This indebtedness was then evidenced by a new note of the Sunnyside Land Company to Wells, Fargo & Co. On October 12, 1899, the California Title Insurance & Trust Company executed an instrument transferring and assigning to the Anglo-Californian Bank, Limited, said claim (and note) for $15,900, together with the security agreement of January 3, 1893, and on the 8th of November, 1899, the Anglo-Californian Bank transferred this claim, note, and agreement to John B. Earle, the plaintiff in this action.

The plaintiff instituted this action on November 13, 1899, alleging substantially the foregoing facts, and sought to recover the sum of $15,900, with interest, and to foreclose his lien on so much of "The Sunnyside" as had not been sold to bona fide purchasers. The complaint named as defendants the Sunnyside Land Company, California Title Insurance & Trust Company, and a number of other persons who are alleged to claim some interest in the land. All of these other parties derive whatever interest they may have from McCarthy and Fitzhugh

The California Title Insurance & Trust Company appeared and filed a cross-complaint, in which, in addition to showing the transactions hereinabove stated, it set out in full the instrument described as "Trust No. 1." It may be well at this point to state more fully some of the provisions of that instrument. Paragraph 5 reads as follows: "It is further provided that the said party of the first part (Sunnyside Land Company) shall be entitled to make payments in any amount to said party of the third part (California Title Insurance & Trust Company) on account of the indebtedness hereby secured to be paid and to have said payments applied toward the release of such hereinabove described lands, as said party of the first part may designate, from the lien of said mortgage to Leland Stanford; but it is understood that the sum hereby secured to be paid shall be and is to be paid (except under the said option) only from the proceeds of the sales made by the said party of the first part of the lands hereinabove described, and that said parties of the second and third parts will not require the payment thereof from any other source. The said party of the first part, however, agrees to use reasonable diligence in placing said lands upon the market and in making sales thereof in subdivisions of lots or blocks as said lots and blocks are delineated and designated upon a certain map entitled 'Sunnyside,' owned by the Sunnyside Land Company, and filed in the office of the recorder of said city and county, on the 6th day of April, 1891, such sales to be by it made at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in the hereinafter mentioned 'Schedule B.' * * *" Paragraph 10 reads: "In case the said party of the third part shall at any time advance, or cause to be advanced by any person or persons or corporation sums of money for the purpose of making payments upon the said mortgage to Leland Stanford, or to any other person or persons or corporation to whom the said party of the third part is hereby directed or permitted to make payments of money, such payments out of the money so advanced shall, except where herein otherwise provided, be deemed to have been made for the benefit of the said parties of the second part (McCarthy and Fitzhugh) and the said party of the third part shall as between the said parties of the second and third part, immediately become subrogated pro tanto to all the rights and privileges of the said party of the second part under this deed and assignment of trust; and this deed and assignment of trust shall be and constitute, as between the said parties of the second and third part, a first lien security in favor of said party of the third part for the repayment of all such advances, together with interest thereon at the rate of 9 per cent. per annum." In addition it may be noted that paragraph 2 of the instrument provides that "this deed and assignment of trust is made to secure the payment, as herein provided, to the said parties of the second part of the sum of $226,742.76, together with accrued interest. * * *"

The cross-complaint of the California Title Insurance & Trust Company alleges that at the time of filing the cross-complaint there remained unpaid and due from the Sunnyside Land Company to the cross-complainant, as trustee on account of the principal sum secured to be paid by said trust No. 1, the sum of $111,198.63, together with the sum of $36,552.17 for interest. It alleges further that the said Sunnyside Land Company "has at all times failed and neglected to use reasonable or any diligence in placing the lands herein designated as 'The Sunnyside' upon the market, and making sales thereof in subdivisions of lots or blocks, as said lots and blocks are delineated and designated upon such map of Sunnyside or any other subdivisions or at all." The cross-complaint asks for a decree that the property be sold to pay the amounts due the cross-complainant under the trust deed.

The answers of the Sunnyside Land Company to the complaint and the cross-complaint raise no material issue that need here be considered beyond the denial of the allegation of the cross-complaint that the land company had failed and neglected to use reasonable or any diligence in making sales of the lands.

After a trial the court made its findings of fact, in which it found, among other things, that "said Sunnyside Land Company has at all times since the execution of said trust No. 1 failed and neglected to use reasonable or any diligence in placing the lands herein designated as 'The Sunnyside' upon the market and in making sales thereof in subdivisions of lots or blocks, as said lots and blocks are delineated and designated upon the said map of 'Sunnyside,' or any other subdivisions, or at all," and that "the prices which said Sunnyside Land Company placed and maintained on the unsold and unconveyed lots in said Sunnyside tract, and which it sought and tried to obtain for the same after the execution of said trust No. 1, were and are excessive and prohibitory, and were and are largely in excess of the prices that were obtainable in the open market and largely in excess of the minimum selling price set forth in Schedule B annexed to said trust No. 1."

Upon the findings the court made its decree, in which it decreed that there was due the plaintiff from the Sunnyside Land Company upon the promissory note of March 26, 1897, for principal, interest, and attorney's fees the sum of $21,608.64, which, with plaintiff's costs, constituted a first lien upon the lands described in the complaint; that there was due the California Title Insurance & Trust Company, as trustee, from the Sunnyside Land Company for principal and interest secured to be paid by the instrument known as "Trust No. 1," the sum of $165,627.71, which constituted a valid lien upon said lands and premises, and that said lands, or so much thereof as might be sufficient to raise the sums declared to be due the plaintiff and cross-complainant, together with interest thereon and costs subsequently accruing, be sold at public auction in the manner prescribed by law on foreclosure of mortgages by a commissioner appointed by the court, and that the commissioner, after the expiration of the time for redemption, execute a deed or deeds to the purchaser or purchasers at said sale, and that the commissioner out of the proceeds of said sale, after retaining his commissions and disbursements, pay, first, to the cross-complainant, California Title Insurance & Trust Company, the amount sufficient to redeem the said lands from all tax sales to the state; second, that said commissioner out of said proceeds pay to the plaintiff the sums declared to be due to said plaintiff; and, third, that said commissioner pay to the cross-complainant, California Title Insurance & Trust Company, the balance of the sums declared to be due to it as trustee from said Sunnyside Land Company under said trust No. 1. Any surplus remaining is directed to be paid to the defendant, the Sunnyside Land Company. The decree then goes on to designate the amounts due to the California Title Insurance & Trust Company individually, and payable out of the amount to be received by it, and decrees that the defendants other than the Sunnyside Land Company and the California Title Insurance & Trust Company have no interest in the lands, except such right as they may have in moneys received by the California Title Insurance & Trust Company as trustee for them.

The Sunnyside Land Company made a motion for a new trial, which was denied, and now appeals from the judgment and from the order denying its motion for a new trial.

While the transactions which gave rise to this controversy are somewhat involved and complicated, the questions to be considered upon these appeals are neither numerous nor difficult. The principal contention of the Sunnyside Land Company is based upon the provision found in trust No. 1, to the effect that the sum secured to be paid is to be paid only from the proceeds of sales made by said land company of the lands covered by the trust deed, and that the other parties to the instrument will not require the payment thereof from any other source. From this provision it is argued that the respondents —i. e., the plaintiff and the California Title Insurance & Trust Company—agreed to look for their payment only to the proceeds of such sales to be made by the Sunnyside Land Company, and that they have no right to seek or enforce payment in any other way. But we think that this argument is based upon too narrow a construction of the provisions of paragraph 5 of the trust deed. That paragraph provides, in addition to the agreement that the payment of the sums due is not to be required from any other source than sales of lands, the undertaking that the Sunnyside Land Company is to use reasonable diligence in placing said lands upon the market and in making sales thereof, such sales to be by it made at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in a schedule attached to the deed. These provisions are all to be read together, and it certainly could not have been the intention of the parties that the Sunnyside Land Company should, by violating its agreement to use reasonable diligence in making sales, have the power to indefinitely or perpetually postpone the right of the creditors to obtain payment of their claims out of the land which was by the deed of trust made security, and the only security, for such claims. The cross-complainant alleged, and the court found, that the Sunnyside Land Company had failed to use reasonable diligence in making sales of these lands. This finding is attacked by the appellant as unsustained by the evidence. We do not intend to restate or even to summarize the many pages of testimony appearing in the transcript upon both sides of this question, but shall content ourselves with saying that, in our judgment, the evidence was ample to support the finding. This being so, can it be said that paragraph 5 of the deed of trust contemplated that the party of the first part, which had agreed to use reasonable diligence in selling these lands, could violate this clause of the agreement, and still stand upon the connected clause, providing that no payments were to be made except out of its sales? The case presents a close analogy in principle to the decisions holding that, where there is an agreement to pay a sum of money out of the proceeds of a particular fund to be realized by some act of the party who is to make the payment, the act must be performed by him within a reasonable time, and, if he fails to perform this duty, the sum is payable without reference to the performance of the condition. In Sears v. Wright, 24 Me. 278, the action was brought upon the defendant's agreement to pay a certain sum of money from "the avails of the logs bought of Martin Mower, when there is a sale made." It was contended that as the logs had not been sold there was no obligation, but the court, finding that a reasonable time for a sale had elapsed, refused to recognize the defense, saying: "By the terms of that contract it could not be inferred that the plaintiff had consented to subject himself to any such contingency. His agreement in terms was to wait till the logs could be sold. Thus the defendants had a duty to perform. They were bound to sell the logs and do it within a reasonable time. A reasonable time for such purpose had long since elapsed." In Nunez v. Dautel, 19 Wall. 560, 22 L. Ed. 161, the action was upon obligations promising to pay "as soon as the crop can be sold or the money raised from any other source." The suit was instituted more than five years after the date of the instrument. It was held that the plaintiff was entitled to recover without proof that the crops had been sold or the money raised from any other source; the court saying: "No time having been specified within which the crops should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulation secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source the debt should never be paid. Such a result would be a mockery of justice. * * * When the suit was instituted, more than five years had elapsed from the date of the instrument. This was much more than a reasonable time for the fulfillment of the undertaking of the defendants, and the plaintiff was entitled to recover." In Williston v. Perkins, 51 Cal. 554, the defendants, who were engaged in building a vessel, gave to their laborers certificates providing that the payees were entitled to receive specified sums, "when the three-masted schooner now in course of construction by said association is sold." Action was brought upon these certificates before the vessel had been sold. The trial court found that the defendants did not make an honest effort to sell the vessel at its market value, and gave judgment for the plaintiff. The judgment was affirmed on appeal, the court saying: "The defendants were entitled to only reasonable time in which to finish and sell the schooner, and, that time having elapsed, the plaintiff could maintain his action." See, also, Bryant v. Saling, 4 Mo. 522; Ubsdell v. Cunningham, 22 Mo. 124; Hicks v. Shouse, 17 B. Mon. (Ky.) 483; Wilder v. Sprague, 50 Me. 354; De Wolfe v. French, 51 Me. 420; Crocker v. Holmes, 65 Me. 195, 20 Am. Rep. 687; Noland v. Bull, 24 Or. 485, 33 Pac. 983. In nearly all of these cases the literal reading of the contract was merely that the payment should be made upon the sale of certain property or the performance of some act by the defendant. The court, however, in each instance had no difficulty in reading into the contract an obligation on the part of the defendant to use reasonable diligence to perform the act, upon the completion of which the payment was made contingent, and in the event of his failure so to do in requiring payment without the performance of the condition. The present case is stronger than any of those cited, in that here the Sunnyside Land Company agrees in terms to use reasonable diligence in placing said lands upon the market and in making sales thereof.

It is true that this case differs from those cited in that here, under the express provisions of trust No. 1, a personal liability could not be imposed upon the Sunnyside Land Company. Nor was it attempted to impose such liability. But by the instrument in question the "deed and assignment of trust" was made a "first lien security" in favor of the title insurance and trust company for the repayment of all advances, and was also made to secure the payment to McCarthy and Fitzhugh, through the title company, of the purchase price not yet received by them. The payment of these sums being thus secured by the land, we are satisfied that, upon the failure of the land company to use the required diligence to make sales, a court of equity was authorized to subject the security to the payment of the claims of the plaintiffs and the cross-complainant by some appropriate method, such as the method here adopted.

The appellant lays much stress upon the provision in paragraph 5 of the deed of trust that sales are to be made by it at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in the schedule. The provision for minimum prices is no doubt inserted for the protection of the parties other than the Sunnyside Land Company. It is a restriction upon the right of the land company to fix prices according to its pleasure. But it is not the only restriction on this right. The clause giving the right to fix prices must be read in connection with the covenant to use reasonable diligence to make sales, and in the light of the general purpose of the trust agreement. The object which the parties had in view was that the lands should be disposed of to the ends, first, that the claims against the lands should be discharged; and second, that the land company should realize a profit either in money or in lands remaining unsold after payment of the indebtedness. It was never intended that the Sunnyside Land Company should have an arbitrary and unfettered power to fix prices which would make any sales impossible and would for an indefinite time prevent the accomplishment of the purposes of the trust.

In this discussion we have treated the plaintiff's case and that of the California Title Insurance & Trust Company as standing on the same grounds, viz., that both are based on claims secured by the terms of trust No. 1. But, so far as the plaintiff is concerned, the relief granted by the decree finds other support. The plaintiff is the assignee of the agreement of January 3, 1893, under which Wells, Fargo & Co. made an advance of $50,000. In this agreement the Sunnyside Land Company stipulated that Wells, Fargo & Co. should be subrogated to the rights of Stanford under the original mortgage. The plaintiff, as the holder of a part of the indebtedness, and assignee of the agreement, succeeded to this right of subrogation, and is, by virtue of it, entitled to a decree of foreclosure. His rights are in no wise affected by the fact that the Wells, Fargo & Co. note passed through the hands of the California Title Insurance & Trust Company. There was nothing in the relations of trust created by trust No. 1, which prevented the title company from advancing the money required to pay off Wells, Fargo & Co., and taking the security which had been held by Wells, Fargo & Co. The advance was made to prevent a threatened foreclosure, and in making it the title company was not required to surrender any part of the security for the claim assigned to it.

It is argued by the appellant that the instrument known as "Trust No. 1" attempts to create a trust for purposes not authorized by section 857 of the Civil Code, and that for that reason the entire instrument is void. We do not think it necessary in this case to determine whether the instrument in question was a valid trust deed so as to convey the legal title to the California Title Insurance & Trust Company. If it was not a valid trust deed, there can be no difficulty in sustaining the instrument as an equitable mortgage or lien. As this court has said, in Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192, quoting the rule as stated in Howard v. Iron Company, 62 Minn. 298, 64 N. W. 896: "Every express agreement in writing whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity or a specific lien upon the property so intended to be mortgaged." In a case like this, where the parties have entered into a written agreement, of whatever form, intended to make certain property a security for past indebtedness and for future advances, and have acted upon the faith of that agreement in making and accepting such further advances, we should be slow to adopt any construction which would result in invalidating the entire transaction and depriving the creditor who has advanced his money in good faith, of any remedy for its recovery. No policy of the law is violated by treating this instrument as creating a lien in the nature of a mortgage, if it cannot be upheld as a deed of trust. Whether it be the one or the other, we do not doubt the power of a court of equity to direct the sale of the security for the discharge of the debt, at least where the instrument itself furnishes no available method of realizing on the security.

We cannot agree with the contention of the appellant that the judgment should have directed that the sales be made at figures not less than the minimum prices set forth in the trust agreement. This provision for minimum sales was, as we have said, inserted for the benefit of the creditors. Furthermore, it was a part and parcel of the general scheme for the sale of the lands by the Sunnyside Land Company itself. When, by reason of its neglect to perform its duty, the Sunnyside Land Company produced a condition which authorized a court of equity to take the security into its hands for the purpose of realizing the sums for which it was liable, the provision for minimum prices fell with the provision authorizing the land company to make the sales, and the court was authorized to direct a sale in any just and equitable manner. We see no objection to the manner that is here adopted.

The point is made that the judgment does not follow the findings in that it authorizes payment to the California Title Insurance & Trust Company of amounts due to it individually, in addition to the sum of $165,627.71, payable to it as trustee. Reading the decree as an entirety, there can be no question that it intended to provide and did provide that the sums due to the California Title Insurance & Trust Company individually should be deducted from the total sum of $165,627.71 to be received by it from the proceeds of the sales.

We find no prejudicial error in any rulings made by the court upon the admission or rejection of evidence, nor is any other point made by the appellants that requires notice.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.

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150 Cal. 258

KING v. DUGAN et al. (S. F. 3,942.)

(Supreme Court of California. Jan. 10, 1907.)

1. Appeal — Presentation of Grounds of Review—Motion for New Trial—Service of Statement—Failure to Serve in Time — Relief from Court — Sufficiency of Showing.

A statement on motion for a new trial which showed that objections thereto for failure to serve in time were heard in open court and submitted on plaintiff's affidavits of mistake, surprise, and excusable neglect under Code Civ. Proc. § 473, authorizing relief in such case, defendants' counter affidavits and plaintiff's affidavit in rebuttal and that they were, "after consideration, overruled, and said statement ordered settled and filed," sufficiently showed that plaintiff was relieved by the trial court, under Code Civ. Proc. § 473, from the effect of her failure to serve the statement in time so as to authorize consideration of such statement on appeal.

2. Dedication—Estoppel to Deny—By Record of Plat.

Where the owner of land caused a portion thereof to be surveyed and subdivided into blocks, lots, and streets, a map showing the subdivisions and streets to be filed in the office of the county recorder, and subsequently sold and conveyed lots by reference to such map, a person thereafter acquiring from the owner title including the fee in the streets designated in the survey held it under the same conditions as her predecessor and subject to the same burden; and hence she was bound by his declaration of record that the land constituted portions of public streets, and was not entitled to possession thereof against purchasers from him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 34-47, 77.]

3. Ejectment — Equitable Defenses — Persons Against Whom Available.

Where plaintiff in a suit to quiet title to certain lands against the holder of the legal title, after having obtained the relief sought, brought an action of ejectment, with notice of equities existing in favor of defendants in such action, she stood in the position of the former holder of the legal title with full notice of the equities of defendants; and hence, where, by reason of a mistake in a deed from the former holder of the legal title to defendants' predecessor, defendants had a perfect equitable right as against the former holder, such equitable right was a full and complete defense in the action of ejectment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 107–109.]

Department 1. Appeal from Superior Court, San Mateo County; Geo. C. Buck, Judge.

Action by Frances V. King against Charles E. Dugan and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Edward J. Linforth, for appellant. Geo. C. Ross, for respondents.

ANGELLOTTI, J. This is an action in ejectment. Judgment went for defendants, and plaintiff appeals from an order denying her motion for a new trial.

Defendants make a preliminary objection to any consideration by this court of the statement on motion for a new trial, on the ground that no statement was prepared or served within the time prescribed by law, or as extended by stipulation of counsel or any valid order of court. Admittedly the proposed statement was not served in time. Objection to the settlement of the statement was duly made and overruled. In the absence of action on the part of the trial court made upon a proper showing under section 473, Code of Civil Procedure, relieving plaintiff from the effect of her failure, the statement could not be considered here. See Cameron v. Railroad Co., 129 Cal. 279, 282, 61 Pac. 955; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893. It is claimed that there was no such action on the part of the trial court. We think that the statement sufficiently shows such action. It is true that what purport to be, first, a notice of motion for such relief and the settlement of the statement, and second, a minute order granting said motion, printed in the transcript, constitute no proper part of the record on appeal, not being included in any bill of exceptions or statement, and cannot be here considered. See Code Civ. Proc. §§ 661, 952. But it does appear from the statement that, in response to the objections, the only showing made by plaintiff was one by affidavits of mistake, surprise, and excusable neglect under section 473, Code of Civil Procedure. This was met by counter affidavits on the part of defendants, and by an affidavit in rebuttal on the part of plaintiff. The objections were heard in open court, and submitted to the court on these affidavits, and it is stated that they were "after consideration, overruled, and said statement ordered settled and filed." It would doubtless have been better and safer practice to incorporate in the statement a showing in terms that application for relief was made to the court, and also that the court granted the same, but we are inclined to the opinion that this should be held to be the effect of what is said therein. A sufficient showing of excuse was made to preclude us from saying the court abused its discretion in relieving plaintiff from the effect of her default.

The land involved in the action is a small strip 37 feet wide and about 325 feet long. It is the most easterly portion of lot 5, subdivisions of the Mezes Ranch, Belmont, in San Mateo county, adjoining lot 6 of the same tract. One Harriet M. Lewis was originally the owner of both lots 5 and 6, containing 9 acres of land. On February 2, 1893, said Lewis agreed to sell to one W. O. Brown all of said property, subject to a mortgage that covered the same, which Brown subsequently satisfied, and on that day executed her deed to Brown, intending to convey to him thereby and he intending to acquire thereby all of said 9 acres. The description in this deed was by metes and bounds and acreage. The acreage was correctly stated, but, by mistake and inadvertence, the metes and bounds expressed only included lot 6. Said Lewis forthwith delivered possession of all of said 9 acres to Brown. He caused a portion thereof to be surveyed and subdivided into blocks, lots, and streets, and on March 30, 1894, filed in the office of the county recorder of San Mateo county a map showing these subdivisions and streets. The strip of land in suit was the westerly end of block 2 according to said map, being the westerly 37 feet of lots 11 to 19 thereof, both inclusive, prolonged across two streets shown on said map, Cypress avenue and Hill street. West of said strip and adjoining the same, another street, Laurel avenue, was shown on said map, the lots named above fronting thereon. Immediately thereafter he caused the lots shown on the map to be staked out, and the streets to be opened, graded and turnpiked, and ever since then they have been open, and used by the public as desired. He sold and conveyed lots by reference to said map. On April 5, 1894, he mortgaged a portion of the property to the Occidental Building & Loan Association, describing the property mortgaged by reference to said map, including lots 11 to 16, both inclusive, in block 2, as laid out on said map. On January 24, 1900, in foreclosure proceedings brought thereon, a decree of foreclosure sale was given, and at the sale thereunder defendant Charles E. Dugan purchased all of the mortgaged property, and subsequently received the commissioner's deed, and he thereafter transferred the property to the defendant Lydia Dugan, since when she has been in possession thereof. The defendants took the land relying on the correctness of said map both as to lots and streets, and believing that such streets had been dedicated as a means of access to the lots, and will suffer great loss shall the streets be now closed or obstructed. Until

July 26, 1901, Brown continued in possession of all of said lot 5, except that portion embraced in the lots and streets shown on the map, and the lot was assessed every year to and including the year 1901 to him.

Plaintiff's deraignment of title consists of a subsequent deed from Brown to one William F. Sawyer of lot 5 of the Mezes Ranch, a quitclaim deed for the same property dated November 7, 1901, from said Sawyer to her, and a decree quieting her title as to the same property as against Harriet M. Lewis, in an action to quiet title commenced by her on December 27, 1901. Prior to the commencement of her action to quiet title, plaintiff had actual notice of the sale by Lewis to Brown of the whole of lots 5 and 6, and of the error in the Lewis-Brown deed, of Brown's going into possession of all of said property, and of the laying out, opening, grading, and turnpiking of the streets shown on the map.

The foregoing facts are shown by findings as to which there is more than ample support in the evidence. The trial court also found, in addition to the probative facts above stated, that plaintiff is the owner of those portions of the land in controversy that are included in Hill street and Cypress avenue, as shown on said map, and of the portion thereof included in lots 17, 18, and 19 of block 2, according to the Brown map. being the portion not covered by the Brown mortgage under which defendants deraign title, but that she is not the owner or entitled to the possession of the remaining portion of said strip, viz., the portion covered by the Brown mortgage. It further found that she was not entitled to the possession of the portion embraced in said streets, and that defendants had not ousted or ejected plaintiff from any part of the land. Upon these findings, judgment was given for defendants.

It is manifest that, in so far as plaintiff claims under Brown, her only source of title other than the decree quieting her title as against Lewis, her rights are subordinate to those of defendant Lydia Dugan, who acquired by mesne conveyances under a prior deed from Brown. Said defendant acquired under this chain of deeds as against Brown the absolute ownership of that portion of the land in controversy, which is included in the lots purchased at the foreclosure sale, being portions of lots 11 to 16, both inclusive, of block 2. Regardless of any question as to whether the portions of said strip included in Cypress avenue and Hill street became public highways, there can be no question that, as to those acquiring under Brown according to and on the faith of the map filed by him, they became highways as against Brown and his successors. They acquired the same rights as to the land shown on the plat as such streets as against Brown and his successors, as they would if such streets were in fact public streets. Their rights in this respect are established under the doctrine of estoppel in pais, which is held applicable to the vendor who has declared to the purchaser that the parcels are streets, in favor of those who act thereon in making the purchase. The matter has been discussed many times by this court, but it is unnecessary to do more here than to cite the case of Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186. So far, therefore, as plaintiff acquired under Brown, while she acquired the fee in the streets, she held it under the same conditions as her predecessor had held it, and subject to the same burden. As to those who had purchased under him on the faith of his declaration of record that the land constituted portions of public streets, she was bound by such declaration equally with him (Code Civ. Proc. § 1849), and therefore was not entitled to the possession thereof as against such purchasers.

As to the claim of plaintiff based upon the decree quieting her title to all of the property as against Lewis: The trial court found, upon sufficient evidence, that plaintiff commenced this action with full notice of defendants' equities. The utmost possible effect of the decree was to make plaintiff the successor, with full notice of the equities of defendants, of such rights as Lewis had in the property on the day the action to quiet title was commenced, December 27, 1901. Conceding that the bare legal title to the land in controversy was then in Lewis, defendant Lydia Dugan, by reason of the probative facts found as to the mistake in the deed from Lewis to Brown, had, as successor and purchaser from Brown, a perfect equitable right as against Lewis to the land she had purchased under Brown, and to the unobstructed use as streets of the necessary streets depicted on the Brown map, including Hill street and Cypress avenue. It is well settled that such equitable rights constitute a full and complete defense as against the bare legal title in an action of ejectment. See Hoppough v. Struble, 60 N. Y. 430; Walker v. Brem, 67 Cal. 600, 8 Pac. 320; Meeker v. Dalton, 75 Cal. 154, 158, 16 Pac. 764. In the last case cited, the defense was asserted by the successor of the grantee in whose deed the mistake was first made (the mistake being repeated in the deed from such grantee to the defendant, Dalton), and sustained as against a subsequent grantee with notice of the original grantor. This court said: "It is apparent that when Ringer (the original grantee) purchased and went into possession of the lot in controversy, he became the equitable owner of it, and, when he sold to the defendants, the latter succeeded to all his rights. It is also apparent that, when the plaintiff received his deed to the lot, he took only such right as his grantor had, and that was the naked legal title. The defendant, then, having the equitable title, coupled with the possession, the question is, could he set up that title as a defense to an action of ejectment brought against him by the holder of the legal title?" It was held that he could. Quoting from Hoppough v. Struble, supra, and declaring that the same rule obtains in this state, the court said: "A reformation of the deed is not necessary, but the same facts which will entitle defendant thereto will establish his equitable right to possession, and constitute a defense as effectual as the legal title." We can conceive of no good reason why this defense is not as available against plaintiff, the successor of Mrs. Lewis, with full notice of defendants' equities, as it would have been against Mrs. Lewis herself.

It thus appears that the conclusion of the trial court to the effect that plaintiff was not entitled, as against defendant Lydia Dugan, to the possession of any portion of the land in controversy other than the small portion thereof included in block 2, being portions of lots 17, 18, and 19 thereof, was the necessary result of the specific probative facts found, the finding as to the right to possession of those portions included in Cypress avenue and Hill street being construed, as it must be when taken in connection with the other findings, to mean no more than that plaintiffs are not entitled as against said defendant to any such possession as would interfere with the use thereof as streets. This finding as to the right to possession is, under the circumstances shown by the record, sufficient to require the judgment that plaintiff take nothing by her action. It is unnecessary to consider the question as to whether the finding that plaintiff is not the "owner" of the portion of block 2 of which the defendant Lydia Dugan is the equitable owner, is technically correct or not. She did have the bare legal title thereto, but nothing more, and this bare legal title was ineffectual for any purpose as against the defendants' equities.

There is no other point made requiring notice.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

150 Cal. 277

CITY STORE v. SAN JOSE–LOS GATOS INTERURBAN RY. CO. (S. F. 3,809.)

(Supreme Court of California. Jan. 10, 1907.)

STREET RAILROADS — RESTRAINING USE OF STREET.

The complaint of an abutter on a street to enjoin the construction and operation of a street railroad in the street, which it is alleged defendant is about to do without right, does not show that the public nuisance will be specially injurious to plaintiff, in which case only, under Civ. Code, § 3493, can he maintain the action, by the statement of the conclusion that, by reason of the construction and operation, the property right of plaintiff will be irreparably injured, in that the value of the property will be greatly diminished, free access to it irreparably impaired, and the rental value permanently decreased; this not being a statement of facts, as is necessary, from which the court can determine whether plaintiff's apprehensions are well founded.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the City Store against the San Jose-Los Gatos Interurban Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

John H. Yoell, for appellant. Cobb & Rea and O'Neal & Richardson, for respondent.

LORIGAN, J. This action was brought to permanently restrain the defendant from constructing, operating, and maintaining a street railroad over Market street, a public street in the city of San Jose. A general demurrer to the complaint having been sustained, and plaintiff declining to amend, judgment was entered for defendant, and from this judgment plaintiff appeals.

The only point presented on the appeal is as to the correctness of the ruling of the lower court upon the demurrer. The plaintiff alleged the corporate existence of plaintiff and the defendant railway company; that plaintiff is the owner in fee of real estate on the east line of South Market street in the city of San Jose, adjacent and contiguous to and abutting upon the line of said street; that said city of San Jose is a municipal corporation, and South Market street is a public street within the corporate limits thereof; that the defendant, "without right so to do, is about to commence the construction in and upon and over the said South Market street, and, without right so to do, maintain and operate a double-track street railway" thereon, and that the line of said proposed railway is in front of, adjacent to, and contiguous to said real estate of plaintiff; that, in the event of the construction, maintenance, and operation of said double-track street railway as proposed to be constructed, "the property of plaintiff and the property rights of plaintiff will be irreparably injured and damaged, in this, that the value of said property will be greatly diminished, free access in and to the said property will be irreparably impaired, and the rental value of said property greatly and permanently decreased"; that plaintiff has no adequate remedy at law.

These are the material allegations of the complaint, and it is quite manifest that the theory upon which the complaint was framed was that the construction of said street railroad on the public street, without right, as alleged, would constitute a public nuisance, the creation of which would be specially injurious to the plaintiff. Undoubtedly a railroad constructed on a public street without authority would constitute a legal obstruction, and hence be a public nuisance (Amestoy v. Electric R. T. Co., 95 Cal. 311, 30 Pac. 550), which any private person might sue to abate, or the threatened construction of which he might enjoin, where his property is, or will be, specially damaged or injured through its existence. This is the general rule of the authorities, and finds expression in our Code. "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." Civ. Code, § 3493. In order, therefore, to warrant the maintenance of an action by a private individual to abate or restrain the construction of a public nuisance, it is not enough to allege that injury has been or will be sustained by him thereby, but it is essential that it appear by proper allegations in the complaint, to be supported by proof upon the trial, that this injury is, or will be, special in character to him; that is, that such injury will not only be greater in degree, but will be different in kind from that sustained by the public generally. Among many of the cases to this effect are Aram v. Schallenberger, 41 Cal. 449; Lewiston Turnpike Co. v. Shasta Wagon Road Co., 41 Cal. 562; Payne v. McKinley, 54 Cal. 532; McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618; Siskiyou Lumber, etc., Co. v. Rostel, 121 Cal. 513, 53 Pac. 1118; Reynolds v. Presidio & Ferries Railroad Co. (Cal.) 81 Pac. 1118.

It is alleged that the defendant is about to commence the construction of the railroad on a highway upon which plaintiff's property fronts will constitute a nuisance—a public nuisance. Being a public nuisance, it was essential that, within the above rule, plaintiff distinctly avers some special injury to its property which it would sustain by its construction, before it could maintain an action for its abatement. The most common form of injury, which the owner of land abutting upon a public highway specially sustains as to his property by reason of the obstruction of the highway in front thereof, arises from the fact that such obstruction will interfere with the easement incident to his property of free access from it to the public highway. Where the obstruction of the public highway has this effect, it becomes as to the owner of property abutting thereon a private nuisance, which he may have abated. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; Helm v. McClure, 107 Cal. 205, 40 Pac. 437. But, in order to warrant the interposition of a court of equity to grant this relief, facts must be alleged in the complaint from which it shall appear that the obstruction of the highway will be specially injurious to plaintiff's property abutting thereon, and it is quite evident that the complaint at bar does not state these facts. It is alleged that the defendants are about to commence the construction of a double-track street railroad on the street in front of the property of plaintiff without right to do so, and that by reason thereof the property rights of plaintiff will be irreparably injured, in this, that the value of the property will be greatly diminished, free access to it irreparably impaired, and the rental value permanently decreased. These allegations of irreparable injury in general, and the particular specifications relative to it, amount to nothing more than the expression of an opinion or the conclusion of the pleader. They do not constitute a statement of facts from which the court could determine whether the apprehensions of plaintiff that its property would be specially injured by the construction of the street railroad were well founded or not. General allegations of irreparable injury are never sufficient—the facts must be stated from which it will appear that irreparable injury will probably follow.

Under the authorities, no right of action could accrue to the plaintiff from the mere fact that there was an unlawful obstruction of the public highway. In order to warrant an action therefor at its instance it must appear that it is specially injured in its property by such obstruction. This right of action proceeds, not from the fact that the obstruction is a public nuisance, but because as a public nuisance it specially injures his property, and whether it does or not could only appear from a statement of facts relative to the nature of the obstruction, and from which the court could determine whether the plaintiff's claims of special injury arising therefrom were well founded or not. Now, as to the construction of said railroad: It is only alleged that defendant proposes to unlawfully construct it and operate it on the public street. The simple construction of a railroad along a public street would not necessarily injure the property abutting thereon. It would not be the creation of such a public nuisance that necessarily special injury would follow from it. If such injury would be suffered, it must proceed from the method of the construction, maintenance, or operation of the road. In the complaint, however, there is no statement as to any of these matters. It does not appear what is the width of the street over which it is proposed to construct this road; the proximity of the tracks to plaintiff's property; whether any embankments or depressions will be created preventing access to his property: or that the operation of the road itself will affect him. The complaint is silent as to any fact relative to the construction or operation of said road, or as to any fact from which it can be determined that any injury, special or otherwise, will result to the plaintiff. The complaint was defective in not having stated any facts from which it would appear that special injury to plaintiff's property would result from the creation of the alleged public nuisance, and hence the demurrer to it was properly sustained.

Judgment affirmed.

We concur: McFARLAND, J; HENSHAW, J.

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150 Cal. 327

ANAHEIM UNION WATER CO. et al. v. FULLER et al. (L. A. 1,629.)

(Supreme Court of California. Jan. 19, 1907. Rehearing Denied Feb. 18, 1907.)

1. WATERS AND WATER COURSES — NATURAL WATER COURSES — RIPARIAN RIGHTS — BED AND BANK OF STREAM—RIGHT TO WATER.

The fact that land forms part of the wide bottom extending between higher lands on each side of a stream, and is underlaid by an underground flow, which is a part of the surface stream, does not make it part of the bed of the stream, nor render it nonriparian, where it has been successfully cultivated and irrigated for many years.

2. SAME—RIPARIAN OWNERS—WHO ARE RIPARIAN OWNERS.

Land not within the watershed of a stream is not riparian thereto, and is not entitled to the use or benefit of the water from the stream, although it may be part of an entire tract which does extend to the river.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 31.]

3. SAME.

Where two streams unite, the rule in regard to the riparian rights therein is that each is considered as a separate stream with regard to lands abutting thereon above the junction, and that lying within the watershed of one stream above that point is not riparian to the other, even though both lie in one drainage basin and are separated only by a low tableland.

4. SAME—CONVEYANCE—RIPARIAN RIGHTS.

Where the owner of land abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby deprives the part so conveyed of riparian rights in the stream, unless the conveyance declares the contrary, and land thus severed from the stream can never regain the riparian right, although it may thereafter be conveyed to the person who owns the part abutting on the stream.

5. SAME—RIPARIAN RIGHTS—WHAT CONSTITUTES A WATER COURSE.

The fact that land lies contiguous to an underground flow connected with the surface stream does not give the owner of this land riparian rights in the surface stream.

6. SAME—APPROPRIATION AND PRESCRIPTION—DIVERSION—INJUNCTION.

A wrongful diversion of the waters of a stream will be restrained at the instance of a person having riparian rights in the stream, although no actual damages are averred or proved; the relief being granted to prevent the wrongful acts from ripening into a right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 84, 85.]

7. SAME—DIVERSION—ACTION—INJUNCTION.

A holder of riparian rights in a stream has the right to have a wrongful diversion of the waters thereof enjoined, even though there is plenty of water remaining in the stream for his use after the wrongful diversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 85.]

Department 1. Appeal from Superior Court, Riverside County; Benj. F. Bledsoe, Judge.

Action by the Anaheim Union Water Company and another against O. B. Fuller and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. W. Freeman, for appellants. E. E. Keech, Richard Melrose, John D. Pope, and A. W. Hutton, for respondents.

SHAW, J. This is an action to enjoin the defendants from diverting water from the Santa Ana river. Judgment in favor of the plaintiffs as prayed for was given in the court below. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The plaintiffs own lands through which the Santa Ana river flows. They have been accustomed for many years to irrigate this land with waters from the river, and for that purpose there is required, during the irrigating season, a continuous flow of 400 miners' inches of water. The defendants, or some of them, own land on the river, situated above the land of the plaintiffs, and upon it they had built a dam in the river and were thereby diverting water from the stream, which, by means of a ditch, they were conducting to other lands owned by them and were there using it for irrigation. The plaintiffs claim, and the court found, that the land which the defendants were thus irrigating with water from the river was not riparian thereto. The sufficiency of the evidence to support this finding, and the question whether or not the plaintiffs' land is entitled to riparian rights in the river, are the principal questions presented upon the appeals.

1. The defendants claim that the land of the plaintiffs lies within, and constitutes a part of the bed of the stream, and contend that such land is not riparian, nor, as such, entitled to the use of the water of the stream. It appears that the land consists of good soil, capable of producing valuable crops, that it abuts on the river, and that it has been successfully cultivated and irrigated by the plaintiffs and their predecessors for many years. The only facts upon which the claim that it is nonriparian is based are that it forms part of the wide bottom extending between higher lands or bluffs on each side; that the course of the river channel is subject to changes by unusual floods, although no substantial change has occurred for 40 years last past; and that the land is all underlaid by an underground flow, in contact with, and forming a part of, the surface stream. We are of the opinion that land thus situated is not to be distinguished from other land abutting on the stream, so far as the right of the owner to the reasonable use of the water is concerned. We know of no principle of riparian rights that would except such land from its benefits, nor of any decision to that effect. The opinion in Ventura L. & P. Co. v. Meiners, 136 Cal. 284, 68 Pac. 818, 89 Am. St. Rep. 128, contains nothing that can be so construed. It appears to decide that land may be riparian to a stream, although it does not abut thereon, except when the stream is swollen by floods. Without conceding the soundness of the decision so far as it seems to decide that the owner of such land may take water from the stream, at its ordinary flow, as against other owners whose lands abut upon such ordinary stream, we think it is clear that the discussion in the opinion as to the character of the ground lying between the edge of the stream at its ordinary flow, and the line of high water when in flood, has no reference to the right of the owner of such intervening land, as a riparian owner, to use the water of the stream for any useful purpose which his position upon the stream enables him to make of it. The land here involved was not at all similar to the land described in the opinion in that case. The case of Diedrich v. N. W. U. Ry. Co., 42 Wis.

264, 24 Am. Rep. 399, is not in point. It refers to the rights of the owner of land lying wholly under the bed of a navigable lake, and holds that such owner may not erect wharves or other structures thereon which would interfere with navigation, and that, in that respect, he has not the right of one owning land along the bank of such lake to erect wharves in aid of navigation for his own use. There is nothing in that opinion to indicate that the owner of land which was under the bed of an ordinary stream might not, by virtue of the position of his land, have such benefit from the water as he could get from it. This question, however, is not involved in the case at bar, for we are of the opinion that the plaintiffs' land was not in the bed of the stream in any proper sense of the term.

2. Some distance below the land of the plaintiffs a tributary, known as "Chino creek," enters the Santa Ana river. Chino creek also has a tributary, known as "Mill creek," which enters Chino creek 1½ miles above the confluence of the latter with the Santa Ana river. The defendants take the water from the river, above the land of the plaintiffs, in a ditch which extends across the low bottom to the high land or bluff, and then extends along the bluff, at a grade less than that of the river, gradually getting further above and away from the river until it reaches and crosses the divide, or summit of the elevated land, between the watershed of the river and that of Mill creek. The court found that the land irrigated with water from this ditch lies beyond this divide, and is wholly within the watershed of Mill creek, and that it does not abut upon the stream of the Santa Ana, and is not riparian thereto. Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. Chauvet v. Hill, 93 Cal. 410, 28 Pac. 1066; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Southern Cal. I. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

The defendants claim that these findings are contrary to the evidence, and that this rule does not apply to the land they seek to irrigate, because, while it is wholly within the Mill creek watershed, it is also within the general watershed of the Santa Ana river, considered as an entirety including the valley from its sources to its mouth. This fact does not affect the case, at least so far as the land of the plaintiffs is concerned. The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, with regard to lands abutting thereon above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed, or drainage basin, should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low table land, or "mesa," as it is called in the evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case. In some cases it may be difficult to distinguish the line of separation. This seems to have been a case of that sort. Nevertheless, we think there is evidence sufficient to support the finding of the court that there is a dividing line between the two watersheds, and that the land irrigated by defendants lies upon the slope which descends into Mill creek. It is not necessary to discuss this evidence in detail.

The evidence also supports the finding that the land irrigated by the defendants does not abut upon, or extend to, the river. If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership. Boehmer v. Big Rock C. I. Dist., 117 Cal. 26, 48 Pac. 908; Alta Land Co. v. Hancock, 85 Cal. 229, 24 Pac. 645, 20 Am. St. Rep. 217; Lux v. Haggin, 69 Cal. 424, 10 Pac. 674; Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. 835, 738, 70 L. R. A. 964, 107 Am. St. Rep. 653; 2 Farnham on Waters, 1572, § 463a. All the land belonging to the defendants, including the Smith tract, which was in part irrigated, was originally a part of the Jurupa rancho, which abutted upon the river. The original owner of that rancho subdivided it by arbitrary lines, corresponding to the government surveys, and sold and conveyed it in parcels according to that survey. Under the rule above stated the conveyance by him of a tract not contiguous to the stream would sever such tract from the riparian interest and deprive it of subsequent participation in the use of the water of the river, the right to which previously attached to the entire rancho. The tract which includes the irrigated land of the defendants is not at any point contiguous to the river. At the time the action was begun it was owned by the defendant Smith. He was not the owner of any adjoining land which lay contiguous to the river. After the action was begun he conveyed this land to certain of the other defendants, some of whom owned adjoining lands extending from the Smith land to the river. This subsequent conveyance gave those defendants a continuous ownership of land extending from the river to and including the Smith land. This contiguous ownership, however, did not confer upon the Smith land the riparian rights of which it was deprived, when Smith, or his predecessors, obtained it by a conveyance which severed it from the portion of the Jurupa rancho abutting upon the river.

It seems to be contended that, for the purpose of determining what lands are riparian, the river is to be considered as including all the space through which its underground flow extends, as well as that occupied by the surface stream. It is claimed, and apparently conceded by the respondents, that the Smith tract, at one or two of its angles, extends into the low bottom under which the underground water flows or percolates, and upon this circumstance riparian rights are asserted to accrue. It is not necessary here to decide what rights to the use of the underground flow of a stream may, by virtue of its position, attach to land which abuts upon, or extends into or over such waters, but does not extend to the surface stream. We are certain that such location of the land, with relation to the stream, does not carry the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from such surface stream, and there apply it to use on the latter, to the injury of lands which abut upon the proper banks of the surface stream, and hence that, even if the Smith land were within the watershed, such location upon the underground flow does not justify the diversion the defendants were making from the surface stream for use upon that tract.

3. It is further contended that the plaintiffs' land is in no wise damaged by the diversion complained of, and hence that the diversion cannot be enjoined. Upon this proposition the decisions of this court, and the general principles of law regarding injunctions, are against the theory of the defendants. In Southern Cal. I. Co. v. Wilshire, supra, speaking of the right of a lower riparian proprietor to enjoin a diversion of a part of the stream for use outside of the watershed of the stream, leaving enough in the stream for any use which had theretofore been made, or was then proposed to be made, by the lower riparian proprietor on his land, the court said: "It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right, which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined"—citing Moore v. Clear L. W. Co., 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Fowler S. C. Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Conkling v. Pac. I. Co., 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198. All of these authorities fully sustain the proposition to which they are cited. In Stanford v. Felt, supra, the court says: "Nor is the owner lower down the stream required to show in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right. [Citing authorities.] To prevent such result, an injunction will be awarded." The same proposition is reiterated in the other cases. The defendants, in opposition to the above decisions, cite the case of Modoc L. & L. Co. v. Booth, 102 Cal. 151, 36 Pac. 431, and Vernon I. Co. v. Los Angeles, 106 Cal. 243, 256, 39 Pac. 762. In the Modoc Case, however, it appear that "during the months of June, July, August, and September, when respondent used the small quantity of water appropriated by him, the full flow would have worked an injury rather than a benefit to appellants, and they sought to avoid the injury by maintaining expensive diverting and drainage works," to turn off the water and keep their lands from being overflowed. The decision was evidently based on the doctrine, stated in some of the decisions, that a diversion of water during times of extraordinary floods, which does not perceptibly diminish the stream below, will not be enjoined. Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Heilbron v. 76 L. & W. Co., 80 Cal. 194, 22 Pac. 62; Fifield v. S. V. W. W., 130 Cal. 552, 62 Pac. 1054; Black's Pom. Water Rights, § 75. Unless it can be so reconciled, the case is contrary to all the other decisions of this court above cited and to the settled principles of law, and must be disregarded. In Vernon I. Co. v. Los Angeles the plaintiff was not claiming any injury or damage by virtue of his riparian ownership, but was asserting the right to divert water for use upon lands not riparian against the city of Los Angeles, which was asserting its pueblo right, and what was said in that case, with respect to the necessity of showing injury, must be taken with the qualifications made evident by the character of the case and by the concurring opinion of Mr. Justice McFarland. The conditions existing in those cases do not exist in the case at bar. The court finds, on sufficient evidence, that the diversion of the defendants, if allowed, would render plaintiffs' land much less fertile and valuable. The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no ques-

tion of the diversion of flood water involved in the case. The right which they assert is the right to take the ordinary water of the stream, and hence the doctrine of the Modoc Case does not apply.

On this point the defendants cite several cases in which it is held that a lower riparian owner cannot enjoin a diversion by another riparian proprietor above, unless he can show that such diversion works damage to him, and that it is more than a just proportion of the water to which the upper owner is entitled. Such decisions are not applicable to this case. Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share and injures and damages the other thereby. Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs' property rights from the beginning, and the continuance of the trespass for a sufficient time would divest the right of the plaintiffs with respect to the water diverted. The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner upon his land, to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and, if an injunction can issue at all therein, it can be only when one owner takes more than his due proportion and damage to the other ensues from such excessive taking.

The defendants urge that inasmuch as the plaintiffs need but 400 inches of water for their land, and there remained in the stream, after defendants' diversion, more than 2000 inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance; and hence that their diversion should not be enjoined. The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream; each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above and below by those having rights in the stream. In view of the well-known aridity of the climate, and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right.

The findings support the judgment, and we are unable to perceive any substantial or material conflict in them. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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150 Cal. 265

BUILDERS' SUPPLY DEPOT et al. v. O'CONNOR et al. (No. 3,903.)

(Supreme Court of California. Jan. 10, 1907. Rehearing Denied Feb. 7, 1907.)

1. MECHANICS' LIENS—PERSONAL JUDGMENT.

In an action to enforce a mechanic's lien for material and labor furnished by subcontractors, it was error to enter a personal judgment against the landowner; the claim being enforceable only against the land.

2. SAME—SET-OFFS.

Code Civ. Proc. § 1184, provides, in relation to mechanics' liens, that as to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner, and against the contractor. *Held*, that the statute refers to offsets not arising under the terms of the contract, and the owner, in a suit by a subcontractor, is entitled to set off damages because of the delay in the completion of the building as required by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 447, 448.]

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW.

Code Civ. Proc. § 1021, provides that the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties. Section 1195 provides that, in an action to enforce a mechanic's lien, the court must allow, as a part of the costs, reasonable attorney's fees, to each lien claimant whose lien is established. *Held*, that section 1195 is violative of the federal Constitution, guarantying to every person the equal protection of the law.

4. STATUTES—SPECIAL LAWS.

Code Civ. Proc. § 1195, is violative of the state Constitution, providing that general laws shall be uniform, and prohibiting special laws.

5. CONSTITUTIONAL LAW—RIGHT TO ACQUIRE PROPERTY.

Code Civ. Proc. § 1195, is violative of the state Constitution, declaring the unalienable rights of acquiring, possessing, and protecting property.

6. MECHANICS' LIENS—COSTS.

The statute providing for an allowance, to successful claimants in mechanics' lien cases, of the expense of filing their liens, is not unconstitutional.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Builders' Supply Depot and others against Dennis O'Connor and others, being three mechanics' lien cases, which were consolidated and tried together, and Dennis O'Connor and Mary O'Connor, the owners of the land, appeal from a judgment against them. Reversed.

Mullany, Grant & Cushing, for appellants. Barna McKinne, Maurice L. Asher, Wal. J. Tuska, and J. E. Crane, for respondents.

McFARLAND, J. Three mechanics' lien cases were consolidated and tried together, and judgment was rendered against Dennis O'Connor and Mary O'Connor, the owners of the land involved, who appeal from the judgment.

The judgment must be reversed for the following reasons:

1. The actions were not brought by the original contractor; they were all brought for material and labor furnished by plaintiffs as sub-contractors. Nevertheless personal judgments were rendered against the appellants. This was error, as plaintiffs were entitled only to enforce their claims against the land.

2. There was a written contract between appellants, as owners of the land, and the contractors, Barth & Scarf, for the construction of a certain building thereon. This contract was regular in form and was recorded as provided by the Code, and it is admitted that the rights of all parties rest on said contract; the contract providing that the building was to be built for $7,500, and to be finished in five months—and if not finished within the five months the owners were to be allowed whatever damages the delay should cause. The building was not finished until about 2½ months after the stipulated time, and appellants averred and offered evidence to prove that they were damaged by the delay in the sum of $359.50. Respondents objected to this evidence, and the court sustained the objection upon the ground that appellants could not avail themselves of the damage, even if proved, because of a clause in section 1184 of the Code of Civil Procedure that, "As to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor." But it was definitely settled, in Hampton v. Christensen, 84 Pac. 200, 148 Cal. 729, that damages for failure of the contractor to finish the work within the time specified in the written contract may be deducted by the owners as against lienholders, and that "the clause has reference, in the first place to offsets not arising under the terms of the contract, and as to which, from an inspection of the contract, materialmen and laborers could have no notice." The opinion in that case is quite full on the point, and we need not further discuss it here. The appellants were therefore entitled to deduct from the amount of the money remaining in their hands whatever damages they suffered for the delay in finishing the building, and the court erred in refusing to allow them to introduce evidence of such damage.

3. The court allowed an attorney's fee in each of the cases, and appellants contend that such allowance was erroneous because the statutory provision directing the allowance of such a fee is unconstitutional and void. In our opinion this contention must be sustained. In a few instances this court has affirmed judgments for plaintiffs in mechanics' lien cases which included attorney's fees; but our attention has not been called to any case where the question of the constitutionality of the statute providing for such fees has been raised, or presented to the court for adjudication. In the case at bar the question has been for the first time raised.

The statutory provision in question is found in section 1195, Code Civ. Proc., and is as follows: "The court must also allow, as a part of the costs, * * * reasonable attorneys' fees * * * to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant." It is to be noticed that this section provides for an attorney's fee to plaintiff, but not to defendant, even though the latter be successful in the action, and that attorney's fees are allowed even to plaintiff, only in actions under the mechanics' lien law; the general rule being that "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Code Civ. Proc. § 1021. This provision is, in our opinion, violative both of the federal and the state Constitutions—of the 14th amendment of the former, which guaranties to every person "the equal protection of the law," and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed. That said law is violative of the fourteenth amendment to the federal Constitution was established by the Supreme Court of the United States in Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. In that case the statute of the state of Texas allowing attorney's fee to any person having a bona fide claim against a railroad company for services, or for damages, or for stock killed, was held to be unconstitutional because violative of the said fourteenth amendment. The court, speaking of the statute, said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover, if right, and pay nothing, if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the decisions of several states a statute similar to the one involved has been held unconstitutional. The question is elaborately discussed by the Supreme Court of Colorado, in Davidson v. Jennings, 60 Pac. 354, 27 Colo. 187, 48 L. R. A. 340, 83 Am. St. Rep. 49, and a statute of that state similar to ours declared void. The opinion rendered in the case is an exhaustive one, and we will make only a few quotations from it. After stating the statutory provisions, the court says: "It will be seen that this section imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious." And the court further says: "We are unable to perceive any reason why, in actions to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provisions or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim. He may, nevertheless, be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense or makes an honest though unsuccessful one, or allows judgment to be taken against him by default. He is subjected to the same penalty." Many cases are cited which sustain the opinion. This case was afterwards expressly approved by the courts of Colorado. See Perkins v. Boyd, 65 Pac. 350, 16 Colo. App. 266, and cases there cited.

In Atkinson v. Woodmansee, 74 Pac. 640, 68 Kan. 71, 64 L. R. A. 325, the Supreme Court of Kansas held unconstitutional a clause of a Kansas statute as follows: "In any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." It will be observed that in this statute the special advantage is given only to the "artisan or day laborer," and not to materialmen who constitute the main lien claimants in California; but the provision was, nevertheless, held void. The court says: "Under the Constitution of the state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. * * * The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others"—and then follows a quotation from the case of Gulf, etc., R. Co. v. Ellis, above noticed.

In Hocking Val. Coal Co. v. Rosser, 41 N. E. 263, 53 Ohio St. 12, 29 L. R. A. 386, the Supreme Court of Ohio held unconstitutional a statute providing that in an action for wages the plaintiff should recover an attorney's fee. The court said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney's fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law." And, further, the court say: "Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific, real or personal property. An adverse result in either case deprives the defeated party of property."

In Grand Rapids Chair Co. v. Runnels, 43 N. W. 1006, 77 Mich. 104, the Supreme Court of Michigan held that a statute authorizing an attorney's fee to be taxed to the party in a judgment for personal services was unconstitutional—being an attempt to give special advantages to one class at the expense of another. In Wilder v. Chicago Ry. Co., 38 N. W. 289, 70 Mich. 382, the Supreme Court of Michigan held that an act authorizing an attorney's fee against a railroad company in an action for injury to stock was unconstitutional and void. In Openshaw v. Halfin, 68 Pac. 138, 24 Utah, 426, 91 Am. St. Rep. 796, the Supreme Court of Utah held that a statute allowing attorney's fees to plaintiff in an action to compel the release of a mortgage was unconstitutional as special legislation, and violative of the constitutional principle of equal protection to all. See, also, Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500.

In the opinions rendered in the cases above noticed there are many citations of authorities sustaining the opinions; but we have been unable to verify these citations on account of the difficulty of access to books since the recent destruction here by fire of law libraries. We are satisfied with the reasoning on the point in the cases which we have cited and quoted from, and deem it unnecessary to discuss the matter further. Upon the three grounds above stated the judgment must be reversed.

Appellants also make the contention that the court erred in allowing plaintiffs as costs the expense of filing their liens, upon the ground that the statute providing therefor is unconstitutional; but in our opinion this contention is not maintainable. The Constitution imposes upon the Legislature the duty of providing for these liens, and, as the filing of the liens is part of the legislative method of perfecting them, we think that the small expense of such filing is properly included in the phrase "costs and disbursements."

The judgment is reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; LORIGAN, J.

(150 Cal. 326)

JOHNSON v. GERMAN AMERICAN INS. CO. et al. (S. F. 4,218.)

(Supreme Court of California. Jan. 19, 1907.)

1. Exceptions, Bill of—Authority to Allow or Settle — Judges — Disqualification to Act—Relationship to Attorney.

Code, Civ. Proc. § 170, provides that "any" judge related within the third degree to defendant's attorney is disqualified from sitting in any action or proceeding, except as to "the arrangement of the calendar" or "regulation of the order of business." Section 1054 provides that orders extending the time for filing and serving bills of exception settled for use on motion for new trial or appeal from the judgment may be made by the judge of the county where the action is pending. *Held*, that such order extending time for filing bill is not embraced in its exceptions.

2. New Trial—Failure to File Statement—Motion for Relief—Waiver.

Where plaintiff, at the time its motion for a new trial was argued, made a conditional motion to be relieved from failure to serve its proposed statement in time, under Code Civ. Proc. § 473, but did not press the motion to a ruling by the court, but submitted its case upon the record then existing, it waived and abandoned such motion.

Department 1. Appeal from Superior Court, San Mateo County; Hiram D. Tuttle, Judge.

Action by Elizabeth D. Johnson against the German American Insurance Company and others. From a judgment in favor of plaintiff, defendant German American Insurance Company appeals. Affirmed.

Corbet & Goodwin and E. F. Fitzpatrick, for appellant. Chas. S. Peery and R. H. McGowan (Galpin & Bolton, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying a motion for a new trial, in an action brought and tried in the superior court of San Mateo county upon a policy of insurance against loss by fire. The only matters discussed in appellant's brief are as to the insufficiency of the evidence to justify the verdict, and instructions given to the jury. It was attempted to present the questions so discussed by bill of exceptions settled for use on the motion for a new trial. It is claimed that appellant's proposed bill of exceptions on motion for a new trial was not served within the time provided by law, and, therefore, could not be considered either on the appeal from the judgment, or on the motion for new trial, or the appeal from the order denying such motion. This objection was never waived by plaintiff. Upon this ground plaintiff objected to the hearing of the motion for a new trial in the lower court, and moved to dismiss all proceedings thereunder, but the court refused to dismiss on this ground, heard the motion for a new trial, and denied it. If there was no bill of exceptions which could be considered on the motion for a new trial, the order denying the new trial must be affirmed, for otherwise no error is shown in the action of the lower court. The same is true as to the judgment appealed from.

We can see no good answer to the claim that appellant's proposed bill of exceptions was not served in time. Concededly it was not served in time unless an order attempted to be made granting appellant an extension of time within which to serve it was valid. This order was made September 7, 1904, by the judge of the superior court of San Mateo county. By reason of the fact that said judge was related to an attorney for appellant, by affinity within the third degree, he was, by express provision of statute, prohibited from sitting or acting as judge in the case, and for this reason a judge of the superior court of Santa Clara county had presided at the trial of said action. The language of our statute upon the subject (Code Civ. Proc. § 170), as it existed at the time of this order and until the amendment of 1905, was, so far as is here material: "No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: * * * (2) When he is related to either party, * * * or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law. * * * But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring an action or proceeding to some other court, or the hearing upon such affidavits and counter affidavits" (affidavits alleging and denying bias or prejudice). The statute thus expressly stating the exceptional matters as to which a disqualified judge may act, it must be taken as specifying all such matters, and as absolutely prohibiting the disqualified judge from performing any judicial act not included in the exceptions designated. See People v. De la Guerra, 24 Cal. 77; Estate of White, 37 Cal. 190, 192. The making of an order under section 1054, Code Civ. Proc., extending the time allowed by that Code within which an act in an action or proceeding may be done, is a judicial act, involving the exercise of judicial discretion. Such an order may be made by the judge only "upon good cause shown" to him. He is the sole judge of the sufficiency of the showing, and when he makes such order, he judicially determines the showing to be sufficient, and as a result thereof grants a privilege to one of the parties to the action to which such party would not otherwise be entitled. He thus judicially acts in an action in which he is disqualified to act at all, other than as specified in the exceptions enumerated in the statute. By no reasonable construction of the language used can the making of such an order be held to fall within any of the enumerated exceptions. It is not an order relative to the "arrangement of the calendar" or a "regulation of the order of business," and manifestly no other exception stated could possibly apply. The case before us is, in this respect, precisely the same as that of Frevert v. Swift, 19 Nev. 363, 11 Pac. 273, where it was held, upon a substantially similar statute, that an order of this character could not be made by a judge who was disquaified to act in the case. The reasoning of the opinion in that case appears conclusive to us.

It is suggested that as section 1054, Code Civ. Proc., provides that orders extending time may be made "by the judge of the superior court of the county in which the action is pending, or by the judge who presided at the trial," it was intended to allow the judge of the county, even though disqualified, to make the same; but we are satisfied that the provisions of this section must be read subject to the express prohibition of section 170, Code Civ. Proc., to the effect that no judge shall sit or act in any proceeding wherein he is disqualified by the provisions of that section, other than in the specially excepted cases enumerated therein. The judge of the superior court of San Mateo county was, therefore, without power to make the order extending time. It is overwhelmingly settled that under statutes like our section 170, Code Civ. Proc., as the same existed prior to its amendment in 1905, expressly prohibiting a judge from sitting or acting in certain specified cases, any act of the disqualified judge in violation of the provisions of the statute, is absolutely void wherever brought in question. See note Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 126. See, also, Frevert v. Swift, supra; People v. De la Guerra, supra.

The order extending time within which to serve the proposed bill of exceptions was absolutely void. The proposed bill of exceptions was, therefore, not served in time. In the absence of an order relieving appellant under section 473, Code Civ. Proc., from the effect of the default, upon a proper showing made, the bill should not have been settled or considered on the motion for a new trial. No order relieving appellant from such default has ever been made. There is therefore no legally settled bill of exceptions on motion for a new trial which can now be considered, or which could have been considered on the hearing of the motion for a new trial in the court below. Regardless of the reasons which may have actuated the trial court in denying the motion for new trial, the denial of the motion was necessarily correct, there being no legally settled bill of exceptions or statement showing any error on the trial.

It appears from the bill of exceptions settled on the hearing of the motion to dismiss appellant's proceedings for a new trial, that, at the time the motion was argued and submitted, appellant did make a conditional motion to be relieved from the effect of the failure to serve its proposed statement in time, "if there was such failure," upon the ground of mistake, inadvertence and excusable neglect, and supported such motion by affidavit, which affidavit is not contained in the record. It affirmatively appears from the bill that the trial court never ruled on this conditional motion for relief, and denied the motion for dismissal solely on the ground that there was no default, and appellant acquiesced in this action of the court, not even excepting to the failure to rule upon the motion for relief. It is now suggested that the case may be remanded with directions to the court below to pass upon the motion for relief. We are satisfied that it must be held that the appellant, by thus acquiescing in the action of the trial court and voluntarily submitting its motion for a new trial upon such legal record as then existed, waived and abandoned its motion for relief under section 473, Code Civ. Proc.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

4 Cal. App. 660

THOMPSON et al. v. BANK OF CALIFORNIA et al. (Civ. 240.)

(Court of Appeal, Third District. California. December 31, 1906. Rehearing Denied by Supreme Court Feb. 28, 1907.)

1. TRUSTS—RIGHT TO FOLLOW TRUST PROPERTY OR PROCEEDS—TRUST PROPERTY TRANSFERRED TO THIRD PERSONS.

Defendant's intestate, acting for himself and as the agent and trustee of a second party took a note in which the second party had an interest because of having furnished a part of the consideration for the same. He pledged it to a bank as security for a loan to himself and the bank collected it when due. *Held*, that where the bank had notice of the second party's interest before it had paid over the money collected, it was bound to account to the second party for the proceeds collected after it had been fully paid its loan to defendant's intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 529-538.]

2. SAME.

Where a bank collected a part of the amount due on a note pledged to it, a party having an interest in the note because of having furnished part of the consideration therefor, has a right, after notice to the bank of his interest, to have his proportionate share of whatever was collected.

3. SAME—ACTIONS—DEFENSES.

Where a bank collects money on a note pledged to it by a person since deceased, and before distribution of the funds has notice of the claim of a second party to part of the proceeds collected on the note, it becomes liable to account to the second party for his share of the amount collected, and the fact that a contingent claim for this amount had been filed and allowed by the executor of the deceased does not bar an action by the second party against the bank to recover his share of the proceeds collected on the note.

4. APPEAL—REVIEW—DISCRETION OF LOWER COURT—PLEADING—AMENDMENT.

Where a proposed amendment to an answer was such as was within the discretion of the court, the refusal to allow it will not be disturbed by the Appellate Court, where no abuse of discretion is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Louisa J. Thompson and others against the Bank of California and another in which A. M. Drown, as administrator with the will annexed of the estate of William W. Thompson, deceased, intervened. Judgment for intervener, against defendant bank and defendant, Teresa Bell, as administratrix of the estate of Thomas Bell deceased, appeals. Affirmed.

T. Z. Blakeman, for appellant. James M. Allen, for respondent intervener bank. Drown, Leicester & Drown, for respondent Thompson.

CHIPMAN, P. J. Plaintiffs are heirs at law of William N. Thompson, deceased. Intervener A. N. Drown is administrator with the will annexed of the estate of said Thompson, deceased. Teresa Bell was joined as a defendant in the action as special administratrix of the estate of Thomas Bell, deceased, but was later substituted as administratrix with the will annexed of said Bell, and the action as to defendant George Staacke, formerly executor of the will of said Bell, was dismissed. Objection was made by defendant Teresa Bell to plaintiffs prosecuting the action on the ground that Drown had been appointed administrator of the estate of Thompson, deceased, and had filed his complaint in intervention setting up the same cause of action as that of plaintiffs. The cause was tried upon the issues presented by the complaint of intervener Drown and the answer thereto by defendant Teresa Bell as administratrix. The defendant bank denied the averments of the complaint in intervention except as to the demand alleged to have been made upon it by the intervener. The cause was tried by the court without a jury and the intervener had judgment against defendant bank, from which defendant Teresa Bell, administratrix, alone appeals and comes here on a bill of exceptions.

The complaint of intervener and the answer of Teresa Bell present the issues in the case. These pleadings are somewhat voluminous, but the facts essential to a clear understanding of the issues may be considerably abbreviated. The complaint set forth: That on November 19, 1891, one L. L. Robinson, being indebted to said Thomas Bell in the sum of $28,262.18 and to said Wm. N. Thompson in the further sum of $1,000, executed on said date to Bell, acting for himself and also as the agent and trustee of Thompson, his promissory note for the sum of $29,262.18, the aggregate of the two above sums, said note to bear 5 per cent. interest. Facts are fully set forth showing a fiduciary relation to have existed on the part of Bell towards Thompson prior to November 19, 1891, and subsequently and up to the day of Bell's death, and that Bell was the financial agent of Thompson in California and managed the latter's property, and was charged with the collection of said $1,000 by Thompson, and that it was pursuant to said fiduciary relation that Bell took the said Robinson note in his own name, but that although the said note was in his own name, it was held by Bell as owned in common according to their said respective interests therein; that prior to Bell's death he became indebted to defendant bank, and to secure his said indebtedness he pledged the said note to defendant bank without the knowledge or consent of

Thompson, but with the knowledge of the defendant bank; that said note was owned in common with Bell, and that Bell held Thompson's interest therein as the agent and trustee of Thompson; that Bell died October 16, 1892, and that the executors of his will were duly notified of Thompson's interest in said note, and after investigation acknowledged that he had such interest therein; that the said executors of the will of Bell resigned or were removed, and defendant Teresa Bell became administratrix of his estate; that Thompson died October 15, 1897, and intervener was duly appointed administrator of his estate with will annexed; that about November 5, 1900, and before said note or the indebtedness evidenced thereby, or any part thereof, had been paid to defendant bank, plaintiffs in the action notified it of the aforesaid facts as to Thompson's interest in said note, and that prior to the filing of the complaint in intervention, intervener made demand upon defendant bank for the said sum of $1,000 and interest thereon, but said defendant refused payment thereof; that about the 8th day of December, 1900, defendant bank collected the aforesaid promissory note so held by it as security, to wit: the whole of the principal and a portion of the interest, said amount so collected exceeding by more than $1,500 the amount for which said promissory note was held as security, which said surplus now remains in the hands of said bank and belongs to the estate of said Thompson, deceased, to the extent of said $1,000 and interest thereupon; that the said Teresa, as administratrix, repudiates the claim of intervener thereto, and claims that the whole of said surplus should be paid to her for the benefit of the said estate of Bell, deceased; that intervener is unable to state the amount of interest paid on said note, but that he is entitled to receive a proportionate share thereof; that the estate of Bell is insolvent, as is also the said Teresa, and that, if said surplus were turned over to her, intervener would be unable to recover the said sum of $1,000 or the interest thereon or any part thereof. Intervener prays for judgment for the sum of $1,000 and interest collected or received thereon by defendant bank; that defendant bank be required to account to intervener for all moneys collected or received by it on said promissory note, and that he recover his proportion or share of said moneys; that the court adjudge the rights of all parties in and to the said promissory note and the indebtedness evidenced thereby. Prayer also for general relief.

The answer to the complaint in intervention denies most of its averments. As separate defenses it avers that whatever money Bell owed Thompson at the death of the former was loaned to him by Thompson, and the indebtedness was for money had and received. As a further and separate defense, it is alleged that said Thompson as a creditor of the Bell estate presented for allowance to the executors thereof "a certain contingent claim for the sum of $1,000, contingent upon the payment to the estate of the said Thomas Bell of the said note of L. L. Robinson described in the complaint of intervention for the sum of $29,262.18," which said contingent claim was allowed by said executors and approved by the court. For a further defense, it is alleged that, after the death of Bell, to wit, on February 13, 1893, Thompson presented to said executors his claim, as creditor of said estate of Bell, deceased, wherein he stated that there was on October 16, 1892, a balance on account due and owing to him in the sum of $3,561.63; that the said executors paid the said claim in the month of May, 1893, without any order of the court; that there are other claims against said estate which have never been paid; that the estate is unsettled and the assets thereof are insufficient to pay other claimants "as much on their respective claims as the said Thompson has been paid on his claim as aforesaid." It is not alleged that the said claim for $3,561.63 included the amount now claimed or any part of it. Further answering, defendant Teresa pleads this latter sum as a counterclaim. The court made findings substantially as alleged in the complaint in intervention; that defendant bank collected on the Robinson note on December 7, 1900, the sum of $30,847.18, and thereafter on September 3, 1901, it collected the further sum of $8,325.12, in all $39,172.30, of which $9,910.12 was collected on account of interest; that the total amount received by defendant bank "exceeded by more than $1,500.00 the amount of all indebtedness due or payable to it and secured by the said pledge of said note so made to it by said Thomas Bell"; that of the said sum of $29,262.18, the principal of said security note, $1,000 belongs to and is part of the estate of Thompson, deceased, and of the sum of $9,910.12 collected as interest, the sum of $338.55 belongs to said estate. Judgment passed for intervener for the sum of $1,338.55 against defendant bank, with costs of suit, and that plaintiff take nothing by the action against defendants and intervener. No errors of law in the admission or rejection of testimony are claimed in defendant's brief, and there are no specifications of insufficiency of the evidence to support the findings. The inquiry is therefore confined to the sufficiency of the findings, and to such questions of law as are properly raised by defendant.

1. It is contended that because the court failed to find that the Robinson note was pledged without the consent of Thompson, and failed to find that the bank had notice at the time of the pledge of Thompson's interest in the property pledged, the judgment has no sufficient support. There was evidence, and the court found that before the bank had paid over any of the money collected on the Robinson note it had notice of

Thompson's interest in it. To the extent of that interest the bank was under obligation to account to Thompson after it had been fully paid its loan to Bell. The fact that the bank had or had not notice does not concern Bell's administratrix for she stands in no better position than did Bell in his lifetime, and he certainly would not have been heard to dispute Thompson's interest in the pledged note simply because in pledging it he failed to notify the bank of the fact. This want of notice was a fact of which the bank might have taken advantage had it, without notice, used the money to discharge Bell's indebtedness to it and had paid to him the surplus remaining. The evidence was that Bell in his lifetime acknowledged Thompson's interest in the note, and we fail to see how Bell could divest Thompson of that interest, as between themselves, by pledging the note to the bank. The court made no specific finding that at the time of the pledge the bank had notice as to the alleged fiduciary relation subsisting between Bell and Thompson, and it is urged for this reason the bank cannot be charged with any trust. It is further contended that the judgment is based upon the theory of some contractual relation existing between the bank and intervener. The facts proven were that Thompson had a property interest in the Robinson note to the day of Thompson's death, and that Thompson provided part of the consideration for the note which Bell acknowledged. That Bell became a trustee for Thompson to the extent of this property interest the evidence clearly shows. Under familiar principles of equity jurisprudence a resulting trust arose in favor of Thompson, upon his furnishing the consideration for the Robinson note, to the extent of that consideration, for the principles of equity to which resulting trusts in real estate are subject are equally applicable to personal property. 1 Perry on Trusts, §§ 126, 130. See, also, 1 Beach on Trusts & Trustees, §§ 52, 177. And a court of equity will enforce a trust against all persons who, with notice of the trust, come into possession of the trust property, in the same manner and to the same effect as against the original trustee. Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, and cases cited in notes on California Reports. See, also, 1 Perry on Trusts, § 127; 2 Perry on Trusts, §§ 837, 838; Sharpstein v. Friedlander, 63 Cal. 78. Also Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215, cited in the briefs, an instructive case which fully confirms the soundness of the above principles. Among other things, the court said: "It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received deposits, it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability have been extinguished in the absence of interference of his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to their agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor. If an agent receives money of his principal, and lends it, taking a promissory note to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed that there is a superior right and has received notice not to pay the agent"—citing Story on Equity, § 1259. It is not necessary, to support the judgment, that it be found that at the time the bank received the note it was informed of the trust relation between Bell and Thompson. The bank had notice of Thompson's claim before it had disposed of the proceeds of the Robinson note, and that was sufficient to charge it with liability to Thompson.

2. It is contended that by computing interest on the Robinson note up to the date of the last collection, it would appear that there still remained uncollected over $6,000; that the findings do not show from whom the bank collected the two sums above stated on account of said note, whether from Robinson himself or from his estate or other source, or whether Robinson or his estate was insolvent. It is hence argued that "no principle of law or rule of equity would authorize the intervener as administrator of the estate of Thompson to take from the bank money which it had as the pledgee and agent of Bell collected as a part due upon the Robinson note." Appellant claims that the bank should turn over to the Bell estate the balance in its hands and Thompson's estate should look to Robinson or his estate for the balance due upon the Robinson note remaining uncollected, as it was more than sufficient to pay the $1,000 and interest claimed by Thompson. We cannot agree with appellant. Conceding that the bank did not collect the full face value and interest of the Robinson note, still Thompson was entitled to have his proportionate share of whatever was collected. The amount was sufficient to pay the principal due both Bell and Thompson and the interest collected was apportioned according to their respective interests. The finding of the court is that the amount collected by the bank "consists of, and was and is made up of, the whole of said principal sum of $29,262.18 mentioned in said note, and the sum of $9,910.12 on account of the accrued interest," and this ap-

plication of the money collected by the bank, as we understand the evidence, was in accordance with the express provisions of the note. No reason occurs to us in support of appellant's contention that all the money collected should have been turned over to the Bell estate and Thompson be compelled to look to Robinson or his estate. The bank was under the same obligation to account to Thompson, having notice of his rights, as Bell would have been had he collected the money. The complaint of appellant that intervener is availing himself of the services of the bank in collecting the amount due Thompson, has no merit. If these services had value, appellant had the benefit equally with Thompson's estate.

3. It is urged that the court erred in sustaining intervener's demurrer to the defenses set forth in paragraphs 13 and 14 of the answer of defendant Teresa Bell. These defenses have already been mentioned, and related to the claims filed by Thompson with the executor of Bell's estate. As to the claim for $1,000, it was presented as contingent and its allowance was upon the happening of the contingency, to wit, that the payment of the Robinson note might be made to the Bell estate. It was not alleged that the payment had been made or would be made. On the contrary, it appeared, and the court found, that the money due on the claim had been collected by the defendant bank, in whose hands the money still was. Of what materiality was it that the claim was then pending or allowed in the Bell estate? This action was intended to and will finally determine every question arising out of the claim and the judgment will forever discharge the Bell estate from any liability thereon. It is true, that in a sense the approval and allowance of a claim against an estate is a judgment, but it was said in Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53: "The allowance of a claim is not in any true sense a judgment." In Estate of Glenn, 74 Cal. 567, 16 Pac. 396, cases were cited to show "that for some purposes the allowance of a claim is a judgment." The fact that the allowance and approval may be contested at subsequent stages of the proceedings in probate (Estate of Lohse, 62 Cal. 413) shows that the allowance is not a final judgment in the full sense of that term. In the present case, where the allowance was of a contingent claim, it could not in its very nature be regarded as a judgment upon which payment could be ordered, for the simple reason that until the happening of the contingency no liability of the estate of Bell could arise on the claim as alleged. This action is primarily against the bank to recover money in its hands belonging to the estate of Thompson. The only reason existing for making the administratrix of Bell's estate a party was because she made some claim to the funds. Thompson did not by presenting his claim to the Bell estate part with his right to enforce it from the person primarily liable, as the bank had become by collecting the money, nor did he give to the representative of Bell the exclusive right to collect the money from the bank. Admittedly the Bell estate is unable to pay its creditors in full, and to drive intervener to that estate for what is justly due the Thompson estate would be unjust to the latter and result in loss to it. Furthermore, Thompson had no assurance that his interest in the Robinson note would be acknowledged by Bell's representatives and hence the prudential step taken by him in presenting the claim was but a natural one to determine their attitude towards the claim. Its allowance simply settled the matter as between them and him and gave him the assurance that if the money came into their hands his claim to it would be recognized. But we cannot bring ourselves to believe that he was thus barred of his right or estopped to enforce payment from the bank. We think the matter set up by way of special defense was immaterial, and that the demurrer to it was properly sustained. We find nothing in Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435, inconsistent with the foregoing. The case of Louis v. Triscony, 58 Cal. 304, more nearly approaches the present case. There the survivor of two joint makers of a note was sued and he pleaded that the note had been presented to the administrator of the deceased maker and had been allowed as a claim against his estate. It was held that the facts pleaded did not constitute a defense.

4. Appellant moved to amend her answer at the trial, and her motion was refused. The allowance of the proposed amendment was not such as could have been demanded as of right and was within the discretion of the court, with which we will not interfere unless abuse be shown. 1 Spelling's New Trial, § 107. There is nothing in the record, except the proposed amendment, from which we may judge of its materiality to the defense or of the reason for not offering it before the trial commenced. The amendment was by way of pleading with greater particularity the contingent claim already commented upon, and, if we are right in the conclusions already stated, the proposed amendment offered no defense to the action, and was immaterial.

5. Paragraph 14 of appellant's answer, to which the demurrer was sustained, set forth the presentation by Thompson and the allowance and payment to him of a claim already mentioned. There is no allegation that this $1,000 claim was included in it and no presumption can arise that it was so included. It is alleged that the claim set out in paragraph 14 was paid in May, 1893, by the Bell executors, and yet appellant shows by her proposed amendment that the contingent claim for $1,000 was allowed and approved by these same executors in June, 1893. It is

not probable that they would have taken this action if this same amount had been included in the other claim paid by them.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

4 Cal. App. 655

GOYTINO v. McALEER et al. (Civ. 326.)

(Court of Appeal, Second District. California. December 31, 1906.)

1. Municipal Corporations—Police Power—Pool Halls.

Since the business of conducting a pool hall is not a useful employment, and is not always unattended with uses injurious to public peace and morals, an ordinance authorizing the police commissioners to make such regulations for granting permits to conduct that business as may be necessary for the maintenance of public order, the promotion of public morals, and the orderly conduct of such places, is not invalid; the city's right to prohibit lines of business being not restricted to nuisances per se, but extending to anything tending to injure the public morals, welfare, or safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1328.]

2. Same — Validity of Ordinance — Discretion of Board.

An ordinance, empowering the police commissioners to make such regulations for granting permits to run pool halls as may be necessary for the maintenance of public order, the promotion of public morals, and the orderly conduct of such places, is not invalid as vesting an unrestricted discretion in the board.

3. Same—Conclusiveness of Board's Decision.

Where discretion is validly vested in a municipal board, a court will not interfere with its exercise, but, in the absence of positive proof to the contrary, will assume the duties are properly and lawfully performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 155.]

4. Abatement and Revival—Pendency of Another Action—Mandamus.

The pendency of a mandamus proceeding in the superior court to compel police commissioners to issue an occupation permit was, under the express provisions of Code Civ. Proc. §§ 430–433, a bar to a proceeding in the Court of Appeal between the same parties for the same cause.

5. Courts—Appellate Courts—Original Jurisdiction—Mandamus—Grounds.

Where the superior court denies mandamus against a board of police commissioners to compel the issuance of an occupation permit, and the petitioner appeals, the mere possibility of a change in the personnel of a board before the appeal can be heard will not justify the Court of Appeal in allowing a mandamus as an act of original jurisdiction.

Petition by J. P. Goytino against Owen McAleer and others for a writ of mandamus. Denied.

Haas, Garrett & Dunnigan, for petitioner. W. B. Mathews, City Atty., Leslie R. Hewitt, and John W. Shenk, for respondents.

ALLEN, J. This is a proceeding in mandamus to compel the respondents, the board of police commissioners of the city of Los Angeles, to issue a permit authorizing the city clerk to issue to petitioner a license, upon payment of the legal fee therefor, to carry on and conduct a pool room and pool tables at a certain street number in said city.

It appears from the conceded facts set out in the petition and return that an ordinance is in force in said city making it unlawful to carry on certain kinds of business in said city without first procuring a license so to do, and among the kinds of business so specified is that of conducting pool rooms and operating pool tables. It is further ordained that no license to carry on certain kinds of business, among which is that of conducting a pool room or operating a pool table, shall issue, except a permit therefor be first had from the board of police commissioners; and that said board can only issue such permits upon petition of the party intending to operate the same, accompanied by consent of a majority of the property owners within the block where the permit is sought. It is further provided, by section 3 of said ordinance, that said board is empowered to make such rules and regulations for the granting of permits as may be proper or necessary for the maintenance of public order, the promotion of public morals and the orderly conduct of such places, or of the better enforcement of the provisions of the ordinance.

Petitioner's application for a license was denied by the board for the reason that the place mentioned in said application is located in a part of the city inhabited by a class of people which would render a pool room, if established there, a place of resort for dissolute and objectionable persons, and in the judgment of the board the issuance of such permit would injuriously affect public health, peace, and morals. Petitioner does not question the legality of the ordinance or ordinances in any regard, save as to the provisions of section 3 thereof, and as to which he contends that the power of regulation therein contained gives the right to prohibit certain kinds of business which he claims cannot be exercised except in relation to nuisances per se. "The power to regulate or prohibit, * * * not only includes nuisances, but extends to everything 'expedient for the preservation of the public health and the prevention of contagious diseases'" (Ex parte Shrader, 33 Cal. 284), and, to which may be added, that it extends to everything expedient for the promotion of public morals, welfare, or safety. It is only when a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself. County of Los Angeles v. Hollywood Cemetery Association, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. The business of conducting a pool table cannot be said to be a useful employment or business. Nor can it be said that as ordinarily, if not invariably conducted, such business might not within the limits of reasonable probability be attended with uses injurious to public peace and morals. Whatever of danger or menace to such public interests is threatened by the establishment and conduct of such business is a question of fact which the ordinance authorizes the board of police commissioners to determine. Ex parte Shrader, supra. Such determination is conclusive. Ex parte Lacey, 108 Cal. 329, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93.

Petitioner further claims that the ordinance is invalid because it vests an undefined and unrestricted discretion in a board. This cannot well be said of an ordinance which contemplates an exercise of discretion only after determining certain facts upon which their judgment is based, for all regulations and rules of the board authorized by the ordinance are required to be directed to questions of public safety, health, and morals. The power to exercise the discretion reposed in the board by the ordinance is uniform as to all persons who may apply for a license to engage in that particular business, and it is the effect of that business in the locality which determines its tendency as affecting the subjects of police regulation. It needs no argument to establish the proposition that a public place of amusement, or any other place conducted as an inducement for the assemblage of a crowd of people, may be kept or maintained in certain localities under such circumstances as to render the same dangerous to the public safety. The safety of the people is the supreme law and justifies legislation pertaining to the public welfare, health, and morals. Ex parte Drexel, 147 Cal. 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588. The city council of Los Angeles by its charter has full power to pass ordinances upon any subject of municipal control. The board of police commissioners have such power as is granted or imposed by ordinance. "In the government of the affairs of a great municipality, many powers must, necessarily, be confided to the discretion of its administrative officers, and it can be productive only of mischief, in the treatment of such questions, to substitute the discretion of strangers to the power, in place of that of the officers best acquainted with the necessities of the case, and to whom the Legislature has specially confided their exercise." People v. Grant, 126 N. Y. 476, 27 N. E. 967. The ordinance under consideration does not undertake to declare the keeping of a pool table a nuisance. It simply by fair inference declares that if in certain places, under certain circumstances, such pool room is conducted in a manner injurious to public morals or safety, it becomes a nuisance, and it leaves to the board of police commissioners discretion to determine whether the establishment of such place of amusement and assemblage in a certain district, with certain surroundings, is or is not a menace to public safety. If they determine that it is, then, and only then, can they refuse a permit, if other conditions are complied with. In addition to this, the other sections of the ordinance, which denounce the issuance of a license without permission therefor shall first be given by the board of police commissioners, contemplate an inquiry by the board as to the character of the permit; for it would be an idle thing to say that a board should issue a permit were they given no power to determine the circumstances and necessities of the case where the permit was claimed. The board of police commissioners, as its name implies, has in charge the police regulations of the city, and, in the absence of section 3 of the ordinance, they might well withhold a permit when in the exercise of reasonable discretion they are convinced that the issuance thereof would injure public health, morals, or safety. No question of unwarranted interference with private business is here presented, as was the case in all of the cases cited by petitioner; but here the only attempt appears to be to confine the business of pool rooms and places of that ilk to such restrictions and burdens as are necessary to prevent the infliction of public injury. Holding as we do the right of the city under the charter to enact the ordinance under consideration, a court will not interfere with the discretion reposed in a proper board or tribunal, but will assume that official duty has been properly and lawfully performed, in the absence of positive proof to the contrary.

In addition to what has heretofore been said, this writ should be denied upon another ground. The return and answer of respondents show, and its truth is admitted, that there is another action pending between the same parties for the same cause. This constitutes a good defense, under sections 430 and 433 of the Code of Civil Procedure, by way of a plea in abatement. This court and the superior court have concurrent jurisdiction in proceedings in mandamus. The return and answer of respondents show that heretofore petitioner commenced an action in the superior court of Los Angeles county, wherein the respondents to this proceeding were respondents; that the petition so filed in said court is identical in language with the petition in this case; that the answer therein filed by the respondents is the same in all respects other than as to the special plea in abatement; that the superior court proceeded to the trial of said action upon the merits and denied the writ, ordering findings and judgment for the defendants. The identity of the subject-matter of the two suits cannot be questioned. A judgment in the proceedings in the superior court, when final, could be pleaded in bar of this action as a prior adjudication (McCormick v. Gross, 135 Cal. 305, 67 Pac. 766), and, were it conceded that petitioner's application possessed merit, his legal remedy by way of an appeal from the judgment of the superior court, when the same is entered, is a sufficient answer to this petition and constitutes of itself sufficient grounds for the denial of the writ, and the mere possibility of a change in the personnel of the board of police commissioners before an appeal could be heard would afford no justification for the allowance of the writ by this court.

Writ of mandate denied.

We concur: GRAY, P. J.; SMITH, J.

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4 Cal. App. 650

Ex parte VANDIVEER. (Cr. 36.)

(Court of Appeal, Third District, California. Dec. 31, 1906.)

1. HABEAS CORPUS — SCOPE OF INQUIRY — WEIGHT OF EVIDENCE.

In a habeas corpus proceeding to review the commitment of one on a preliminary examination, the court will only examine the evidence to ascertain whether the commitment is with reasonable or probable cause; whether the evidence is sufficient to convict beyond a reasonable doubt being for the jury to determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 87–89.]

2. SAME—CREDIBILITY OF WITNESSES.

It is only when the testimony of the material witnesses for the people before a committing magistrate is clearly shown to be false that a prisoner should be discharged on habeas corpus; the office of the writ not warranting the court in passing upon the credibility of witnesses where there is conflict in the testimony, and the magistrate having the same right to judge of the credibility of witnesses as a jury would have at trial of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 89.]

3. WITNESSES—CREDIBILITY—FALSUS IN UNO, FALSUS IN OMNIBUS.

Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be discredited in others, did not require the rejection of the prosecutrix's direct testimony, in a prosecution for seduction given before the examining magistrate, because her testimony on cross-examination may have been rejected as being incredible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1080.]

4. SEDUCTION—CHASTITY OF FEMALE—EFFECT OF REPUTATION.

Under Pen. Code, § 268, requiring proof of the prosecutrix's previous chaste character in prosecutions for seduction, her reputation may be evidence of such character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 73.]

5. HABEAS CORPUS—CHARGE OF SEDUCTION—COMMITMENT—SUFFICIENCY OF EVIDENCE.

In a habeas corpus proceeding by one committed on a charge of seduction, evidence *held* sufficient as to the previous chastity of the prosecutrix, within Pen. Code, § 268, making such proof essential to conviction in such cases, to warrant the commitment.

Appeal from Superior Court, Merced County; J. J. Griffin, Judge.

Application of James Vandiveer for a writ of habeas corpus. Writ discharged, and prisoner remanded.

F. G. Ostrander, for petitioner. E. H. Hoar, Dist. Atty., and Ben Berry, for the People.

CHIPMAN, P. J. Petitioner was charged with the crime of seduction under promise to marry, alleged to have occurred January 1, 1906. At the preliminary examination he was committed, and sues out the writ on the ground that the justice of the peace acted without reasonable or probable or any cause in committing him to the custody of the sheriff. No question arises on the regularity of the proceedings. We deem it best not to comment upon the evidence to any considerable extent, as the cause may be tried on substantially the same testimony as is now before us.

The prosecuting witness testified that petitioner had sexual intercourse with her at the date alleged, coupled with a promise on his part to marry her as a condition to her consent to such intercourse. Upon cross-examination she was interrogated as to the manner in which petitioner performed the act of intercourse. Her reply apparently placed the parties in such juxtaposition as to make the act physically impossible, if she clearly understood the question, and if we may infer that she meant her answer to be taken literally. It is strongly urged that, as petitioner was held to answer upon the testimony alone of the prosecuting witness, he should be discharged on this showing; that her testimony on cross-examination as to the manner of the accomplishment of the act of intercourse was so incredible as to compel the rejection of her direct testimony to the act. And the code rule is invoked "that a witness false in one part of his testimony is to be distrusted in others." Code Civ. Proc. § 2061, subd. 3. Although upon first impression our Supreme Court held that it could not go behind the warrant of commitment and inquire into the question of reasonable or probable cause, on further consideration it was held that the court not only had the right, but that it was its duty, to so inquire. Ex parte Sternes, 82 Cal. 245, 23 Pac. 38. And this has been the practice ever since that decision. Among other cases, see In re Howell, 114 Cal. 250, 46 Pac. 159. Petitioner, at the argument, placed much reliance upon the case of Lowery v. San Joaquin, C. & I. Co., 134 Cal. 185, 66 Pac. 225. That was a case of damages from the overflow of water alleged to have been caused by defendant's dam. The plaintiff had the verdict of the jury and judgment followed accordingly. On a review of the evidence the court reversed the judgment. The court said: "There is no direct evidence that defendant's dam caused the overflow. It rests upon inference from known laws of physics, and from actual physical conditions shown to exist at the time the levee gave way. * * * All reasonable inferences may be indulged from proved facts, but no inference may be upheld which is contrary to reason, to physical laws, or the course of nature." This case is not controlling of the case here, for there was direct evidence of intercourse, and the question is not alone whether the act could possibly have been performed in the manner described, but it is whether the magistrate had the right to accept part of the prosecuting witness' testimony and disregard a part. It is only necessary to examine the evidence to ascertain whether the commitment is without reasonable or probable cause. Whether the evidence is sufficient to convict beyond a reasonable doubt is the province of the jury to say, and ought not to be determined in advance on habeas corpus. Ex parte Becker, 86 Cal. 402, 25 Pac. 9. It is only when the testimony of the material witnesses for the people, taken before a committing magistrate, is clearly shown to be false, that a prisoner should be discharged on habeas corpus. So held when the court was called upon to determine the credibility to be accorded to the testimony of witnesses whose material statements conflicted. People v. Boyle, 64 Cal. 152, 28 Pac. 232. The office of the writ does not go to the extent of warranting this court in passing upon the credibility of witnesses where there is conflict in the testimony. The utmost power given us is to say whether or not there is some evidence which would reasonably justify the magistrate in finding that probable cause appeared that the offense was committed by the person charged. We are not permitted to speculate as to how a jury may regard the evidence. The committing magistrate has the same right to judge of the credibility of witnesses and of the truth or falsity of their testimony as a jury would have at the trial of the cause, but he is not bound by the rule of reasonable doubt. The code rule of evidence invoked by petitioner does not require that the entire testimony of witness is to be distrusted, much less disbelieved, because he has testified falsely upon some material fact. People v. Hicks, 53 Cal. 354. In this case it was said: "The effect of this provision (Code Civ. Proc. § 2061, subd. 3) is that if a witness is willfully false in one portion of his testimony, 'he is to be distrusted in others,' and not that his whole testimony is to be absolutely rejected." Without suggesting possible circumstances, which may have appeared at the hearing before the justice of the peace, leading him to believe the direct testimony of the prosecuting witness, it is enough for us to know that the testimony was given, and that, presumably, it was believed, although the testimony on cross-examination may have been rejected.

It is further insisted that there is not sufficient evidence of previous chaste character. Section 268 of the Penal Code, under which the petitioner was committed, provides: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character is punishable," etc. It was said, in People v. Krusick, 93 Cal. 74, 28 Pac. 794: "It is as essential for the prosecution to show that the person against whom the offense was committed is of the character named in the statute, as it is to show that the sexual intercourse was had under promise of marriage." The father of the prosecuting witness testified that his daughter had lived with him during her whole life. "Q. Do you know what her reputation is as to being chaste and virtuous; that is, about and prior to January 1, 1906? The witness: Yes, sir. Q. What is her reputation as to being chaste and virtuous? A. Good." Cross-Examination: "Q. Who have you ever heard discuss it, Mr. Christian? A. Well, I never seen anything wrong with her. Q. You never heard anybody discuss that? A. No, sir; I never heard anything or seen anything. Q. That is what you mean by your answer—it is simply that you yourself never observed anything to indicate that she was not chaste? A. In my own judgment; yes, sir. Q. That is your judgment in the matter? A. Yes, sir." The statute uses the language "previous chaste character," and the question is suggested that proof of reputation is not necessarily proof of character. It is true that reputation is not character itself, but it may be evidence of character. Mr. Anderson, in his Law Dictionary, gives this definition of the term character: "The qualities impressed by nature or habit on a person, which distinguish him from other persons. These constitute his real character, while the qualities he is supposed to possess constitute his estimated character or reputation." We do not think that the statute requires proof of the true character of the person, for that would in most cases be impossible. The best we can do is to judge the character of our neighbors by the estimation in which they are held in the community. Good general reputation for honesty, chastity, veracity, and like qualities is synonymous with good character as to these qualities, within the meaning of the statute. It must be admitted that the evidence of the previous chaste character of the prosecuting witness is not entirely satisfactory, especially in view of some testimony given by her when asked if she had not previously to January 1, 1906, had sexual intercourse with petitioner. We cannot say, however, that there is no evidence upon this issue, or that it is entirely insufficient to justify the magistrate in submitting it to the determination of a jury.

The writ is discharged, and the prisoner remanded.

We concur: BUCKLES, J.; McLAUGHLIN, J.

4 Cal. App. 671

TABLER v. PEVERILL et al. (Civ. 266.)

(Court of Appeal, Third District, California. Dec. 31, 1906. On Rehearing, Jan. 30, 1907.)

1. Estoppel — Deed — Quitclaim — Subsequently Acquired Title.

The quitclaim of one having a bond for a deed of land is rendered ineffectual by the subsequent conveyance to him by the title holder who gave him the bond for deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 109.]

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—DIVORCE.

Community property undisposed of by a decree of divorce is thereafter *held* by the divorced parties as tenants in common.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 998, 1003; vol. 17, Divorce, §§ 822–824.]

3. QUIETING TITLE—PROOF OF PART OF INTEREST CLAIMED.

Though plaintiff, in an action to quiet title, claims the entire title, he may have judgment for an undivided half interest; the evidence showing it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 98.]

4. TENANCY IN COMMON—ADVERSE POSSESSION—EVIDENCE.

Evidence in an action to quiet title *held* insufficient to show adverse possession as between tenants in common.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by C. E. Tabler against Will Peverill, individually, and as administrator of Christopher Peverill, deceased, and others. Judgment for defendants. Plaintiff appeals. Reversed, and remanded for new trial.

M. B. Harris and Bernhard & Sutherland, for appellant. Smith & Ostrander, for respondents.

CHIPMAN, P. J. Action to quiet title to certain land in Fresno county.

The cause was tried by the court without a jury and defendant Will Peverill had judgment that he is the owner in fee of the land subject to the administration of the estate of Christopher Peverill, deceased. Plaintiff appeals from the judgment, and from the order denying his motion for a new trial. Prior to the filing of the complaint (which was August 23, 1903), defendant Martha J., widow of said deceased, on April 28, 1903, conveyed all her interest in the land to defendant Will Peverill, as did also defendants Mary M. and George A., children of deceased, on April 29, 1903. The default of Martha J. was duly entered, and Mary M. and George A. disclaimed having any interest in the property. Defendant Will Peverill alone answered to the complaint.

The complaint is in the form usual in actions to quiet title. The answer and cross-complaint of defendant Will Peverill denies plaintiff's title and alleges title in himself subject to administration of the estate of Peverill, deceased. In his cross-complaint asking that his title be quieted as against plaintiff, defendant alleges that on April 16, 1892, one Charles H. Robinson was the owner in fee of the property, and that on that day he and his wife, Leonora L., conveyed the same to Christopher Peverill, who thereupon became and remained the owner thereof until May 20, 1900, on which day he died intestate, leaving said property to his heirs at law, the said defendants. Plaintiff's answer to the cross-complaint denies the alleged title of Christopher Peverill and sets up title in plaintiff, claiming that said Robinson agreed to sell said property to Christopher Peverill, on March 15, 1888; that on November 20, 1890, said Peverill conveyed his interest to one Coulthard, who, on March 31, 1892, conveyed said property to Clara S. Peverill, through whom by mesne conveyances the property was conveyed to plaintiff; that from March 31, 1892, said Clara Peverill and her grantees, and successors in interest and plaintiff herein, "have been openly, notoriously, continuously, uninterruptedly, peaceably and adversely to defendant Will Peverill, and to his grantors and predecessors in interest and to all the world, in the possession of and seized of said premises under a claim of right and title therein and thereto, and as the owner in fee." Sections 318 and 319 of the Code of Civil Procedure are pleaded in bar of the cross-complaint. The statute of limitations, however, is not urged in the brief of plaintiff and will not be further noticed.

The court found, and the findings are not challenged, that Robinson conveyed the property as alleged by defendant; that Christopher Peverill died intestate May 30, 1900, leaving as heirs at law the persons above named as such; that Martha, Mary Minerva and George Peverill conveyed to defendant as alleged. Plaintiff assigned as error the insufficiency of the evidence to justify the findings following: That defendant Will Peverill is the owner of the land subject to administration of said estate; that plaintiff has not, nor have his grantors, been openly, notoriously, etc., in adverse possession of said premises, and that plaintiff is not the owner thereof. It was stipulated that Charles H. Robinson is the common source of title of plaintiff and defendant.

An abstract of title was agreed upon as including all records relating to the title except a deed from J. F. Cowdery to plaintiff. This abstract shows the following: (1) Bond for deed from Robinson to Christopher Peverill, dated March 15, 1888. (2) Quitclaim deed from Christopher Peverill to C. Coulthard, dated November 20, 1890. (3) Quitclaim deed from Coulthard, to Clara S. Peverill (divorced wife of Christopher and mother of Mary Minerva and George), dated March 31, 1892. (4) Robinson and wife to Christopher Peverill, by grant, bargain, and sale deed, dated April 16, 1892. (5) Grant, bargain, and sale deed from Clara S. Peverill to California Savings & Loan Society, dated May 13, 1899. (6) Grant, bargain, and sale deed of California Savings & Loan Society to J. F. Cowdery, dated May 14, 1903. (7) Cowdery, by grant, bargain, and sale deed to plaintiff, dated June 15, 1903. There was introduced by plaintiff, as bearing upon the issues, the judgment roll filed in the clerk's office of San Benito county, in the action entitled "Clara S. Peverill v. Christopher Peverill," for divorce. The judgment showed that the verified complaint was filed February 7, 1896, in San Benito county, in which plaintiff averred that she had for four months last past been a resident of said county; that defendant had deserted her "from the 2d day of February, 1895; that the issue of the said marriage are: Mary M. Peverill, aged 16 years; William C. Peverill, aged 15 years; George A. Peverill, aged 14 years;" that a decree was granted plaintiff in the action as prayed for on the ground of desertion; which the decree adjudged took place February 2, 1895, and the custody of the children given her; the decree was granted March 25, 1896. No reference was made to any property in the complaint.

In his answer and cross-complaint the defendant in the divorce action set forth certain personal property, and also the land in question, claiming that all of the property was community property. The answer to the cross-complaint denied that "the real estate set forth and described in defendant's cross-complaint is now the community property of said plaintiff and defendant, but alleges the fact to be that the said real estate and the whole thereof is, and for many months past has been, the separate property of said plaintiff herein, and that said defendant has no interest, ownership or title thereto." The decree adjudged "that the plaintiff be and she is hereby awarded the community property of said parties consisting of household and kitchen furniture and farming tools and implements," being all the personal property mentioned in the cross-complaint except one horse, one mule, one set double harness, one cart and some poultry. Of this latter and the real estate, no disposition was made in the decree. It does not appear when Christopher married Martha, after his divorce, but it does appear that she is his surviving widow. It appears that the Savings & Loan Society loaned $500 to Christopher on May 10, 1892, and he and his then wife, Clara, executed their mortgage of the premises to secure payment of the loan. This mortgage rested upon the property up to 1899, and, as shown above, Clara Peverill, on May 13, 1899, conveyed the property to the Savings & Loan Society, and by an agreement dated May 31, 1899, the loan society entered into a contract to sell her the land for the sum of $800, to be paid in installments—the last one falling due May 10, 1903—she to pay all taxes on the land, "and to cultivate and care for said premises, first party (the society) agreeing, on payment and performance of the other covenants" to give second "party a deed." It appeared that Clara Peverill paid three annual installments, 1900, 1901, 1902, of $50 each, and, as we have seen, in May, 1903, deeded the property to the Savings & Loan Society probably because she could make no more payments. The record title clearly runs from Robinson to Christopher Peverill, and was held by him as community property at the time the decree of divorce was entered, having been acquired during his marriage with Clara. Civ. Code, § 164. The record does not disclose the terms of Robinson's bond for a deed.

One of the issues in the divorce case was as to how Peverill held the property, he claiming it as community, and she claiming it as her separate property, presumably by virtue of the quitclaim deed of Christopher to Coulthard and the latter's quitclaim deed to her. But Robinson conveyed to Christopher subsequently and Christopher's after-acquired title vested valid title in him, thus rendering his previous quitclaim to Coulthard ineffectual. 1 Devlin on Deeds, § 27; McDonald v. Edmonds, 44 Cal. 328, and cases there cited. The decree of divorce failed to dispose of the real estate in question then owned by Christopher. Being community property, he and his divorced wife Clara, as to this land, became tenants in common. DeGodey v. DeGodey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141. Respondent contends that the question of plaintiff's right to a one-half interest in the property as the successor of Clara Peverill was not raised by the pleadings; that because plaintiff claimed throughout the trial that Clara was the owner of the entire property, "plaintiff will not now be permitted to change his theory of the case by the claim that the property was community property." The pleadings put the title in issue. Plaintiff had the right to claim the entire title and show whatever interest he had in the property. Respondent was not misled to his injury by any position taken by appellant, for it is partly through the evidence submitted by respondent at the trial that the true situation of the title was disclosed. There was considerable evidence introduced to show adverse title in Clara. We think, however, that it was wholly insufficient. Clearly she failed to show, if it were possible to so show, that prior to the decree of divorce she had possession adversely to her husband. By the decree she became a tenant in common with him and that relation continued to the day of his death.

It was said in Miller v. Myers, 46 Cal. 535, 78 Pac. 261, cited approvingly in Faubel v. McFarland, 144 Cal. 717: "It is clear that an adverse holding and claim of title do not, of themselves, constitute an ouster. The tenant out of possession, has a right to assume that possession of his co-tenant is his possession, until informed to the contrary, either by express notice or by acts and declarations which may possibly be equivalent to notice under certain circumstances. But until he has notice, either actual or constructive, in some form, that the possession of his co-tenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may in fact, have been holding adversely." In Unger v. Mooney, 63 Cal. 586, 592, 49 Am. Rep. 100, the court said: "Hence there must be some conduct of the occupying tenant evidenced by acts or declarations, or both, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter, to affect his right." See, also, Winterburn v. Chambers, 91 Cal. 170–180, 27 Pac. 658. See, also, subject discussed by Mr. Wood in his work on Limitations (section 266), where it is said that "the evidence must be much stronger than would be required to establish a title by possession in a stranger."

The decree of divorce was entered March 25, 1896. Mrs. Peverill testified as to her residence: "I went to the Purington ranch in the early part of 1901. I did not live continuously on the place from the time I separated from my husband until I went to the Purington ranch. I was away at different periods, and one time changed my residence absolutely to San Benito county for all of a year," where she resided with her father. This was while she was procuring her divorce. The statute, in our opinion, did not begin to run, if at all, prior to March 25, 1896. Mrs. Peverill was awarded the custody of the children (all minors), and she testified, that, after obtaining her divorce (at what date she did not say), she "went back to the place involved in this suit" and lived there with her children. The ranch was her home. She was away frequently employed elsewhere as a nurse, sometimes for two or three months, but the children remained there and "the boys farmed the ranch." Her son "Will was (1896) 14 or 15 years old;" George was a year younger than Will, and Mary was a year older than Will. Christopher died May 30, 1900, and whatever interest he then had in the property vested immediately in his heirs at law. Assuming that the statute was running against Christopher Peverill from March 25, 1896, it had run but 4 years and 2 months when he died. Unless, therefore, the evidence will warrant us in holding that at his death the statute continued to run against these children, plaintiff has failed to establish his contention. These children, as we have seen, became tenants in common with their mother. The evidence is that they "worked [the place] and applied the proceeds of their work upon the interest of this debt [the mortgage debt]." Mrs. Peverill testified: "I did not at any time while occupying the place, after the separation from my husband, make any statement to my children to the effect that I was the sole owner of the place, and that my children had no interest in it. I had no occasion to say anything about it at all. I have no recollection that any of them ever inquired of me as to the title of the land. The children had marketed the crops and received the proceeds and expended the same for the use of the family. I have left the matter entirely to them at times." These children continued to sustain this relation, looking after the property, jointly with their mother and solely when she was absent, as happened often, until February, 1901, when witness Humphrey, as he testified, leased the place for that year and Mrs. Peverill went to the Purington place to live. There is not the slightest evidence tending to show that she held the place or claimed it adversely to her children, in the sense of the statute, from the death of her late husband (May 30, 1900) to the leasing of it to Humphrey (February, 1901). Whatever view may be taken of the evidence up to this time, the continuity of her alleged adverse possession was broken from May to the following February. Conceding that it was renewed by this act of ownership in leasing the property, which we are far from holding as sufficient, against her tenants in common, the statute had not run the requisite time when the action was commenced. The findings of the court, however, that plaintiff had no interest in the property and that defendant was the owner thereof, subject only to administration, are not supported by the evidence.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McLAUGHLIN, J.; BUCKLES, J.

On Petition for Rehearing.

CHIPMAN, P. J. It is now claimed, as we understand the petition, that by the decree of divorce introduced by plaintiff, the property rights of the parties to the divorce action were fully and finally determined. It appeared from the complaint that plaintiff, Mrs. Peverill, said nothing about any property. In his answer and cross-complaint defendant Peverill referred to certain personal property, and also to the real property now in controversy; all of which he averred was the community property of the parties.

In her answer to the cross-complaint, plaintiff does not mention the personal property, but denies that the real property is community property, and avers that it is her separate property. The decree, as pointed out in the opinion, purported to dispose only of certain specified articles of community and personal property. It seems clear to us that the decree left the real estate undisposed of. In the present action, we are not seeking to set aside or disturb that decree, but only to give it effect so far as we may do so. If it be true, as we think it is, that the real property remained undisposed of by that decree, the parties remained tenants in common of the real property as was pointed out. Looking, then, to the conveyances, we find that Christopher Peverill conveyed by quitclaim to Coulthard November 20, 1890. But as Peverill then had no title, he conveyed nothing. On April 16, 1892, Robinson, the source of title, conveyed by grant, bargain and sale to Peverill, who died without conveying to any one, and his interest vested at his death in his heirs at law. The opinion shows how it came about that his former wife, Clara, had an interest in the property as tenant in common, and that her grantee succeeded to that interest.

We are unable to discover any error in the decision heretofore rendered, and the petition for a rehearing is therefore denied.

We concur: HART, J.; BURNETT, J.

150 Cal. 425

SHIPMAN et al. v. UNANGST, Judge.
(S. F. 4,654.)

(Supreme Court of California. Feb. 5, 1907. Rehearing Denied March 4, 1907.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—NEW TRIAL.

A motion for a new trial is not a proper procedure after the court in probate proceedings sets apart a homestead to the widow, with certain property as exempt from execution, and awards her a family allowance, in accordance with Code Civ. Proc. §§ 1465, 1466; it being the duty of the court ex parte and without petition to make such orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 720.]

2. EXCEPTIONS, BILL OF—COMPELLING SETTLEMENT—TIME OF PRESENTATION.

A writ of mandate to a court to settle a bill of exceptions to be used on appeal from an order of the court will not issue where the proposed bill is not presented in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 82.]

In Bank. Application by Eliza Shipman and others for a writ of mandate against E. P. Unangst, judge of the superior court for the county of San Luis Obispo. Application denied.

S. V. Wright, for petitioners. William Shipsey, for respondent.

HENSHAW, J. In the course of the probate proceedings in the matter of the estate of Patrick Moore, deceased, the court made its order setting apart a homestead to the widow, with certain property as exempt from execution, and also awarded her a family allowance, all in accordance with sections 1465 and 1466 of the Code of Civil Procedure. Subsequently petitioners herein gave notice of intention to move for a new trial, and moved therefor, presenting for settlement a bill of exceptions to be used on said motion. The court refused to settle the bill and petitioners applied for mandate.

In Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, this identical question came before the court, and it was there decided that a motion for a new trial was not a proper procedure after a family allowance had been granted; that it is the duty of the court ex parte and without petition to make such orders. What is there said is decisive of the question under this application.

It is, however, urged by petitioners that the bill should be settled as a bill of exceptions to be used upon their appeal from the order. If the circumstances permitted, this court would so hold, as was done in Leach v. Pierce, supra. But, treating the proposed bill of exceptions in this case as a bill of exceptions to be used on appeal from the order, its presentation was entirely too late.

The application for mandate is therefore denied.

We concur: ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

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150 Cal. 392

DARBEE & IMMEL OYSTER & LAND CO. v. PACIFIC OYSTER CO. (S. F. 4,352.)

(Supreme Court of California. Jan. 31, 1907.)

PARTITION—PROPERTY SUBJECT TO PARTITION—OYSTER BEDS.

Act March 30, 1874, St. 1873–74, p. 940, c. 671, § 1, provides that any citizen may lay down and plant oysters in any of the public waters of the state, and that the ownership of and the exclusive right to take up the same shall remain in such person, etc. Following sections provide that the person desiring to use the right must define the limits of his claim by stakes, etc., maintain thereon a sign with the words, "Oyster Beds," and record a description of such beds, etc., and makes the carrying off of oysters or the removal of boundary marks by strangers a misdemeanor. Section 9 provides that the act shall not apply to any tide lands which the state may have sold to private parties, and that nothing herein shall be so construed as to interfere with the right of the state to sell any of the tide lands, nor affect the rights of purchasers at any sale of tide lands by the state. *Held*, that the privilege given by the act is a mere personal license, and not an estate of inheritance, subject to partition under Code Civ. Proc. § 752, providing for the partition of real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 39–50; vol. 23, Fish, §§ 10–15.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Darbee & Immel Oyster & Land Company against the Pacific Oyster Company. Judgment for defendant, and plaintiff appeals. Affirmed.

F. J. Russell, for appellant. Campbell, Metson & Campbell, Charles Tupper King, and J. R. Moulthrop, for respondent. Reed, Nusbaumer & Black, amici curiæ.

McFARLAND, J. Plaintiff, a corporation, brings this action for a partition of certain premises which it avers to be "real property," and avers that it has an "estate of inheritance" therein. A demurrer to the complaint was filed by some of the defendants. The demurrer was general and special, and was sustained in the court below, and judgment was rendered in favor of defendants. From this judgment plaintiff appeals.

The action is based on section 752, Code Civ. Proc. That section is under the head of "Actions for Partition of Real Property," and it provides that an action for partition may be brought by one or more co-tenants of real property, in which one or more of them "have an estate of inheritance, or for life or lives, or for years." The court below held that the complaint shows that neither plaintiff nor any of the defendants had an estate of inheritance, or for life, or for years, in any real property, and upon that ground sustained the demurrer; and, as we think that this conclusion was right, we need not examine any other question raised in the case.

In the complaint the alleged real property in which plaintiff is averred to have an estate of inheritance is described as follows: "The right to the exclusive use and occupation thereof for the purposes of laying down and planting oysters and taking up and carrying off the same in and from said real property, in accordance with and as provided by the terms of an act of the Legislature of the state of California, entitled 'An act to encourage the planting and cultivation of oysters,' approved March 30, 1874." Those parts of said act of March 30, 1874 (St. 1873–74, p. 940, c. 671), which are material here, are as follows: The title of the act is: "An act to encourage the planting and cultivation of oysters." And the first section is as follows: "Any citizen of the United States may lay down and plant oysters in any of the bays, rivers or public waters of this State; and the ownership of and the exclusive right to take up and carry off the same shall be continued and remain in such person or persons who shall have laid down and planted the same." The next sections, down to and including section 8, provide that the person desiring to use the right must define the limits of his claim by stakes, etc., must maintain thereon a sign on which must be painted the words, "Oyster Beds," and must record a description of his bed or beds of oysters in the county recorder's office. In the case at bar it does not appear that appellant complied with these provisions, but we will not consider that matter. It is further provided that, after he has complied with these provisions, any person who enters thereon and carries off oysters or removes therefrom marks designating boundaries shall be guilty of a misdemeanor. Section 9 is as follows: "This act shall not apply to any tide lands which the state may have sold to private parties; provided, further, that nothing herein shall be so construed as to interfere with the right of the state to sell and dispose of any of the tide lands, nor to affect in any manner the rights of purchasers at any sale of tide lands by the state."

In the property described in the complaint there is no element of an estate of inheritance, or, as described in section 761, Civ. Code, a "perpetual" estate. The privilege extended to all citizens by said act to temporarily use the unsold tide lands belonging to the state, if it can be considered as an estate at all in lands, is certainly of no higher dignity than an estate at will. But, in our opinion, it is really nothing more than a mere personal license. That was the view taken of similar statutes by the highest court of Maryland, where the oyster business is a very large one. In Phipps v. State, 22 Md. 380, 85 Am. Dec. 654, the court was dealing with statutes like ours, and it said: "It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of the state's title to lands covered by navigable water was contemplated. Permission to use given areas covered by navigable water for a particular purpose seems to be all that the Legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the Legislature." Again, in Hess v. Muir, 6 Atl. 673, 65 Md. 586, Alvey, C. J., said: "These statutes, the better to promote the growth and to increase the supply of oysters in the waters of the state, provide that any of the citizens of the state may locate one lot, and only one, of five acres, in any unappropriated ground covered by the tide, and plant the same with oysters, and thereupon he is given exclusive control thereof. This, however, is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state. Phipps v. State, 22 Md. 380, 85 Am. Dec. 654. It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot."

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

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150 Cal. 367

GOYTINO v. CITY OF LOS ANGELES.

(L. A. 1,616.)

(Supreme Court of California. Jan. 28, 1907.)

1. Adverse Possession—Evidence.

Evidence in an action involving the question of adverse possession *held* sufficient to sustain a finding that there was no such possession for time enough to give title.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Constance M. Goytino against the city of Los Angeles. From an order denying a new trial, plaintiff appeals. Affirmed.

Dunnigan & Dunnigan, for appellant. W. B. Mathews, City Atty., and Lester R. Hewitt, for respondent.

McFARLAND, J. This action was brought by plaintiff to quiet her title to certain lots of land in the city of Los Angeles. Judgment went for plaintiff as to all the land except that part last described in the complaint, which the city of Los Angeles alleges to be a public street called "Leonis street."

As to the last-named land, the court found that plaintiff had no title thereto, and that it was a public street, and rendered judgment as to said land in favor of the city. Plaintiff moved for a new trial, and the court denied the motion; and from the order denying the motion for a new trial plaintiff appeals. There is no appeal from the judgment.

The appellant founds her claim of title solely upon prescription, claiming to have fenced in the said land and to have held it by actual adverse possession under claim of ownership for more than five years.

The main features of the case are these: The said piece of land called "Leonis street" was formerly part of a larger tract, called "Leonis tract," which was owned by several persons as tenants in common, including appellant. In 1892 there was pending an action entitled "Brousseau v. Leonis" for the partition of the said Leonis tract; and in March, 1892, a decree was rendered in said action by which partition was ordered, and a part of the tract was awarded to each co-tenant. Appellant was awarded a part of the land designated as "lot 20," which adjoins and faces on said Leonis street. The referees who had been appointed in the case had made their report, which was accompanied by a map on which was delineated the lots which were to go to the co-tenants, respectively, and also certain streets, among which was the said Leonis street. This decree and map were accepted by all the co-tenants, and the map was duly recorded. Afterwards, in 1901, the mayor and council of the city of Los Angeles passed an ordinance by which all offers of dedication of streets were formally accepted.

Appellant, however, contends that prior to the passage of said ordinance she had acquired title to this asserted street by prescription. But the court found that she had no title to said land; and the evidence as to the question whether or not she had acquired any title by prescription was certainly conflicting. The only evidence on the point offered by appellant was the testimony of her husband, J. P. Goytino. He testified that he was appellant's agent in the management of her business and real property; and that after the decree, and early in 1892, he inclosed lot 20 and also said land designated on the map as "Leonis street" by fences, and that since then the appellant had kept the said land inclosed by fences, claiming to own it. But Horace Bell, a witness for respondent, testified that he was one of the tenants in common of the Leonis tract, and had awarded to him lots 23 and 25, which face on Leonis street directly opposite to said lot 20 of appellant; that three or four years after the date of the decree he went upon the land, and, finding some Chinamen intruding on his lots, he fenced them in; that appellant had a fence along her lot 20, and that after he had fenced in his lots there was a fence on each side of Leonis street, but no fences on the end of said street, and that "this left Leonis street open"; that several years afterwards he heard that Goytino had closed in the street, and, going there, he found that Goytino had taken some lumber left there by the witness and had built two fences across Leonis street; and that he immediately complained to the street superintendent, who afterwards removed the fences and opened the street. While the dates of some of these later occurrences are not given with entire exactness, still Bell's testimony squarely contradicted the testimony of Goytino, to the effect that he had fenced in the street in 1892, and showed that there had been no such fencing for three or four years after 1892; and, considering all the evidence, we cannot say that the court was not justified in its finding. Goytino also testified that he planted some trees in the street, but the testimony of Bell was that these trees ran parallel with the south line of lot 20 owned by appellant, and were "about where the curb line of a sidewalk would run."

The findings are general, responding to the averments of the complaint, which were general. There is no point made as to any want of findings; the position taken by appellant being that the findings were not warranted by the evidence.

The order denying the motion for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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150 Cal. 435

RIXFORD v. ZEIGLER et al. (S. F. 3,607.)

(Supreme Court of California. Feb. 6, 1907.)

DEEDS—ESSENTIALS OF CONVEYANCE—PARTIES—CAPACITY TO TAKE.

A deed to a Roman Catholic church community, which was not a corporation either de jure or de facto, and in which instrument no individual was named as a grantee, and in which there was no statement as to who constituted the church community, and under which neither the community, nor any of its members, nor any person claiming to act for it, ever took possession or used the property, passed no title from the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 21.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Suit by E. H. Rixford, substituted for the original plaintiff, F. G. Halsey, against Robert E. Zeigler and others, for partition. From a judgment granting partition, defendant George M. Perine appeals. Affirmed.

D. H. Whittemore, for appellant. E. H. Rixford and J. A. Fairweather, for respondents.

McFARLAND, J. This action was brought by the original plaintiff, F. G. Halsey, for the partition of a certain piece of land. It was averred in the complaint that Halsey and defendant Zeigler were the owners in fee of the land as tenants in common, and the other defendants were made parties as claiming some interest in the property. Zeigler answered, admitting and averring that plaintiff and himself were owners of the land in contest as tenants in common, and united in plaintiff's prayer for partition. Defendant Perine answered, denying that plaintiff and Zeigler were the owners of the land, and averring that he (Perine) was the sole owner thereof. The other defendants made default. The court found that plaintiff and defendant Zeigler were the owners of the property, that Perine had no interest therein, and rendered an interlocutory judgment for a partition as prayed for in the complaint. From this judgment, defendant Perine appeals.

The material facts are these: On July 8, 1864, one B. C. Vandall recovered judgment in the district court in and for the city and county of San Francisco against Harvey S. Brown for $1,759.26, with interest and costs. On July 23, 1864, an execution was issued under said judgment and was levied upon the land in contest in the case at bar as the property of said Brown, and by virtue of said execution the property was sold by the sheriff to said Vandall, and on June 7, 1865, the sheriff executed a deed to Vandall, conveying to the latter all the title which Brown had in the land at the date of said judgment. Afterwards, and before the commencement of this suit, whatever title Brown had in the land at the time of the execution sale, etc., vested by mesne conveyances in the plaintiff, Halsey, and the defendant Zeigler. Brown was admittedly the owner of the land at the time of the suit by Vandall, the execution sale, etc., unless before that, on the 22d day of December, 1862, he parted with the title by an instrument in writing which he that day executed. This instrument purported to be a deed conveying the land in contest here to "the community styling itself the German Roman Catholic St. Bonifazieus Church Community." This instrument contains the following provision: "This conveyance is upon express condition that said property is to be used by said community for school and church purposes, and for no other purpose whatever, nor shall said community sell or transfer the same or any part thereof, but the same shall be and remain the property of said community as long as they shall make use of said property for above purposes; but if they sell or transfer the same, or use it for any other purposes than those above mentioned, they shall forfeit all rights under this conveyance, and the said property shall revert to the first party and his heirs." It is found by the court upon sufficient evidence that at the time of the execution of said instrument the said church community was and still is an unincorporated association of persons associated together for the purpose of religious worship. It was not a corporation either de jure or de facto. It never pretended to act as a corporation. In the instrument no individual person was named as a grantee, nor was there any statement as to who constituted said church community. Neither the said community, nor any of its members, nor any person claiming to act for it, ever took possession or used the said property for school or church purposes, or for any other purpose whatever, and never undertook to make any use whatever of the properties named in said instrument. In the case at bar all persons who are members of said community were made defendants, and they all made default.

Under these facts we are of opinion that no title ever passed out of Brown to any persons whatever by said instrument. The general rule is, beyond doubt, that a deed of conveyance is void unless the grantee named is capable of taking and holding the property named in the deed; and the general rule also is that to make a deed effective the grantee must be a person, either natural or artificial, capable of taking and holding the property. In Wiseman v. McNulty, 25 Cal. 230, a deed had been made to the "Hibernia Company," and it was held void; the court saying: "The company does not appear to be a corporation, nor even a partnership, holding the claims as partnership property, but simply a voluntary association, not formed by articles in writing and without legal existence—a body unknown to the law. As such the company would be incapable of taking and holding mining claims, by grant or by any other means by which title to real estate would pass." In Winter v. Stock, 29 Cal. 408, 89 Am. Dec. 57, the court approves a decision in the case of Arthur v. Weston and Strode, 22 Mo. 378. In that case it appeared that lands had been conveyed to "W. W. Phelps & Co." At the trial Arthur offered to prove that, when the conveyance was made to Phelps & Co., said firm was composed of Phelps, Cowdry, and Whitmore; but the court rejected the offered evidence, holding the law to be that "the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps alone, and that the entire title passed by the sheriff's deed under the execution sale, and gave judgment accordingly." Upon writ of error the Supreme Court sustained the decision of the court below, holding that the deed to W. W. Phelps & Co. did not take effect as a legal conveyance of the premises to Phelps, Cowdry, and Whitmore jointly, but that it operated to convey the property to Phelps alone. The court observed that the question "is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the firm. * * * A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title." See, also, Sunol v. Hepburn, 1 Cal. 254; Phelan v. San Francisco, 6 Cal. 531. In 13 Ency. of Law & Procedure, p. 624, it is said: "If the firm name is given, and it consists of the surnames of the several partners, it will vest the legal title in them; and, generally, if members of a partnership are designated with sufficient certainty under a firm name, they will take, but a general or an abbreviated term, such as 'Company,' 'Co.,' or 'Bro.,' is held to be insufficient." The foregoing is undoubtedly the general rule; and there is nothing in the case at bar which brings it within any of the exceptions to that rule. The cases cited by appellant are where property had been granted for charitable purposes, and had been taken possession of and continuously used for those purposes by persons claiming to be intended by a deed which merely uses the general name of the association, and in such cases courts of equity have devised plans for carrying out the intended charity; and they were cases where the persons claiming to be the beneficiaries under the deed were parties to the action asserting their rights. But nothing of the kind occurred in the case at bar. The persons who are members of the church community have never asserted any right under the deed, and from 1862, the date of the deed, to the present time, have never set up any claim under it. It is, therefore, our opinion that no title whatever passed from Brown to the said church community, that the title to the property was in Brown at the time of the sale under the Vandall judgment, and that such title was in the respondent at the time of the commencement of this action and when the judgment was rendered.

The appellant Perine claims title through a deed made by said Brown to one Spring, executed January 12, 1867. Whatever title Spring got from Brown went by mesne conveyances to one Gendotti, and afterwards Perine brought suit to foreclose a street assessment on the land in question, in which Gendotti was made defendant; and after a judgment in that case in favor of Perine the sheriff made a deed under the decree to Perine. In that case Perine also made the "church community" by that general name a party, but did not make any one of the members of that community a party. Of course, if, as appellant contends, Brown's deed to the church community carried the title, he had nothing left to convey to Spring, and, if Brown's deed did not convey the title to the church community, then his title passed under the Vandall judgment, which was prior to his deed to Spring. But it is sufficient to say that the judgment in the assessment case is of no value as against the respondents herein, who are the real owners of the property, and were not made parties to that suit.

The foregoing views make it unnecessary to notice other points made by respondents. The interlocutory judgment appealed from is affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

150 Cal. 426

CALKINS v. SOROSIS FRUIT CO.

(S. F. 3,665.)

(Supreme Court of California. Feb. 6, 1907. Rehearing Denied March 7, 1907.)

1. WATERS—CONTRACT OF SALE—LIMITATION AS TO USE.

Defendant, owning the waters of a creek, sold to plaintiff the right to receive and use one-fifth thereof, with the right to convey them across defendant's land to plaintiff's land, with the covenant "that all the interest, rights, estate, and privileges hereinabove described as passing or accruing to or vesting in" plaintiff "shall be deemed and treated as appurtenant to and as a part and for the benefit of said lands of" plaintiff "hereinabove described, and that" defendant "is bound by the terms of this instrument to all subsequent owners of said land of" plaintiff, "as well as to" plaintiff, "but to no other person or persons." *Held*, that the agreement, while making the water rights appurtenant to plaintiff's land, did not limit the use of the waters thereto, so that he could sell, for limited periods, surplus water to which he was entitled and which had been carried to his lands.

2. DAMAGES—EVIDENCE.

Evidence that between January 16th and April 19th, on which latter day defendant stopped the flow of plaintiff's water, plaintiff had negotiated for sale of the water for 21 days at $20 per day, does not show damage to the extent of $420; it not appearing when the water was to be furnished, or whether any of it was furnished.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Mark Calkins against the Sorosis Fruit Company. Judgment for plaintiff. Defendant appeals. Reversed in part, and new trial ordered.

W. P. Johnson and E. E. Cothran, for appellant. Joseph H. Patton, for respondent.

LORIGAN, J. This appeal involves the question as to what extent plaintiff is entitled to control certain waters conveyed to him by defendant.

The record discloses the following facts: In October, 1893, defendant was the owner of a tract of land containing 247.37 acres, known as the "Sorosis Farm," bordering on the easterly side of Quito creek in Santa Clara county, and in that month built a dam across said creek and a diverting ditch upon its own lands, and thereby effectually diverted to its lands, for the purposes of irrigating said Sorosis farm, and also for the purpose of irrigating other lands in said county of Santa Clara owned by parties other than defendant, all the waters of said creek flowing therein ordinarily during all seasons of the year.

After such appropriation and diversion, and on July 22, 1896, defendant conveyed to plaintiff 40.37 acres of such Sorosis farm, and also the right to take from the said ditch of defendant, at the headgate thereof in said Quito creek, so much of the water flowing therein to which defendant was entitled as should be represented by a fraction having for its numerator 40.37 and for its denominator 247.37 (about one-sixth of said diverted water), together with the right to convey said water across lands of the defendant lying between the diverting ditch (which was on said land of defendant) and the lands conveyed to plaintiff. Thereafter, and prior to January 16, 1902, the waters of said creek flowing in said ditch were applied to a beneficial use, namely, the irrigation of the respective lands of the plaintiff and defendant, on which there were growing and bearing orchards, and for the purpose of the irrigation of other orchard land, both riparian and nonriparian to said stream. Immediately prior to January 16, 1902, plaintiff and defendant, in concert, built in said irrigation ditch a receiving box, and two certain flumes of uniform depth but of different width; one box being six feet in width, the other 13½ inches, the larger one being known as defendant's flume, the smaller one as plaintiff's flume, and the waters from the latter flume being conducted into the lands of plaintiff by the ditch then existing across defendant's lands and mentioned in the deed of July 22, 1896. By the construction of the smaller flume plaintiff received in his ditch and conveyed to his land a somewhat larger quantity than he was entitled to under his deed—about one-fifth of the water instead of one-sixth. After the receiving box and flumes had been constructed, and on January 16, 1902, plaintiff and defendant entered into a written agreement which recited that plaintiff had a right to a certain portion of the waters that flowed in said main irrigation ditch, and a right of way to carry the same across defendant's lands to the lands of plaintiff, and that, for the purpose of dividing, apportioning, and setting apart to each other their respective quantity of the volume of water which each was entitled to receive, they had constructed and built in said irrigation ditch the receiving box and flumes above referred to. By the agreement the parties immediately conveyed to each other the right to receive and use all the waters that might flow in their respective flumes, with the additional right conferred on plaintiff to convey said waters across said defendant's land to his own through the then existing ditch which he had theretofore been using. The agreement further provided for a payment by both parties of a proportionate amount of the expenses of permanently maintaining the main irrigation ditch from the dam to the point of diversion of its waters between the parties, with other provisions relative to said main irrigation ditch unnecessary to state. The agreement then proceeded with the following covenant: "That all the interest, rights, estate, and privileges hereinabove described as passing or accruing to or vesting in the said party of the second part [plaintiff] shall be deemed and treated as, and appurtenant to and as a part and for the benefit of said lands of the party of the second part hereinabove described, and that the party of the first part [defendant] is bound by the terms of this instrument to all subsequent owners of said land of the party of the second part, as well as to the said party of the second part, but to no other person or persons."

From the execution of the agreement of January 16, 1902, to April 19, 1902, plaintiff received water from said smaller flume and conveyed it in the ditch across the land of defendant to his own lands. About the latter date, plaintiff, finding that the water so conveyed to his lands was more than sufficient to irrigate them, and that there was a surplus of waters taken and received in his flume and ditch which he did not require until a later period during the irrigation season, sold and contracted to sell, to his neighbors owning orchards below the land of plaintiff, the use of said surplus waters, for short periods of time, and till he would again need them for irrigation, and constructed ditches for that purpose. On said April 19, 1902, defendant, asserting that plaintiff could only use such waters on his own lands, and that when not so being used defendant was entitled to take and use them, dammed up plaintiff's flume and ditch and diverted from plaintiff all the waters which should have flowed to plaintiff's land therein, caused a portion thereof to be turned back into the Quito creek, and diverted the remainder thereof for the purpose of selling the same to other persons. Plaintiff thereupon commenced this action, praying, in effect, that it be adjudged that he had a right to sell and dispose of the surplus waters flowing or to flow from said main irrigating ditch through his flume and ditch upon his lands, and for special damages in the sum of $420, sustained through the act of defendant in obstructing and diverting the flow of water through his flume and ditch, and thereby preventing the sale by him thereof. The court decided that since July 22, 1896, plaintiff had been and still is the owner of the water rights, waters, and rights of way described in the deed of conveyance of that date, and on said January 16, 1902, was the owner of the waters, water rights, and rights of way granted and conveyed to him by defendant by the agreement of that date; that plaintiff is entitled to use and appropriate said waters when conducted to his lands in such manner and for such purposes as he may deem proper, both in the irrigation of his land and selling the use thereof to others for the irrigation of their lands, and that plaintiff was specially damaged in the sum of $420. Judgment was accordingly entered for plaintiff, and from said judgment, accompanied by a bill of exceptions, this appeal is taken.

The main question in this case is, to what extent plaintiff is entitled to control the waters taken to his land, over the lands of defendant from defendant's main irrigation ditch, under his conveyance from the latter. Counsel have devoted much discussion to the terms of both the deed and agreement as bearing on this question. We see no reason, however, why any consideration of the deed need be had. The matter before us is, not to what extent the plaintiff acquired a right to the waters conveyed by the deed or by the agreement, but whether the right which he was exercising of selling the use of the surplus waters taken to his lands to his neighbors was authorized under either. No question is involved here of a sale of the water right which plaintiff acquired; no question of a segregation of the right from the land to which appellant claims it was an easement appurtenant, or any attempt to dispose of such right to others to be used separate and apart from plaintiff's land and to his exclusion. What he has done, and what he claims the right to do, is to contract with his neighbors for the sale to them of the use of the surplus waters carried to his land, for limited periods of time. There was no sale made or attempted, and in effect what he was doing was to license the use of the waters to his neighbors for a rental during the period when he did not need them for the irrigation of his own land. If under the agreement this right was secured to him, it is immaterial whether it was also secured by the deed. And that it was secured by the agreement we think is not open to question.

Appellant's position is that the waters conveyed to the plaintiff's premises could be used only on the lands of the plaintiff and nowhere else; that the agreement did not convey the corpus of the waters, but merely an easement appurtenant consisting of the right to the flow and use of them to irrigate his own land, and no other. But upon inspection it will be seen that neither the covenant, nor the agreement, provides or says anything about using the waters on plaintiff's land for any purpose whatever, or at all. Plaintiff purchased a right to a given quantity of water to be received in his flume from the main irrigation ditch of defendant, and thence taken to his land. At the time of this agreement defendant had secured a prescriptive title to all of the waters of the Quito creek, and, as far as the parties to this agreement are concerned, these waters were the private property of the defendant. Parks C. & M. Co. v. Hoyt, 57 Cal. 44. Defendant had become as fully vested with the ownership in them as a person can be said to have acquired ownership in one of the natural elements, and the right which he conveyed to plaintiff was commensurate with the right which he had. Nor is there any merit in the claim that by the covenant in the agreement the water right conveyed under it became an easement appurtenant to plaintiff's lands so that the use of the waters was limited exclusively to such land. No doubt, by the covenant the water right itself was made an easement appurtenant to the land. But we look in vain to the agreement or to this covenant to find anything limiting or restricting the use of the water to the lands of plaintiff. It is not a case where by the very terms of the conveyance the right to use the water was expressly limited to lands to which the right was made appurtenant. Undoubtedly a grant of a water right may restrict the use of the waters to particular lands for irrigation purposes, or for domestic uses, for the operation of a mill, or for the development of mechanical power, or for other specific and designated purposes; but no such restriction is found in either the agreement or this covenant. In fact, when we examine the covenant, it is observed that what it was intended to effect, and did effect, was to make the water right granted an easement appurtenant to the land, and nothing more. It was not intended to, nor did it, create a limitation upon the use of the waters which plaintiff had purchased. The covenant, in as far as it applies to "rights" mentioned in it which were vested in the plaintiff, had relation only to the water right, and made it "appurtenant to and as a part and for the benefit of said lands of the party of the first part." The effect of this language was simply to make the water right an easement appurtenant to the lands which were already owned by the plaintiff. The term "for the benefit of said lands," used in connection with the word "appurtenant," did not limit or restrict, as is contended for by appellant, the use of the waters to the land of plaintiff in addition to making the water right appurtenant to it. As defined by the Code, a thing is "appurtenant to land when it is by right used with the land for its benefit." Civ. Code, § 662. And it is obvious that, in using the terms in the covenant declaring that the water right "shall * * * be deemed appurtenant to * * * and for the benefit of said lands," nothing more was meant by the expression "and for the benefit of said lands" than to couple with the word "appurtenant" its legal definition.

Nor does the further provision in the covenant, binding the appellant, with reference to the water rights conveyed, solely "to all subsequent owners of said land * * * and to the said party of the second part [plaintiff] but to no other person or persons," at all limit the use of the waters purchased by plaintiff to his own lands. Under the deed the grant of the water right to plaintiff was not expressly made appurtenant to the land. As it was possible, therefore, that some question might arise as to whether the plaintiff might not have the right to segregate the water right conveyed by the deed and sell it independent of his land, providing that no different or additional burden was imposed upon the servitude than then existed, and no substantial alteration in the mode of using the easement resulted, it was intended by the subsequent agreement to avoid all question on that score. This was accomplished by, in terms, declaring in the covenant that the water right should be not only appurtenant, but that it could not be conveyed, unless by a conveyance of the land itself, and this was all that it was intended to accomplish. As the covenant relied on did not limit or restrain plaintiff as to the use of the water conveyed to him, and there is nothing anywhere else in the agreement which pretends to do so, we are satisfied that plaintiff had a legal right to temporarily dispose of the use of the waters conveyed to his property as he saw fit when he did not need it for his own use. As we have before said, the plaintiff has not and is not attempting to dispose of any water right, but solely of the use for a limited period by his neighbors for irrigation purposes of waters which he owned, and to the entire use of which he was entitled, but which he then had no necessity to use. In so doing we do not see how he invaded any right of defendant, or what concern the latter has in the matter. Plaintiff is not wasting the water or applying it to other than a beneficial use. By the agreement plaintiff became entitled to one-fifth in quantity of the waters of the main irrigation ditch with a right to carry them to his own land. It is not pretended that he is taking out of the main irrigation ditch any greater quantity than he purchased, whether he used it on his own land, or only used part of it there, and disposed of the surplus. Appellant's position sems to be that, because plaintiff does not need upon his own land all that he purchased and carried there, it is entitled to the surplus or residuum; but, as the sale to plaintiff was of a specified quantity of water, if any such right is available to defendant it must have been reserved in the agreement of conveyance, and we have seen that there was no such reservation. The grant to plaintiff of this water was not restrained by any limitations or conditions whatever. The right to the waters—the right to use them for beneficial purposes—was vested in plaintiff as a property right, and, when the waters were conducted to his land and under his control, he had the right as incident to his ownership of them to make such disposition of their use as he saw fit, limited, of course, to a beneficial use of them. As he had purchased the right to the use of all the waters conveyed from the irrigation ditch, he was entitled to an unrestricted control over that use. He was not limited by any contract with defendant upon the subject. He is not taking any more water than he purchased, and is not using himself or licensing to his neighbors more than he bought. Having purchased the use of a given quantity, if he cannot use it all himself, we see no reason why he cannot sell the right to a temporary use of it to his neighbors, as wanted, for a beneficial purpose. To hold that he cannot do so would be to impose a restriction for which no warrant is found in the agreement of purchase, and would be in effect to deprive him of a valuable incident to the ownership of this character of property, the right to dispose of its use to others when it is not required for use by the owner himself. There is no law which will impose the limitation contended for by appellant. As there, then, is nothing in the terms of the agreement or the covenant relied on limiting the use of the waters purchased by plaintiff to his own lands, or any rule of law that we are advised of so restricting him from disposing of such use, the conclusion reached by the lower court, that plaintiff had a right to make such disposal of the waters purchased by him, was correct.

As to the only other point in the case, the award of special damages: Appellant insists that the finding upon which the judgment therefor is based is not supported by the evidence. The evidence upon this subject is very meager, and consists of that of the plaintiff. He testified that, between January 16, 1902, and April 19th of the same year, he was selling, or had contracted to sell, the waters to be used on his neighbors' lands; that under the contracts therefor he had negotiated for 21 days' sale of water at $20 per day; and that the flume of plaintiff was obstructed by defendant on April 19, 1902. On this evidence the court made its finding of special damages in the sum of $420. The finding is not sustained by the evidence. It was necessary, in support of the claim for special damages, that clear proof of them be made. All that the evidence shows is that plaintiff was selling water under contracts for 21 days' use between January 16th and April 19, 1902. It does not appear when any of the contracts were made, or at what time the supply of water was to be furnished, or whether any of it had been furnished during the above dates. As the obstruction was not placed in the flume until April 19th it does not appear how many days' use was had under the contracts between January 16, 1902, and the damming of plaintiff's flume, or whether the contracts were for the supply of water before April 19th, or after. It cannot be said that there is any evidence of a definite character upon the subject of special damages.

The judgment therefore is reversed as to that portion of it which awards special damages, and a new trial is ordered to be had solely upon the issue of special damages. As to all the rest of the judgment, it is affirmed. Appellant is entitled to its costs on appeal.

We concur: McFARLAND, J.; HENSHAW, J.

4 Cal. App. 690

UNION SAVINGS BANK OF SAN JOSE v. WILLARD. (Civ. 273.)

(Court of Appeal, First District, California. Jan. 16, 1907.)

CORPORATIONS—ASSESSMENTS—LIABILITY OF SUBSCRIBER.

Civ. Code, § 322, in relation to the liabilities of stockholders, provides that each stockholder is individually liable for such proportion of the corporate liabilities as his stock bears to the whole of the stock, and that the term "stockholder" applies to every equitable owner of stock, although the same appear on the books of the company in the name of another. *Held* that, where shares of stock appeared on the corporate books in the name of one as trustee for another, the former, as between himself and the corporation, was a stockholder, and liable to the corporation for the amount of an assessment on an unpaid subscription; section 322 being applicable only to actions against stockholders by creditors of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 946–959.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the Union Savings Bank of San Jose against Maurice Willard. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wm. A. Bowden, for appellant. Cobb & Rea, for respondent.

HALL, J. "Action to recover from the defendant the amount of an assessment by the plaintiff upon the shares of its capital stock held by him. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

"The authority of the plaintiff to levy the assessment and to collect the same by an action against its stockholders, together with the regularity of its proceedings therein, was affirmed in the cases of the same plaintiff against Dunlap, 135 Cal. 628, 67 Pac. 1084, and against Leiter, 145 Cal. 696, 79 Pac. 441, cases which involve the same assessment as that here presented. The only question presented upon the present appeal is whether the appellant was a stockholder of the plaintiff at the time the assessment was levied; the plaintiff alleging that he was such stockholder, and the defendant denying this allegation. Upon this issue the court made the following finding: 'At and during all the times herein mentioned the defendant, Maurice Willard, was and still is the owner and holder of 35 shares of such capital stock, and of one certificate therefor theretofore duly and regularly issued by said corporation, and numbered 598, and at the time of levying of said assessment herein mentioned said shares of stock appeared on the corporate stock books of said corporation as follows: "Maurice Willard, Tr. for Alfred J. Willard," and said shares of corporate stock of said corporation still so appeared on the corporate stock books of said corporation.' This finding is challenged by the defendant as not supported by the evidence, and in his statement on motion for a new trial he contends that, upon the evidence before the court, it was shown that he was not at any time the owner or holder of any shares of the capital stock of the plaintiff, but that he held a certificate of stock therefor solely and only as trustee for Alfred J. Willard, and not otherwise. At the trial of the cause it was stipulated that at all the times mentioned in the complaint the defendant held a certificate of stock of the plaintiff, of which the following is a copy: 'San Jose, California, March 19, 1896. This certifies that Maurice Willard, trustee for Alfred J. Willard, is entitled to thirty-five shares (35) of the capital stock of the Union Savings Bank of San Jose, California, transferable only on the books of the bank in person, or by attorney, upon the surrender of this certificate properly indorsed, and after compliance with the conditions printed on its back.' It was also stipulated that the books of the plaintiff all show that the stock was issued to 'Maurice Willard, trustee for Alfred J. Willard,' the same as shown in said certificate, and that the defendant was not at any time the owner or holder of any stock of the plaintiff, except that represented and evidenced by said certificate.

"Upon these facts it must be held that the appellant was a stockholder of the plaintiff and liable to it for the amount of the assessment. His name is entered upon the books of the plaintiff as one of its stockholders, and a certificate of the ownership of the shares of stock so subscribed by him was issued and delivered to him. Whether he was an original subscriber for the shares of stock represented by said certificate, or had them transferred to him from one who was such original subscriber, is immaterial. The liability which attached to the original subscriber by virtue of his subscription is inseparable from the ownership of the stock. Upon causing its transfer to him upon the books of the plaintiff, the defendant was substituted for such original subscriber, and thereafter held the stock upon the same conditions and subject to the same obligations as did such original subscriber. Visalia R. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136. He thereby entered into a contractual relation with the plaintiff, and is the person who is entitled to be recognized as a stockholder by it and by its other stockholders for the purpose of voting the said shares of stock, or at any stockholders' meeting of the plaintiff, and to receive whatever dividends may be declared upon said stock. The addition of the words 'trustee for Alfred J. Willard' does not change his relation to the plaintiff, or bring Alfred J. Willard into any relation with the plaintiff. The nature of the trust between him and Alfred J. Willard, or the relation existing between them, is not made to appear; but whatever such relation may be or whatever may be his duties as such trustee, is a matter entirely outside of his relation to the plaintiff. By having the stock issued to him he became one of the stockholders of the plaintiff, and, being the person in whom the legal title to the stock is vested, is the legal owner thereof (Market St. R. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225), and the only person whom the plaintiff can recognize as the holder of the stock so issued to him. If, by reason of any agreement or relation with Alfred J. Willard, the latter is the equitable owner of the stock, this fact is in no respect available as a defense to the plaintiff's right to enforce the collection of the assessment from him. Morawitz says (volume 1 [2d Ed.] § 304): 'The legal owner of shares in a corporation is liable to the company for calls made upon the shares, though he be a trustee for another person; and the beneficiary cannot be made responsible, for he is not a party to the contract from which the liability for calls arises." See, also, 3 Thompson on Corporations, §§ 3193, 3194; Mitchell's Case, Law Rep. 9 Eq. 366.

"Section 322, Civ. Code, upon which the appellant relies, has no application to an action by the corporation against its stockholders for the recovery of an assessment upon the stock held by them. The provisions of that section are limited to actions against stockholders by creditors of the corporation to recover the proportional amounts of their liability for the obligations of the corporation and the exemption therein which is relied upon by the appellant is by its express language limited to proceedings to 'charge the stockholders with any proportion of the debts or liabilities of the corporation.' The present action, as before shown, is not upon the statutory liability of the defendant for the debts of the plaintiff, but is upon his subscription for the stock and his contract to pay the plaintiff for the same. The liability of the defendant to the creditors of the corporation for his proportion of their claims against the corporation, and his liability to the corporation for the unpaid portion of his subscription, are entirely distinct, and rest upon different principles. Visalia R. R. Co. v. Hyde, supra. Welles v. Larrabee (C. C.) 36 Fed. 866, 2 L. R. A. 471, also cited by the appellant, did not present the question of the liability of a trustee upon his subscription for the stock, but involved the construction of section 5152, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3465]. That section provides that: 'Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders.' The defendant therein was a naked trustee for the real owner of the stock, and was shown to have no interest in it."

The foregoing opinion was prepared by Mr. Justice HARRISON shortly before the expiration of his term as presiding justice of this court; but, as the other members of the court had not, at his retirement, fully satisfied themselves of the correctness of his views, the opinion was not filed. After careful consideration of the question involved, we are satisfied that the opinion as prepared by Mr. Justice HARRISON contains a correct statement of the law applicable to the case, and we therefore adopt it as the opinion of this court. In addition to the authorities cited by Mr. Justice HARRISON, we cite, as sustaining the rule that a trustee, recorded as such on the corporate books, is liable for the unpaid subscription price of stock, 1 Cook on Corporations (5th Ed.) § 245.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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4 Cal. App. 695

McQUEEN v. PHELAN et al. (Civ. 303.)

(Court of Appeal, First District, California. Jan. 19, 1907.)

1. APPEAL — JUDGMENT ROLL — FINDINGS — CONCLUSIVENESS.

Where an appeal is taken on the judgment roll alone, the court's findings that plaintiff's carpet-cleaning works constituted a public nuisance would be deemed to be supported by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3762–3771.]

2. INJUNCTION—ACTS OF PUBLIC OFFICERS—ABATEMENT OF NUISANCE.

Where plaintiff's carpet-cleaning works constituted a public nuisance, plaintiff was not entitled to an injunction restraining public officers of the city, authorized by Civ. Code, § 3494, to abate the same, from proceeding against or interfering with plaintiff in the operation of the works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 155.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by John McQueen against James D. Phelan and others. From a judgment in favor of defendant on a judgment roll, plaintiff appeals. Affirmed.

Geo. W. Schell, for appellant. Lewis F. Byington, Franklin K. Lane, and Mullany, Grant & Cushing, for respondents.

KERRIGAN, J. This appeal is from a judgment in favor of defendants taken on the judgment roll. The action was brought against the mayor, the board of supervisors, the chief of police, and the department of public health of the city and county of San Francisco, as defendants, in their official capacities, for the purpose of enjoining them from interfering with the plaintiff's carpet beating and cleaning works and the operation of the same, also to have declared void a certain ordinance set forth in the complaint, upon the ground that it is unconstitutional in several respects.

For the purposes of this case it may be conceded that the ordinance is void, and yet the judgment must be affirmed. The complaint, after setting forth a description of the plaintiff's plant and carpet-beating works, contains this allegation: "Plaintiff further alleges that said works and plant and the operation thereof is in no respect a public nuisance, or a nuisance in any particular, or injurious to health, or offensive to the senses, or an obstruction in any wise to the free use of property." In the answer the defendants deny the above-quoted allegation, and also aver "that the carpet beating and cleaning works and operation thereof, mentioned in the complaint, have always been and are a nuisance." The answer further avers: "That the nuisance and injury to health, and offensive character, and obstruction to the free use of property caused by said carpet-beating works, and the operation thereof, mentioned by plaintiff in said amended complaint, has been carried on and prevailing, and is still being carried on and prevailing. * * * Said carpet-beating works constitute a nuisance in that locality, and to the residents, families, and people thereof, and the same is in fact, owing to its nature and character, very injurious and a great menace to the health of the people of said locality, and very offensive to the senses of said people and residents, * * * and a great obstruction to the free or comfortable use and enjoyment of property." The case thus appears to have gone to trial upon a distinct issue as to whether or not the premises described in the complaint were or were not a nuisance. The court found that "the carpet beating and cleaning works, and the operation thereof, mentioned in the amended complaint, have always been and are a nuisance in the locality in which they have been and are maintained and operated, and in and to the neighborhood and the inhabitants thereabouts; that said carpet beating and cleaning works have been and are a public nuisance and a menace to the health of the residents of the locality in which the same have been and are constructed and operated, and the same, and also the dust and refuse emitted from said works, have been and are indecent and offensive to the senses of the people thereabouts, and an obstruction to the free use of their property, homes, and places of residence."

As this appeal is upon the judgment roll, the above-quoted findings of the court are conclusive here, and must be deemed to be supported by the evidence. It is provided in section 3494 of the Civil Code "that a public nuisance may be abated by any public body or officer authorized thereto by law." It thus appearing that the premises and business described in the complaint are a public nuisance, and that the public officials, defendants in this action, are about to do an act which they are authorized to do by the section of the Code above quoted, it follows that the question as to whether or not the ordinance was a valid ordinance becomes immaterial. We do not mean to intimate that any public official may, of his own volition, without any order of court, tear down or destroy a building because he believes it to be a nuisance. The prayer of the complaint is that defendants be enjoined and restrained from proceeding against or interfering with plaintiff in the operation of said works. The judgment in such case, being for defendants, has only the effect of denying the injunction prayed for. We must presume that the defendants will proceed according to law.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

4 Cal. App. 687

COOK v. SOUTHERN PAC. R. CO. (Civ. 319.)

(Court of Appeal, First District, California. Jan. 4, 1907.)

VENDOR AND PURCHASER—CONTRACT OF SALE—PERFORMANCE—DILIGENCE.

Where defendant railroad company sold certain land in 1886, and agreed to use ordinary diligence to procure patents from the government therefor, it did not breach such provision by delay in procuring patents which was occasioned by the failure of the Land Department to approve the report of commissioners until 1897, on which approval alone patents could be issued, and on account of litigation in the federal courts relating to the railroad's right to patents.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by James Cook against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. Singer, Jr., and Guy Shoup, for appellant. Houx & Barrett, for respondent.

COOPER, J. This action was brought to recover $1,600, with interest, claimed to be due plaintiff from defendant under the terms of four separate, but similar, contracts for the sale of land, in each of which the defendant was the vendor, and the assignor of plaintiff was the vendee. Judgment was entered for plaintiff upon findings made by the court, and from the judgment defendant prosecutes this appeal on the judgment roll and a bill of exceptions. Each of the contracts contained the following provision, to wit: "It is further agreed, between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them that as, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party * * * of the second part, all moneys that may have been paid to it." Each contract is pleaded as a separate cause of action. In each count it is alleged that it has been finally determined that patent shall not issue to defendant for an undivided moiety of the land described in the contract, and also that defendant has not exercised ordinary diligence to procure a patent to the land. The evidence showed, and the court found, that after the commencement of the action a patent was issued (in November, 1903) to defendant for the lands described in the complaint. It is therefore unnecessary to discuss the issue as to a patent not having been granted to defendant. The court found that the defendant "did not and has not used ordinary diligence to procure a patent to the lands mentioned in said contract, or in any of them, or any part of said lands." It was the above-quoted finding upon which the court below gave judgment in favor of plaintiff; and upon the question as to whether or not the said finding is supported by the evidence the case must here be decided.

The facts here are similar to those discussed in Southern Pacific R. Company v. Lipman (Cal. Sup.) 83 Pac. 445. In that case the contracts were dated September, 1888, while in this case they were dated June, 1886. The contract in each case related to lands included in the same grant to defendant. In this case the provision in the contracts to the effect that plaintiff would use ordinary diligence to procure patents to the lands is precisely in the same language as in the Lipman Case. In that case, as in the case at bar, it was found by the court below that the Southern Pacific Railroad Company had not used ordinary diligence to procure patent to the lands. In that case, as in the case at bar, it was claimed that such finding was without evidence to support it. It was there held, upon a full discussion of the facts, that the finding was not supported by the evidence. The court there said: "There is no evidence in the case to sustain this finding, but, on the contrary, what evidence was introduced on the subject (and it was all introduced by the plaintiff) shows that for several years prior to the execution of these contracts, and continuously thereafter, plaintiff at all times vigorously asserted its claims for all the lands, primary and indemnity, to which it claimed title under the acts of 1866, and as early as 1888 it made application to the Land Department under the act of 1866 for patents to lands of similar character and similarly situated to those described in the contracts here. * * * While it appears that the plaintiff in fact filed its lists of selections of the lands described in the contract here in question in 1893 and 1894, the ordinary diligence to procure them which it contracted for would have been fully discharged had the application not been filed until the acceptance and approval by the Secretary of the Interior of the commissioners' report, which was the earliest possible time an application could have been effective and a patent procured upon it. Aside from the proceedings before the Interior Department involving plaintiff's right to patent for these lands, we have seen that its rights thereto were also a matter of litigation in the federal courts, culminating in the decision found in Southern Pac. R. Co. v. United States, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, which we have heretofore referred to and discussed. It will be thus observed that whatever delay in the procurement of patents for these lands occurred was occasioned, not by any want of ordinary diligence on the part of plaintiff, but from the failure of the Land Department, until 1897, to approve the report of the commissioners, upon which approval alone patents could be issued, and on account of the litigation arising in the federal courts relative to plaintiff's right to patents. Wilson v. S. P. R. R. Co., 135 Cal. 421, 67 Pac. 688. From these considerations it is obvious that the finding that the plaintiff did not use ordinary diligence, as provided in the contract, to procure patents for these lands also finds no support in the evidence."

We must hold the above case conclusive upon the question here. In Southern Pac. Railroad Co. v. Bovard (Cal.) 87 Pac. 203, 2 App. Dist., opinion filed July 9, 1906, it was held that the plaintiff was the owner of the lands described in its complaint. The lands were part of the same grant to the Southern Pacific Railroad as the lands involved in this action. The Lipman Case is cited as authority.

It follows that the judgment must be reversed, and it is so ordered.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 8

PEOPLE v. DAVIS. (Cr. 4.)

(Court of Appeal, Third District, California. June 26, 1905.)

CRIMINAL LAW—MISCONDUCT OF PROSECUTING ATTORNEY—PREJUDICIAL ERROR.

Where, in a criminal case, accused and his witnesses showed his moral depravity, the conduct of the prosecuting attorney in asking witnesses questions showing the moral depravity of accused was not prejudicial, within Pen. Code, § 1404, requiring the court to disregard errors, unless the same have actually prejudiced accused, though the court only sustained objections to the questions, and struck out the answers without directing counsel by express command to refrain from further questioning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3127.]

On rehearing. Denied.

For former opinions, see 81 Pac. 716, 718.

McLAUGHLIN, J. Ordinarily the formal order would be the only response to a petition for rehearing; but mistaken brevity in the opinion filed having led counsel of recognized ability to the belief that we had based the decision on mistaken facts, prompts a departure from the rule in this instance. We have again carefully examined the evidence and specifications, only to reach the same conclusion.

All that reached the jury touching the character of the house came into the case through defendant's agency, and the character of the inmates necessarily came with it. Strong and convincing evidence of defendant's relations with the woman Banks was presented to the jury through the same channels, and that which came to the jury through the prosecution was admissible under well-settled rules of evidence. The testimony of defendant alone tells the story of his relations with her. Jurors must be credited with average intelligence, and it needs no more to know that early morning visits to the room of a prostitute, borrowing money from her, and stirring her to wrath and threats by the story of contemplated marriage indicate more than a merely casual and platonic intimacy. And, when to this is added the testimony of William Campbell and George Storrs, it needs not her possession of his trunk or other facts wrung from Lillie Banks and other witnesses on unwarranted cross-examination to remove all doubt as to what their relations were. True, some evidence as to their relations did reach the jury through the prosecution, but more of it was part and parcel of testimony touching his admissions of guilt. These admissions were none the less admissible because they were made to a prostitute while he was seated upon the bed of shame in which she was lying. His familiarity, his admissions, and conduct incompatible with his innocence were relevant facts, and pertinent evidence cannot be excluded merely because it savors of the brothel and carries with it the stigma of infamy. Besides, the bulk of it came in without objection. People v. Lane, 101 Cal. 517, 36 Pac. 16. The court sustained objections to and struck out answers to the two questions so bitterly complained of. The refusal to check counsel by express command was neutralized by counsel refraining from further questioning. Ordinarily irrelevant questions tending to show other wrongful acts or moral depravity would be prejudicial, but, when a defendant through his own lips and witnesses writes his shame upon the record, it would be sticking in the bark to hold that mere insinuations could injure.

Section 1404 of the Penal Code commands that error shall be disregarded, "unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right"; and it would be a travesty on justice to say that these questions, or even the answers to them, could degrade or injure a man in the eyes of a jury when he calmly told the same jury of frequent visits, borrowing money, and the wrath inspired in the breast of a prostitute when he told her he was to be married. During the cross-examination of these women and Dependener, as well as in the examination of defendant's witnesses, there was a shrewd, skillful, and persistent atempt by adroit and ingenious questioning to make it appear that there was no talk or thought of crime or prosecution until after this woman knew defendant was to marry. These witnesses had testified to his incriminating statements and conduct, and Lillie Banks said he never told her of marriage, and on one occasion had said that he came after his trunk and clothes. Following all other witnesses, the defendant contradicted the evidence as to his statements and conduct. He gave entirely different versions of such conversations and the reasons for his presence in the house. He told what Lillie Banks said when told of his matrimonial intentions, and attempted to account for his conduct and acts from Saturday night until the time of his last visit to the house. He, too, testified that he heard nothing of crime or prosecution until after this matter of marriage had been bruited.

His cross-examination was confined to matters brought out in direct examination. It was competent to test his credibility by asking questions tending to show that there was no engagement or thought of marriage at the time he says he told Lillie Banks of his impending marriage, nor until some days after he went to Sacramento. The question as to why he did not remove his trunk and clothing when about to make his wedding trip was also proper in this connection, and for the further reason that he had denied all such conversations testified to by Dependener and the women.

The sharp conflict in the evidence, defendant's credibility as contrasted with the credibility of the women, and the theory that he was innocent and the prosecution a conspiracy, hatched after marriage, excused and rendered nonprejudicial, if it did not entirely justify, the argument.

The petition for a rehearing is denied.

CHIPMAN, P. J., and BUCKLES, J., concurred.

2 Cal. App. 618

BROWN v. LOS ANGELES RY. CO. (Supreme Court of California. March 8, 1906.) A petition to have the cause heard in the Supreme Court, after judgment in the district court of appeal, was denied by the Supreme Court on March 8, 1906, and the following opinion rendered thereon:

BEATTY, C. J. Upon the evidence in this case, the findings and conclusions of the superior court are clearly sustained by the doctrine of "last clear chance."